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Family Law

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I. INTRODUCTION

The majority of important decisions in the area of domestic relations are made at the appellate level. This *Survey* year is no exception. The courts continued making inroads into the valuation of corporations and continued their struggle to balance the Illinois Marriage and Dissolution of Marriage Act (the "IMDMA") with state statutes, such as the Probate and Adoption Acts, and with federal statutes, such as the Bankruptcy Act. The courts also provided additional guidance regarding the proper application of the IMDMA, including the constitutionality of both the state's no-fault provision and its mandatory minimum support guidelines.

The dissolution of a marriage remains a highly personal decision and proceeding. This is reflected by a recently affirmed decision on the standing of guardians to bring a dissolution suit on the ward's behalf. In addition, the numerous unpublished opinions entered pursuant to Illinois Supreme Court Rule 23[1] also illustrate the personal nature of dissolution. This article will not confront the continuing controversy with respect to the applicability of Rule 23 to the family law area;[2] it merely presents the unpublished opinions to provide a more complete picture of the judicial activity in the area of domestic relations during the *Survey* period.

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1. ILL. S. CT. R. 23, ILL. REV. STAT. ch. 110A, para. 23 (1985). Illinois Supreme Court Rule 23 states in pertinent part:

> A case shall be disposed of by opinion when . . . (1) the case involves an important new legal issue or modifies or questions an existing rule of law; or (2) the decision considers a conflict or apparent conflict of authority within the appellate court; or (3) the decision is of substantial public interest; or (4) the opinion constitutes a significant contribution to legal literature by either an historical review of law or by describing legislative history. . . .
>
> All cases not required . . . to be disposed of by opinion shall be disposed of by a written order which shall succinctly state the facts, the contentions of the parties, the reasons for the decision, the disposition, and the names of the participating judges. *Orders are not precedential and shall not be published.* They may be invoked, however, to support contentions such as double jeopardy, *res judicata*, collateral estoppel, or the law of the case.

Id. (emphasis added).

2. *See* Beyler, *An Appraisal of Supreme Court Rule 23*, 72 ILL. B.J. 80 (1983); ILL. STAT. ANN. ch. 110A, para. 23, Hist. & Prac. Notes (Smith-Hurd 1985).

II. VALUATION OF CLOSELY HELD AND PROFESSIONAL CORPORATIONS

A. Value Determinations

The controversies surrounding closely held and professional corporations are predominately concerned with the issue of valuation for the purpose of property distribution. While a closely held or professional corporation may have no establishable market value, it may nevertheless possess an ascertainable value for the purpose of valuation and distribution of marital property.[3] While Illinois courts have refused to enunciate precise rules for determining the value of such corporations,[4] the Illinois Appellate Court for the First District provided factors that may be properly considered.

The appellate court approved the use of book value or shareholder's equity for initial determinations of the value of a closely held corporation in *In re Marriage of Kaplan*.[5] The court further recognized that, absent special factors, the book value or shareholder's equity of such a business is not conclusive of the corporation's actual worth.[6] In *Kaplan*, the wife contested the valuation placed on the husband's forty-nine percent interest in one of his businesses.[7] The court was unable to reconcile the trial court's valuation of the business at $180,000 with the shareholder's equity of over $200,000.[8] Because there was no evidence of negative good will or of the likelihood of unprofitability in the near future,[9] the court asserted that in the absence of these factors or other special considerations, the valuation of the corporation at less than the shareholder's equity was an error.[10] The *Kaplan* court also concluded that the value of the corporation's good will should be added to its book value, and that the economic outlook of the industry must be considered to make a proper valuation.[11]

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3. *In re* Marriage of Merritt, No. 83-1477, No. 84-1163, slip op. at 3 (1st Dist. March 31, 1986); *In re* Marriage of Kaplan, 141 Ill. App. 3d 142, 148, 490 N.E.2d 69, 73 (1st Dist. 1986); *In re* Marriage of Bauer, 138 Ill. App. 3d 379, 385, 485 N.E.2d 1318, 1322 (1st Dist. 1985).

4. *In re* Marriage of Mitchell, 103 Ill. App. 3d 242, 248, 430 N.E.2d 716, 720 (2nd Dist. 1981).

5. 141 Ill. App. 3d 142, 148, 490 N.E.2d 69, 73 (1st Dist. 1986) (citing *In re* Marriage of Johnson, 106 Ill. App. 3d 502, 509, 436 N.E.2d 228, 233-34 (1st Dist. 1982)).

6. *Kaplan*, 141 Ill. App. 3d at 148, 490 N.E. 2d at 720.

7. *Id.* at 147, 490 N.E.2d at 72-73. The trial court valued the business at $180,000, finding the husband's share to be $90,000. *Id.* at 148, 491 N.E.2d at 73.

8. *Id.* at 148, 491 N.E.2d at 73.

9. *Id.*

10. *Id.*

11. *Id.* at 148, 491 N.E.2d at 73-74. For a discussion of the proper valuation of the

In *In re Marriage of Bauer*,[12] the Illinois Appellate Court for the First District approved the consideration of good will and the economic outlook for the particular business and the industry for valuation.[13] The court concluded that when a business's worth and future earnings are determined by factors which hinge on the contributions and personal services of the owner, a precise valuation is futile and not required for the distribution of the marital property.[14] In considering the evidence of an on-going business with a reliable and established clientele, goodwill, an increase in business sales, and a stable economic prognosis,[15] the reviewing court determined the trial court's valuation and property distribution were not an abuse of discretion.[16]

B. Inclusion of Good Will

Book value or shareholder's equity is an approved threshold determination for valuation.[17] The inquiry, however, may proceed to such controversial issues as whether and to what extent the value of the corporation's good will should be included in assessing the net worth of the corporation. Under traditional theories, good will existed only in commercial and trade enterprises because the value of a professional business was considered to be totally dependent on the skills of the practitioner.[18] As the number of valuations of professional practices increases, the vast majority of courts have held that the value of a corporation's good will should be included

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good will of closely held and professional corporations in Illinois, see *infra* notes 12-32 and accompanying text. The First District ordered the trial court on remand to specify grounds for its evaluation of the corporation's good will and the corporation's prospects for future earnings. *Kaplan*, 141 Ill. App. 3d at 148-49, 490 N.E.2d at 74.

12. 138 Ill. App. 3d 379, 485 N.E.2d 1318 (1st Dist. 1985).

13. *Id.* at 386, 485 N.E.2d at 1322. *See Merritt*, No. 83-1477, No. 84-1163, slip op. at 3-4 (value determinations based upon the earning histories of the companies and the amount and availability of business assets used for the personal expenses of the owner spouse approved); *see also infra* notes 17-32 and accompanying text for a discussion of the proper inclusion of good will in the valuation of a closely held or professional corporation.

14. *Bauer*, 138 Ill. App. 3d at 386, 485 N.E.2d at 1322 (citing *In re* Marriage of Greenberg, 102 Ill. App. 3d 938, 945, 429 N.E.2d 1334, 1340 (1st Dist. 1981)).

15. *Bauer*, 138 Ill. App. 3d at 386, 485 N.E. 2d at 1322.

16. *Id.*

17. *In re* Marriage of Reib, 114 Ill. App. 3d 993, 449 N.E.2d 919 (1st Dist. 1983) (valuation of a closely held corporation is not necessarily the book value, although book value may be of importance in ascertaining market value); *In re* Marriage of Johnson, 106 Ill. App. 3d 502, 436 N.E.2d 228 (1st Dist. 1982) (addition of shareholder's equity proper method of evaluating corporations).

18. *In re* Marriage of Kapusta, 141 Ill. App. 3d 1010, 1014, 491 N.E.2d 48, 50 (1st Dist. 1986).

when appraising the value of a professional corporation.[19]

Illinois courts have struggled with the issues of including good will in valuing professional practices and of what constitutes good will, often reaching contradictory resolutions. In *In re Marriage of White*,[20] the Illinois Appellate Court for the Fifth District determined that in appraising the value of the husband's professional dental corporation the trial court had properly included good will.[21] Recognizing good will's intangible quality, the court concluded that it is of value to the practicing spouse, both during and after the marriage as manifested in the amount of business and resulting income.[22]

The Illinois Appellate Court for the First District rejected this reasoning in *In re Marriage of Wilder*.[23] The *Wilder* court found good will, as defined in *White*, reflected in three of the mandatory factors used by the courts when dividing marital property pursuant to section 503 of the IMDMA: "the relevant economic circumstances of each spouse when the division of property is to become effective," the "occupation, amount and sources of income . . . of each party," and "the reasonable opportunity of each spouse for future acquisition of capital assets and income."[24] Defining good will as the ability to generate income, the *Wilder* court found that its addition results in a double consideration of this factor ("double dip") and therefore rejected its inclusion as inequitable.[25] The *Wilder* court concluded that when good will is defined as earning potential, a court is not required to set a fixed monetary amount for good will in valuing the stock of a professional or closely held corporation.[26]

During the *Survey* year, the Illinois Appellate Court for the First District reconciled these two decisions in *In re Marriage of Kapusta*,[27] holding that the valuation of good will did not give double consideration to the husband's earning potential when the trial court did not set a fixed monetary value for the good will of

19. *Id.* at 1014, 491 N.E.2d at 51 (citing Annotation, *Accountability for Good Will of Professional Practice in Actions Arising from Divorce or Separation*, 52 A.L.R.3d 1344 (1973)).

20. 98 Ill. App. 3d 380, 424 N.E.2d 421 (5th Dist. 1981).

21. *Id.* at 384, 424 N.E.2d at 424.

22. *Id.*

23. 122 Ill. App. 3d 338, 347, 461 N.E.2d 447, 453 (1st Dist. 1983).

24. *Id.* (citing ILL. REV. STAT. ch. 40, para. 503(d)(4), (7), (10) (1985)).

25. *Wilder*, 122 Ill. App. 3d at 347, 461 N.E.2d at 453.

26. *Id.* at 348, 461 N.E.2d at 454.

27. 141 Ill. App. 3d 1010, 491 N.E.2d 48 (1st Dist. 1986).

the corporation.[28] In *Kapusta*, the husband argued that the trial court's valuation of his medical practice considered good will in a manner contrary to the decision in *Wilder*.[29] The *Kapusta* court reasoned that while *Wilder* defined good will as the earning potential of the professional spouse, the *Wilder* decision did not preclude the consideration of good will when it could be distinguished from the earning capacity of the practitioner spouse.[30] The trial court set no fixed monetary value for good will and indicated that it had valued the husband's medical corporation with regard for the "double dip" implications of earning potential.[31] The *Kapusta* court determined that the trial court properly had differentiated good will from earning potential and the evidence of good will was properly included in the valuation of the husband's professional practice.[32]

Kapusta indicates that good will may be included in the value of a closely held or professional corporation assuming the courts are careful not to consider the value twice. The Illinois Appellate Court for the First District found that the court's silence regarding a fixed monetary value for the disputed good will indicated the double consideration restriction had been satisfied, arguably an unwarranted elevation of form over substance. It is possible that the "double dipping" restriction can be circumvented by the use of language which defines neither good will nor earning potential. As a result, the *Kapusta* standards conceivably could be met simply by remaining mute.

III. Property Apportionment

A. Spousal Contribution

Various courts have considered the meaning of section 503(c) of the IMDMA during the *Survey* period. This section provides that the marital estate is entitled to reimbursement when one spouse contributes significant personal effort to non-marital property which results in substantial appreciation in the value of the non-

28. *Id.* at 1015, 491 N.E.2d at 51.

29. *Id.* at 1013, 491 N.E.2d at 50. The husband's witness testified that the practice had a market value of $10,000. The wife's expert testified that the practice was worth $553,000 based upon a multiple of gross revenues, a multiple of adjusted earnings, and a capitalization of excess earnings. The trial court accepted the wife's methodology, but changed the multipliers and valued the practice at $375,000. *Id.* at 1012, 491 N.E.2d at 49-50.

30. *Id.* at 1015, 491 N.E.2d at 51.

31. *Id.*

32. *Id.*

marital estate.[33] The marital estate, however, is only entitled to reimbursement for that portion of the appreciation attributable to the spouse's effort, and not for that portion which results from inflation or other external factors.[34] Some of the issues which have been explored include defining "significant personal effort" and whose effort may be considered.

In *In re Marriage of Morse*,[35] the Illinois Appellate Court for the Fifth District held that a wife who worked an average of one to three hours per day at her husband's insurance agency and became involved in local politics to enhance the agency's business did not contribute sufficiently to the appreciation of the business to entitle her to reimbursement under section 503.[36] The court concluded that the wife's involvement did not "rise to the level of significant effort" and did not lead to a "substantial appreciation" of the business as required by the statute.[37]

The court also asserted that the proper inquiry under section 503(c) is whether either spouse contributed a significant personal effort toward the substantial appreciation of the business.[38] The marital estate may be entitled to reimbursement for any appreciation in the value of a non-marital asset resulting from the contributions made, for example, by the owner-spouse.[39] Only efforts that resulted in appreciation and were not compensated, however, may constitute a claim for reimbursement.[40] If a spouse's salary reasonably compensates him or her for his or her efforts, the marital estate will be deemed to have been reimbursed.[41]

B. Pensions

A spouse's retirement benefits are marital property in Illinois to the extent that they were earned during the marriage.[42] Military pension benefits have not always been treated the same as private

33. ILL. REV. STAT. ch. 40, para. 503(c)(2) (1985).
34. *Id.* at para. 503(a)(7).
35. 143 Ill. App. 3d 849, 493 N.E.2d 1088 (5th Dist. 1986).
36. *Id.* at 854, 493 N.E.2d at 1091.
37. *Id.*
38. *Id.* at 854-55, 493 N.E.2d at 1092.
39. *Id.*
40. *Id.*
41. *Id.* at 855, 493 N.E.2d at 1092.
42. *In re* Marriage of Wisniewski, 107 Ill. App. 3d 711, 437 N.E.2d 1300 (4th Dist. 1982); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1st Dist. 1979); *In re* Marriage of Pieper, 79 Ill. App. 3d 835, 398 N.E.2d 868 (1st Dist. 1979).

pensions, however, creating a disparity in dissolution cases.[43] Nevertheless, some states, like Illinois, have divided military benefits in the same manner as civilian pension benefits.[44] In the 1981 decision of *McCarty v. McCarty*, however, the United States Supreme Court determined that current federal law precluded a division of military retirement pensions in state dissolution proceedings.[45] Applying the *McCarty* decision, the Illinois Supreme Court held that military pensions were not marital property.[46] This allowed military personnel to be treated totally different from civilians in dissolution proceedings, and permitted a major, if not the only asset in some cases, to escape distribution. Subsequently, Congress enacted the Uniformed Services Former Spouses Protection Act[47] which permits the states to apply pertinent local laws when determining whether military pensions should be considered divisible.[48] Following this enactment, the Illinois Appellate Court for the Fifth District, in *In re Marriage of Korper*, concluded that Illinois courts were free to apply the law relating to military pensions as marital property as it existed prior to *McCarty*.[49]

Shortly thereafter, the Illinois Appellate Court for the Second District held that a military pension once again could be recognized as marital property in Illinois.[50] In *In re Marriage of Dooley* the husband contended that his military retirement pension could not be apportioned between him and his wife because it was nonmarital property.[51] Nevertheless, the *Dooley* court agreed with the

43. Fenney v. Fenney, 259 Ark. 858, 537 S.W.2d 367 (1976); *In re* Marriage of Ellis, 36 Colo. App. 234, 538 P.2d 1347 (1975), *aff'd*, 191 Colo. 317, 552 P.2d 506 (1976).

44. *See In re* Marriage of Musser, 70 Ill. App. 3d 706, 388 N.E.2d 1289 (4th Dist. 1979).

45. McCarty v. McCarty, 453 U.S. 210 (1981).

46. *In re* Marriage of Musser, 87 Ill. 2d 68, 429 N.E.2d 530 (1981).

47. 10 U.S.C. § 1408(c)(1) (1982) states:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

48. S. REP. NO. 502, 97th Cong., 2d Sess. 16 (1982)

49. *In re* Marriage of Korper, 131 Ill. App. 3d 753, 755-57, 475 N.E.2d 1333, 1335-36 (5th Dist. 1985). The husband contended that the Uniformed Services Former Spouses Protection Act was intended to create only a narrow exception to the holding in *McCarty*. *Id.* at 755-56, 475 N.E.2d at 1335. The *Korper* court determined the respondent's argument was too technical and contrary to congressional intent. *Id.* at 756, 475 N.E.2d at 1335. The appellate court interpreted the Act as completely abrogating *McCarty*, thus overruling the Illinois Supreme Court decision in *Musser*. *Id.* at 757, 475 N.E.2d at 1336.

50. 137 Ill. App. 3d 401, 484 N.E.2d 894 (2nd Dist. 1985).

51. *Id.* at 403, 484 N.E.2d at 896.

reasoning of the court in *Korper*, finding that that portion of military pensions earned during the marriage properly should be classified as marital property.[52]

Once a court decides that a spouse's pension is marital property, the court must determine the appropriate division and the mechanics for distribution of those funds. Courts have vacillated on the appropriate equitable approach for the distribution of pension benefits. There are two common approaches: the "reserved jurisdiction approach"[53] and the "immediate offset approach."[54]

The reserved jurisdiction approach allows for an allocation of benefits in the future, if and when and in the amount they are payable. The immediate offset approach requires an evaluation of the pension benefits, and awards other assets to the non-participant to offset the pension benefits. Each approach has its advantages and disadvantages. The immediate offset approach finalizes litigation, allowing the parties to go their separate ways. Its disadvantage is that it places all the risk of reception on the participant and emphasizes valuation where the principles of valuation are not clear and amounts may be distorted. The reserved jurisdiction approach, or a variation of it, the "if, as, and when" approach, allows a court to award pension benefits earned during the marriage if the participant receives or is entitled to them, when he receives them, and as he receives them. This allocates the risk of receipt between

52. *Id.* at 404, 484 N.E.2d at 897.

53. *See In re* Marriage of Degener, 119 Ill. App. 3d 1079, 458 N.E.2d 46 (2nd Dist. 1983); *In re* Marriage of Wisniewski, 107 Ill. App. 3d 711, 437 N.E.2d 1300 (4th Dist. 1982); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1st Dist. 1979). The reserved jurisdiction approach allows the court to order the employee spouse to pay a portion of each benefit check to the nonemployee spouse if and when the benefits are received. The court may retain jurisdiction to enforce the decree. *Korper*, 131 Ill. App. 3d at 759-60, 475 N.E.2d at 1337-38. This method for apportioning pension benefits earned during the marriage was upheld during the *Survey* period. *In re* Marriage of Barnhart, No. 5-85-0206, slip op. at 9-10 (5th Dist. 1985) (the "reserved jurisdiction" approach provides security for the nonemployee spouse in later years, while a present value award would likely be used to meet current expenses); *In re* Marriage of Dooley, 137 Ill. App. 3d 401, 406, 484 N.E.2d 894, 898 (2nd Dist. 1985) (military retirement payments should be allocated as they are received by the employee spouse under the "reserved jurisdiction" method).

54. *See In re* Marriage of Degener, 119 Ill. App. 3d 1079, 458 N.E.2d 46 (2nd Dist. 1983); *In re* Marriage of Bentivenga, 109 Ill. App. 3d 967, 441 N.E.2d 336 (2nd Dist. 1982); *In re* Marriage of Wisniewski, 107 Ill. App. 3d 711, 437 N.E.2d 1300 (4th Dist. 1982). The immediate offset approach reduces the pension to present value and awards an offsetting value of money or property to the nonemployee spouse. This approach is best employed when actuarial evidence can be utilized to arrive at the present value of the pension plan, when the employee spouse is nearing retirement age, and when there is sufficient marital property to allow an offset to the nonemployee spouse. *In re* Marriage of Britton, 141 Ill. App. 3d 588, 592, 490 N.E.2d 1079, 1081 (5th Dist. 1986).

the parties and removes the uncertainties of valuation. It also may entangle the parties and the courts for years and perhaps promote litigation for years after the judgment for dissolution.

Under the "reserved jurisdiction approach," however, the court must retain jurisdiction to determine what percentage of the pension benefits each spouse will receive.[55] This approach was at issue in *In re Marriage of Britton*,[56] in which the Illinois Appellate Court for the Fifth District held that the trial court had improperly reserved jurisdiction for apportioning pension benefits because there was neither agreement by the parties nor the existence of appropriate circumstances.[57] The trial court had reserved jurisdiction regarding the division of the parties' pension plan until the pension became payable.[58] The appellate court held this approach was unacceptable because it would encourage repeated litigation and create confusion regarding the proper division of the remaining marital property because the award to each party was unclear.[59]

Had the *Britton* court found otherwise, the trial court's failure to apportion the pension may have rendered the judgment unappealable,[60] thus tying the parties to the courts and each other until the employee spouse retired. The appropriate approach, if the court is not going to use an immediate offset approach, is to reserve jurisdiction for the purpose of enforcing specific awards made now, whether in percentage or amounts of pensions to be paid in the future.

Courts using the reserved jurisdiction approach must be aware of competing provisions of the IMDMA promoting the finality of judgments and concepts of the appealability of judgments. These provisions are not always easy to reconcile. The idea of the reserved jurisdiction approach should not be to put off all allocation issues, including the percentage of pension benefits each spouse should be awarded, until another day.

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55. *Britton*, 141 Ill. App. 3d at 591, 490 N.E.2d at 1080. To preserve jurisdiction for the distribution of benefits, the courts must comply with section 401(b) of the IMDMA, which allows courts to enter judgments while reserving jurisdiction on an issue or issues only when there is an agreement by the parties or a finding by the court of the existence of appropriate circumstances. ILL. REV. STAT. ch. 40, para. 401(b) (1985).

56. 141 Ill. App. 3d 588, 490 N.E.2d 1079 (5th Dist. 1986).

57. *Id.* at 593, 490 N.E.2d at 1081.

58. *Id.* at 590, 490 N.E.2d at 1080-81.

59. *Id.* at 591-92, 490 N.E.2d at 1080-81.

60. *See In re* Marriage of Rosenow, 123 Ill. App. 3d 546, 548, 462 N.E.2d 1287, 1288 (4th Dist. 1984).

C. *Fraudulent Conveyances*

The Illinois Appellate Court for the First District, in *In re Marriage of Shehade*,[61] held that in a dissolution a trial court properly may void a transfer of property.[62] In *Shehade*, the trial court voided the husband's transfer of his beneficial interest in certain property to his brother because the transfer was illusory and constituted a fraud on the marital estate.[63] The brother objected to the trial court's remedy, contending that the trial court only possessed the authority to award a marital property lien against the title rather than voiding the transfer.[64] The appellate court stated that in a dissolution action the trial court possesses the jurisdiction to hear all justiciable issues related to the dissolution.[65] The court held that the trial court had full authority to declare the assignment void[66] following a finding that the assignment was a sham, subject to defeasance.[67]

D. *Partition of Jointly Owned Non-Marital Property*

The First Division of the Illinois Appellate Court for the First District held that a partition suit does not lie against real estate

61. 137 Ill. App. 3d 692, 484 N.E.2d 1253 (1st Dist. 1985).

62. *Id.* at 702, 484 N.E.2d at 1260. In another case involving fraud, the court upheld the trial court's division of marital property, ordering the husband to pay the entire amount of a judgment lien held by his parents on the marital residence. *In re* Marriage of Los, 136 Ill. App. 3d 26, 482 N.E.2d 1022 (2nd Dist. 1985). The *Los* court determined that payment was never made on the alleged loan, that the judgment was obtained after the dissolution proceeding was filed, and that the husband never told the wife they had to repay the loan or that his parents were suing on the loan. Therefore, the judgment lien was fraudulent and the trial court acted within its discretion in finding the husband responsible for repayment of the lien. *Id.* at 30-31, 482 N.E.2d at 1025.

63. *Shehade*, 137 Ill. App. 3d at 699, 484 N.E.2d at 1258. The trial court previously had entered an order restraining each of the parties from wasting, selling, conveying, hiding, transferring, concealing, damaging, destroying, encumbering or otherwise dissipating the assets held in his or her name or in the name of another for the benefit of the party. *Id.* at 695, 484 N.E.2d at 1255. The wife claimed the transfer was not only a violation of this order, but was colorable, illusory, and a sham, constituting a fraud upon the marital estate. *Id.* at 697, 484 N.E.2d at 1256. A sham transfer is one that is either colorable or illusory. A colorable transfer appears absolute on its face but due to some agreement between the parties intends ownership to be retained by the transferor. An illusory transfer is one that takes back all that it gives. *Id.* at 700, 484 N.E.2d at 1258-59. The trial court, based on the evidence and testimony, found the assignment of the property from the husband to his brother to be null and void and of no legal consequence. *Id.* at 697-99, 484 N.E.2d at 1257-58. The court further ordered the brother to account to the wife for all rents collected under his pretended ownership of the property. *Id.* at 699, 484 N.E.2d at 1258.

64. *Id.* at 702, 484 N.E.2d at 1260.

65. *Id.*

66. *Id.*

67. *Id.* at 700, 484 N.E.2d at 1259.

owned jointly by the spouses if that property is non-marital in *In re Marriage of Wojcicki* ("*Wojcicki II*").[68] This First Division decision followed an earlier appeal in the same case ("*Wojcicki I*"),[69] and reached a conclusion contrary to the decision reached by the Second Division of the Illinois Appellate Court for the First District in *In re Marriage of Voight*.[70]

In the dissolution proceedings between the Wojcickis, the trial court found certain jointly held properties non-marital and awarded them to the husband.[71] The court in *Wojcicki I* affirmed the trial court's decision, ordering the wife to execute quit claim deeds to the husband for her interest in those non-marital properties.[72] A few weeks later, the *Voight* court reversed that trial court's order requiring the wife to transfer her joint interest in the non-marital property to the husband.[73] Based upon the *Voight* holding, Mrs. Wojcicki refused to execute the required quit claim

68. 135 Ill. App. 3d 248, 481 N.E.2d 939 (1st Dist. 1985).

69. *In re* Marriage of Wojcicki, 109 Ill. App. 3d 569, 440 N.E.2d 1028 (1st Dist. 1982).

70. 111 Ill. App. 3d 618, 444 N.E.2d 694 (1st Dist. 1982).

71. *Wojcicki II*, 135 Ill. App. 3d at 251, 481 N.E.2d at 941.

72. *Wojcicki I*, 109 Ill. App. 3d at 577, 440 N.E.2d at 1033. Shortly after the marriage of the parties, the husband transferred the titles of the properties in dispute into joint tenancy with the wife. *Id.* at 571, 440 N.E.2d at 1029. The husband testified that he intended to prevent any possible difficulties succeeding to title in the event of the death of either of the parties. *Id.* at 573, 440 N.E.2d at 1030. The court found that the affirmative transfer of non-marital property into a form of joint ownership or commingling it with marital property merely creates a rebuttable presumption of that party's intention to change the character of the property from non-marital to marital. *Id.* at 572-73, 440 N.E.2d at 1030. Thus, a transmutation is not absolute when the subject matter is property acquired prior to the marriage. *Id.* at 573, 440 N.E.2d at 1030. The common law presumption of gift controls, subject to rebuttal by "clear, convincing and unmistakable evidence". *Id.* The reviewing court concluded that the trial court's holding that no gift was intended was within the manifest weight of the evidence. *Id.* at 573-75, 440 N.E.2d at 1031-32.

73. *Voight*, 111 Ill. App. 3d at 627-28, 444 N.E.2d at 697. The appellate court upheld the trial court's finding that the jointly owned property was the non-marital property of the husband. *Id.* at 627-28, 444 N.E.2d at 697. The *Voight* court, however, reversed that part of the trial court's order requiring the wife to transfer her joint interest to the husband and denying a partition of the jointly held property. *Id.* at 627, 444 N.E.2d at 697. Once property has been classified marital or non-marital pursuant to the statute, the non-marital property is assigned to each owner and the marital property is equitably divided. *Id.* (citing ILL. REV. STAT. ch. 40, para. 503(c) (1985)). The court concluded that parties' interests in property found to be non-marital and held in joint tenancy should not be affected by the dissolution and property division proceedings. *Id.* Thus, the court held the trial court has no general discretion to alter the fixed, separate interests of the parties as it would in the case of marital property held in co-ownership. *Id.* at 626, 444 N.E.2d at 697. Therefore, the trial court must consider an equitable property division and may order a partition of the property. *Id.* at 627, 444 N.E.2d at 697.

deeds and once again appealed the trial court decision.[74]

The *Wojcicki II* court rejected the holding in *Voight*.[75] The court analyzed the practical effects of the *Voight* holding and found the results contrary to the legislative intent of section 503(c),[76] relied upon by *Voight*.[77] The *Wojcicki II* court reasoned that findings of non-marital property under *Voight* would be rendered meaningless: when non-marital property is held jointly, the noninterested party cannot be forced to transfer his or her interest to the true owner of the non-marital property.[78] Furthermore, the right to reimbursement for non-marital property contributed to an estate depends not on how legal title to the property is held, but rather on whether the spouse transmuted[79] or contributed his or her non-marital property to the estate.[80] The *Wojcicki II* court concluded that even though the legal title to the property was held jointly, the wife, who had not contributed any marital property to the estate, was not entitled to partition.[81] On the basis of these findings, the *Wojcicki II* court ordered the wife to execute all of the necessary documents to convey her right, title, and interests in the properties to the husband.[82]

In declining to follow *Voight*, the court essentially favored equitable distribution under section 503 over the statutory right to partition. When the court allocates property in a dissolution proceeding, it must be able to enforce such an allocation. This raises the possibility that parties may attempt to frustrate this judicial power by filing a partition suit. It is unclear whether equity should allow such interference with the mechanics of enforcing the court's award when a division of jointly held property is before the court; arguably this is not the proper role of equity.

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74. *Wojcicki II*, 135 Ill. App. 3d at 249, 481 N.E.2d at 939.
75. *Id.* at 252, 481 N.E.2d at 941.
76. ILL. REV. STAT. ch. 40, para. 503(c) (1985).
77. *Wojcicki II*, 135 Ill. App. 3d at 253, 481 N.E.2d at 942.
78. *Id.*
79. ILL. STAT. ANN. ch. 40, para. 503(c)(1), Hist. & Pract. Notes (Smith-Hurd Supp. 1986). Paragraph 503(c)(1) (1985) provides that when marital and non-martial property are commingled, the contributed property loses its identity, and its classification as marital or non-marital property is transmuted to the estate receiving the contribution. *Id.* If marital and non-marital property are commingled into newly acquired property, the property is deemed as transmuted into marital property. *Id.*
80. *Wojcicki II*, 135 Ill. App. 3d at 253, 481 N.E.2d at 942.
81. *Id.*
82. *Id.* at 253, 481 N.E.2d at 942.

E. Division of Marital Property

The IMDMA requires the court to divide marital property into "just proportions."[83] Awards of "just proportions" do not necessarily require an equal division of the marital property and need not be of similarly liquid property.[84] In *In re Marriage of Jordan*, the Illinois Appellate Court for the First District upheld a division of marital property under which the wife's portion could be liquidated, but the husband's portion would not be fully realized until 1999.[85]

In *Jordan*, the trial court awarded the husband interest in contingent mortgage receivables payable in 1999, and awarded the wife the marital residence.[86] Contesting the division, the husband argued that while the present value of the property awarded the parties was approximately equal, the wife had the opportunity to sell the marital residence and immediately realize the proceeds; he, however, was forced to wait until 1999 before he would be able to realize his share of the marital property value.[87] The husband contended previous decisions mandated that the parties should have been awarded an equal interest in the four pieces of property.[88]

The appellate court distinguished the authority cited by the husband from the facts of the case before it.[89] The *Jordan* court acknowledged the husband's arguments that there were certain risks attached to the mortgage receivables.[90] In this case, however, in addition to the marital residence, the wife also was awarded a substantial portion of the mortgage receivables.[91] In determining that the wife shared some of the risk, the appellate court held that the award was not an abuse of the trial court's discretion.[92]

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

84. *In re* Marriage of Jordan, No. 84-2848, slip op. at 4 (1st Dist. Oct. 31, 1985).

85. *Id.* at 5.

86. *Id.* at 3. The parties jointly owned four parcels of real property: the marital residence, a 20% interest in two mortgage receivables due in 1994 and a 50% interest in another mortgage receivable due in 1999. *Id.* at 2.

87. *Id.* at 4.

88. *Id.* (citing *In re* Marriage of Korper, 131 Ill. App. 3d 753, 475 N.E.2d 1333 (5th Dist. 1985) (husband not required to pay his wife the amount of her interest in his pension immediately because the value of the pension would be affected by his survival for a projected term of years, the preservation of his pension entitlement rights, and the constancy of the fund); *In re* Marriage of Smith, 105 Ill. App. 3d 980, 434 N.E.2d 1151 (3rd Dist. 1982) (when debts owed the parties are questionable, the risk of repayment must be shared by both parties)).

89. *Jordan*, No. 84-2848, slip op. at 4.

90. *Id.* at 5.

91. *Id.*

92. *Id.*

In *In re Marriage of Ryan*[93], the Illinois Appellate Court for the First District determined that an allocation of all the outstanding indebtedness of the parties to one of the parties was proper.[94] The *Ryan* court emphasized that an equitable division of marital property need not be an equal one.[95] Because the majority of the debts were created by the husband, and the wife lacked awareness of or control over the husband's borrowing practices,[96] the appellate court concluded that the trial court did not abuse its discretion by apportioning those debts to the husband.[97]

The Illinois Appellate Court for the Second District, in *In re Marriage of Banach*,[98] held that the power to divide marital property granted by section 503 of the IMDMA[99] includes the powers necessary to implement the division, and that the trial court may be creative in this regard.[100] In *Banach*, the primary marital property under dispute consisted of a restaurant and the adjoining marital home, which the trial court treated as one property.[101] In order to liquidate the property, the trial court allowed each of the parties a successive option to buy out the other party's interest.[102] The wife, objecting, contended that the IMDMA permitted for the division of property only by its subsequent sale.[103]

The court recognized that courts generally have awarded the property to one spouse, subject to a cash repayment to the other

93. 138 Ill. App. 3d 1077, 487 N.E.2d 61 (1st Dist. 1985).

94. *Id.* at 1080, 487 N.E.2d at 64.

95. *Id.* at 1080, 487 N.E.2d at 63; *see supra* note 84.

96. *Id.* at 1080-81, 487 N.E.2d at 64. The husband was allocated a debt of $103,000. The evidence established that the debt consisted of $25,000 for individual income taxes owed by the husband; $1250 owed to the IRS by the wife for penalties and interest incurred for late filing due to the husband's failure to provide her with documents necessary for her to complete her return; $62,500 owed on a loan made by the husband from his inherited business; and a $27,400 balance due on a loan from the husband's mother for the purpose of financing another business. *Id.*

97. *Id.* at 1081, 487 N.E.2d at 64.

98. 140 Ill. App. 3d 327, 489 N.E.2d 363 (2nd Dist. 1986).

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

100. *Banach*, 140 Ill. App. 3d at 331, 489 N.E.2d at 366.

101. *Id.* at 330, 489 N.E.2d at 365.

102. *Id.* at 330-31, 489 N.E.2d at 365. The trial court found each party entitled to one-half of the value of the properties. *Id.* After determining the value, the court granted the wife the first 30-day option, followed by the husband's 30-day option. If the options remained unexercised, the property was to be listed with a real estate broker at the value determined by the court. If the property remained unsold after six months, it would be sold at public auction and the proceeds divided equally. *Id.*

103. *Id.* at 331, 489 N.E.2d at 365-66. The IMDMA provides in pertinent part: "The court may make such judgments affecting the marital property as may be just and may enforce such judgments by ordering a sale of marital property, with proceeds therefrom to be applied as determined by the court." ILL. REV. STAT. ch. 40, para. 503(i) (1985).

party,[104] when division in kind is inequitable or inappropriate for the type of property under consideration.[105] The *Banach* court held that this may be accomplished through successive purchase options, as proposed by the trial court.[106]

During the *Survey* year, the courts continued to take a practical approach in dividing marital property. An option plan for distribution, as used in *Banach*, is particularly well-suited to those dissolutions in which both parties desire the property, but their ability to make a cash reimbursement is questionable.[107] Additionally, as the *Jordan* court noted, an award of the marital residence to one party serves to more completely sever contacts between the parties.[108] An equal division of the marital residence would only spawn additional litigation regarding partition, distribution of the proceeds, or an award of the value of the home.

IV. MAINTENANCE

While the courts have a certain amount of discretion in awarding maintenance payments, the IMDMA establishes certain guidelines.[109] The IMDMA provides that an award of maintenance is appropriate when income received by a party, from either property, employment or otherwise is insufficient to meet the reasonable needs of that party.[110] Property apportioned to a party is not considered income for purposes of the statute. Nevertheless, inquiring into the income-producing potential of property apportioned to an individual is appropriate when determining the necessity for and the amount of a maintenance award.[111]

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104. *Banach*, 140 Ill. App. 3d at 331, 489 N.E.2d at 366 (citing *In re* Marriage of Rossi, 113 Ill. App. 3d 55, 446 N.E.2d 1198 (1st Dist. 1983); *In re* Marriage of Leon, 80 Ill. App. 3d 383, 399 N.E.2d 1006 (2nd Dist. 1980); *In re* Marriage of Lee, 78 Ill. App. 3d 1123, 398 N.E.2d 126 (1st Dist. 1979)).

105. *Banach*, 140 Ill. App. 3d at 331, 489 N.E.2d at 366. One example is an ongoing business because a division in kind would force the continuation of a business association between the parties. *Id.* (citing *In re* Marriage of Sales, 106 Ill. App. 3d 378, 436 N.E.2d 23 (1st Dist. 1982); *In re* Marriage of Hellwig, 100 Ill. App. 3d 452, 426 N.E.2d 1087 (1st Dist. 1981); *In re* Marriage of McMahon, 82 Ill. App. 3d 1126, 403 N.E.2d 730 (4th Dist. 1980)).

106. *Banach*, 140 Ill. App. 3d at 332, 489 N.E.2d at 366.

107. *Id.*

108. *Jordan*, No. 84-2848, slip op. at 5.

109. ILL. REV. STAT. ch. 40, para. 504(a),(b) (1985).

110. *Id.* at para. 504(a). Further, the spouse seeking maintenance is not required to sell or impair assets or capital in order to provide for his or her support under the statute. *In re* Marriage of Marks, No. 84-0512, slip op. at 9 (5th Dist. 1985) (citing *In re* Marriage of Thornton, 89 Ill. App. 3d 1078, 1088, 412 N.E.2d 1336, 1344 (4th Dist. 1980); *In re* Marriage of Lloyd, 81 Ill. App. 3d 311, 401 N.E.2d 328 (5th Dist. 1980)).

111. *See In re* Marriage of Marks, No. 84-0512, slip op. at 9.

In *In re Marriage of Marks*,[112] the Illinois Appellate Court for the Fifth District rejected an award of permanent maintenance which was to continue unabated after distribution of the marital property.[113] In *Marks*, the trial court awarded the wife $250,000 as her share of the husband's interest in the family business, to be paid over a twelve year period.[114] In addition, the wife was awarded a fixed monthly sum as permanent maintenance.[115] The appellate court overturned the award because, in determining the wife's maintenance needs, the trial court had neither considered nor evaluated the income potential of the property apportioned to her.[116]

The Illinois Appellate Court for the First District held that evidence of the financial status of the husband's current wife and the corporation held by her was relevant and properly admitted for determination of maintenance obligations owed the former wife in *Bronstein v. Bronstein*.[117] In *Bronstein*, the husband petitioned for a modification, asserting that he did not have enough money to satisfy his maintenance and support obligations.[118] The court determined that although the husband had divested himself of assets of a closely held corporation, there were substantial corporate funds available to him.[119] While the husband owned only nine percent of the corporation, the balance was owned equally by his current wife, his mother, and his sister.[120] Concluding that virtually all of the proceeds of the corporation were available to him, either through his own shares or through the interest of his wife, the husband was provided with sufficient funds to satisfy his maintenance and support obligations.[121] In addition, the *Bronstein* court noted that any changes the husband's financial circumstances did not justify a modification of the maintenance award under section 504(b)(6) of the IMDMA.[122]

112. No. 84-0512 (5th Dist. Aug. 15, 1985).

113. *Id.* at 9.

114. *Id.* at 2-3. In addition, the parties divided other marital assets by stipulation. These assets included the parties personal property, marital residence and the proceeds from the sale of out-of-state real property. *Id.* at 2.

115. *Id.* at 3.

116. *Id.* at 9.

117. No. 85-283, slip op. at 6 (1st Dist. Mar. 31, 1986).

118. *Id.* at 4.

119. *Id.* at 2.

120. *Id.* at 5.

121. *Id.*

122. *Id.* Modification of maintenance awards are governed by section 510 of the IMDMA. ILL. REV. STAT. ch. 40, para. 510 (1985). The relevant factors to be considered by the court when ruling on a modification are those found under section 504(b) for

In addition to being modified, maintenance awards also may be terminated by agreement of the parties[123] or as provided under section 510 of the IMDMA.[124] There are three specified terminating events: the remarriage of the recipient, the cohabitation of the recipient on a resident, continuing, conjugal basis, or the death of either party.[125] Failure to specify terminating events when maintenance has been set for a term of years can lead to unpredicted results.

For example, in *In re Estate of Bartlett*,[126] the Illinois Appellate Court for the Fourth District held that the death of a party obligated to make maintenance payments for a certain period under a settlement agreement failed to terminate the obligation.[127] In *Bartlett*, a settlement agreement between the parties required the husband to pay the wife five hundred dollars per month for ten years.[128] The husband died nearly five years after the agreement was entered; the wife filed a claim against the estate for the amount due under the agreement.[129] The executors claimed that the obligation was terminated under section 510(b) of the IMDMA be-

original awards of maintenance. ILL. STAT. ANN. ch. 40, para. 510, Hist. & Prac. Notes (Smith-Hurd 1980). Section 504(b) provides in part:

> (b) The maintenance order shall be made in such amounts and for such periods of time as the court deems just, . . . after consideration of all relevant factors including:
>
> (1) the financial resources of the party seeking maintenance . . . ;
>
> (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 economic circumstances of the parties.

ILL. REV. STAT. ch. 40, para. 504(b) (1985).

Prior to this codification, the Illinois courts recognized the obligation to modify alimony awards maintenance under the 1977 Act when a change in circumstances equitably required such a modification. Herrick v. Herrick, 319 Ill. 146, 153, 149 N.E. 820, 824 (1925). A change in circumstances sufficient to warrant a modification of a maintenance award must be fortuitious and not caused by the party seeking the modification. Barrow v. Barrow, 33 Ill. App. 3d 654, 342 N.E.2d 237 (5th Dist. 1975); Johnston v. Johnston, 9 Ill. App. 3d 247, 292 N.E.2d 39 (1st Dist. 1972); Blowitz v. Blowitz, 75 Ill. App. 2d 386, 221 N.E.2d 160 (1st Dist. 1966).

123. ILL. REV. STAT. ch. 40, para. 502 (1985).
124. *Id.* at para. 510(b) (1985).
125. *Id.*
126. 138 Ill. App. 3d 103, 485 N.E.2d 566 (4th Dist. 1985).
127. *Id.* at 106, 485 N.E.2d at 568.
128. *Id.* at 104, 485 N.E.2d at 567.
129. *Id.*

cause there was no agreement by the parties to continue the payments after death, and thus they terminated by operation of law.[130]

The court concluded that the parties set their own termination date, apparently by their silence, preempting the application of section 510(b).[131] The wife had foregone the possibility of receiving maintenance indefinitely in exchange for maintenance payments guaranteed for ten years.[132] Therefore, the maintenance obligation survived the death of the obligor.[133]

The *Bartlett* holding surprised many practitioners who have come to rely on statutory maintenance termination events. If maintenance is intended to terminate on the occurrence of certain events, each event should be specified in the agreement. For example, if the death of either party is intended as a termination event, this should be clearly stated. Based on *Bartlett*, silence may be interpreted as entirely eliminating the right to terminate maintenance based on these events. This leads to speculation regarding the result when the agreement is silent concerning maintenance. If the result is the same, a person could be obligated to pay permanent maintenance forever despite the recipient's remarriage. This area is ripe for further examination and interpretation by the courts, though the *Bartlett* case clearly places an emphasis on careful draftsmanship.

The concept of maintenance (or "alimony in gross") has been the topic of much commentary in the past few years. After the IMDMA's enactment in 1977, many practitioners were uncertain whether courts had the power to award maintenance in gross; they were also unsure of the definition of the "in gross" concept. Previously, this concept, as it applied to alimony, provided for a fixed sum which was vested, unmodifiable, and not subject to termination upon the death of the recipient.[134] The IMDMA, as originally enacted in 1977, seemed to eliminate the "in gross" concept.[135] The legislature, however, included "in gross" in its 1982 amendment to the maintenance provisions of the IMDMA.[136] Recently,

130. *Id.*
131. *Id.* at 106, 485 N.E.2d at 568.
132. *Id.*
133. *Id.*
134. ILL. STAT. ANN. ch. 40, para. 504, Hist. & Prac. Notes (Smith-Hurd Supp. 1986). *See* Canady v. Canady, 30 Ill. 2d 440, 197 N.E.2d 42 (1964); Ihle v. Ihle, 92 Ill. App. 3d 893, 416 N.E.2d 366 (3rd Dist. 1981); Frank v. Frank, 34 Ill. App. 3d 957, 342 N.E.2d 404 (2nd Dist. 1975).
135. ILL. REV. STAT. ch. 40, para. 504 (1977).
136. ILL. REV. STAT. ch. 40, para. 504(b) (1985) provides that "[t]he maintenance

the Illinois Supreme Court interpreted the meaning of "in gross" to be the same as the traditional meaning in the alimony context.[137]

In *In re Marriage of Burgstrom*,[138] the Illinois Appellate Court for the First District upheld the lower court's decision to deny modification of maintenance based upon a finding that the payments were maintenance in gross.[139] Pursuant to a marital settlement, the wife was to receive $495,360, payable monthly for twenty-four years, with an additional payment to be made on April fifteenth of each year.[140] The agreement contained no provision for either increasing or decreasing the payments, although it did provide that the payments would terminate upon the wife's death or remarriage.[141] The *Burgstrom* court determined that the inclusion of the termination provision insufficient to qualify the payments as maintenance subject to modification.[142] The court stated that maintenance in gross may be combined with conditions that would serve to terminate it.[143] Concluding that the agreement provided for maintenance in gross, the appellate court refused to permit modification.[144]

In *In re Marriage of Cannon*,[145] the Illinois Supreme Court held a maintenance order including a provision which reserves review of the order for two years does not render the order unappealable.[146] Both parties in *Cannon* appealed the trial court's award of maintenance and division of property.[147] The Illinois Appellate Court for the Fourth District dismissed the appeals, holding that the order was not final and appealable because of the trial court's retention of jurisdiction to review the order within two years.[148]

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order shall be in such amounts and for such periods of time as the court deems just, . . . and may be in gross or for fixed or indefinite periods of time . . . ."

137. *In re* Marriage of Freeman, 106 Ill. 2d 290, 478 N.E.2d 326 (1985) (maintenance in gross is a non-modifiable sum certain to be received by the former spouse regardless of changes in circumstances).

138. 135 Ill. App. 3d 854, 482 N.E.2d 383 (3rd Dist. 1985).

139. *Id.* at 857-58, 482 N.E.2d at 386.

140. *Id.*

141. *Id.* The parties had agreed that the payments would be deductible by the husband and taxable to the wife for federal income tax purposes and the court used this provision to disqualify the payments as a property settlement in lieu of maintenance. *Id.*

142. *Id.* at 857-58, 482 N.E.2d at 386.

143. *Id.* at 858, 482 N.E.2d at 386.

144. *Id.*

145. 112 Ill. 2d 552, 494 N.E.2d 490 (1986).

146. *Id.* at 556, 494 N.E.2d at 492.

147. *Id.* at 553, 494 N.E.2d at 491.

148. *Id.* at 554, 494 N.E.2d at 491. The maintenance provision of the trial court's order stated that the order was to be reviewable no later than the expiration of two years, and sooner if the parties' circumstances changed significantly. *Id.* at 553-54, 494 N.E.2d

In reversing the appellate court, the supreme court concluded that the trial court adequately had decided each of the ancillary issues, including the amount of maintenance.[149] The supreme court also concluded that the trial judge had provided for review of that award because of the presence of other factors.[150] The court reasoned that the judgment was enforceable immediately because any later modifications under the review provision could only affect payments accruing subsequent to the filing of the motion to modify.[151] The supreme court thus concluded that the inclusion of such a review provision in the order did not render the order unappealable.[152]

While few Illinois courts have examined the validity of antenuptial agreements, a recent Illinois decision has upheld the validity of a waiver of maintenence in an antenuptial agreement. In *In re Marriage of Burgess*,[153] the Illinois Appellate Court for the Third District validated an antenuptial agreement which contained a waiver of maintenance, and where no significant circumstances existed that were outside the contemplation of the parties at the time the parties entered into the agreement.[154] In *Burgess*, the agreement provided for a division of assets and a waiver of maintenance or alimony after divorce.[155] The trial court awarded maintenance to the wife after finding the waiver of maintenance clause unenforceable because it failed to provide for a settlement as an alternative to maintenance.[156]

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at 491. The Illinois Appellate Court for the Fourth District relied on *In re* Marriage of Leopando, 96 Ill. 2d 114, 449 N.E.2d 137 (1983), in concluding that custody, property division and support are issues ancillary to the dissolution action, and as a result, petitions for dissolution are not fully adjudicated until all of these separate issues relating to the same claim are resolved. *In re* Marriage of Cannon, 132 Ill. App. 3d 821, 823, 477 N.E.2d 716, 718 (4th Dist. 1985). In *Leopando*, a custody order was found not final or appealable because the issues of maintenance, property division and attorney fees had not been resolved. *Leopando*, 96 Ill. 2d at 118, 449 N.E.2d at 140. *See supra* notes 350-360 and accompanying text for further discussion of the application of *Leopando*. The Illinois Supreme Court refused to apply *Leopando* to the facts of *Cannon*. *Cannon*, 112 Ill. 2d at 555, 494 N.E.2d at 492.

149. *Cannon*, 112 Ill. 2d at 556, 494 N.E.2d at 492.

150. *Id.* at 553, 556, 494 N.E.2d at 491-92.

151. *Id.* at 556, 494 N.E.2d at 492.

152. *Id.*

153. 138 Ill. App. 3d 13, 485 N.E.2d 504 (3rd Dist. 1985).

154. *Id.* at 14-15, 485 N.E.2d at 505.

155. *Id.* at 14, 485 N.E.2d at 504.

156. *Id.* In the original action, the trial court found the portion of the agreement pertaining to the division of property controlling only as to property acquired by the parties prior to the marriage. Thus, the property acquired during the marriage was divided by the trial court outside the scope of the agreement. *Id.* at 14, 485 N.E.2d at 505. The trial court denied maintenance based on this division of marital property. *Id.* On an

The appellate court overturned the award of maintenance because the trial court failed to consider the particular necessity for such an award.[157] Narrowly restricting the enforcement of the agreement to the circumstances of *Burgess*,[158] the appellate court emphasized that Illinois courts are to mitigate the potential harm to spouses that could result from strict enforcement of waiver of maintenance provisions in antenuptial agreements.[159] Thus, an otherwise valid waiver of maintenance could be disregarded by the court upon the occurrence of uncontemplated events more significant than a mere change in economic fortune.[160]

V. CHILD SUPPORT

The IMDMA provides for original awards of child support under section 505.[161] Child support modifications generally are governed by section 510.[162]

A. Statutory Minimum Support Guidelines

During the *Survey* year, the Illinois appellate courts addressed significant questions in the area of child support involving the mandatory minimum child support guidelines of section 505(a) of the IMDMA.[163] The Illinois Appellate Court for the First Dis-

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appeal of the first award made by the trial court, the appellate court reversed the trial court's original property division and remanded for further consideration of the maintenance issue based on the proper property division. *In re* Marriage of Burgess, 123 Ill. App. 3d 487, 462 N.E.2d 203 (3rd Dist. 1984).

157. 138 Ill. App. 3d at 15, 485 N.E.2d at 505.

158. *Id.*

159. *Id.* The purpose of the IMDMA, in part, is to mitigate the potential harm to spouses and their children caused by dissolution. ILL. REV. STAT. ch. 40, para. 102(4) (1985). *See* Eule v. Eule, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1st Dist. 1974) (courts should uphold the validity of clauses in an antenuptial agreement when they are fair and reasonable).

160. *Burgess*, 138 Ill. App. 3d at 15, 485 N.E.2d at 505. For example, a waiver of maintenance could be avoided if its enforcement would render the spouse a public charge. Such a condition might arise because of a lack of property resources, a lack of employability, a debilitating illness, or a mental or physical handicap. *Id.*

161. ILL. REV. STAT. ch. 40, para. 505 (1985). Section 505 provides in part: "In a proceeding for dissolution of marriage,. . . 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. . . ." *Id.*

162. *Id.* at para. 510.

163. *See infra* notes 164-94 and accompanying text. The court in *In re* Marriage of Blaisdell, 142 Ill. App. 3d 1034, 492 N.E.2d 622 (1st Dist. 1986), considered the 1984 version of the mandatory minimum child support guidelines. *Id.* at 1035-36, 492 N.E.2d at 623. ILL. REV. STAT. ch. 40, para. 505 (Supp. 1984) provided:

(a) In a proceeding for dissolution of marriage, legal separation, declaration of invalidity of marriage, a proceeding for child support following dissolution of the marriage by a

trict, in *In re Marriage of Blaisdell*,[164] upheld the constitutionality of the statutory guidelines against claims that the statutory guidelines violated substantive and procedural due process and equal protection clauses and prohibitions against enactment of special legislation.[165]

In *Blaisdell*, the custodial parent brought an action to obtain a modification of child support under section 510 of the IMDMA.[166] The trial court found the petitioner had shown a substantial change in circumstances,[167] and thus modified the support order pursuant to the guidelines established by section 505 of the IMDMA.[168]

On appeal, the respondent challenged the constitutionality of the

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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, after considering all relevant factors, including:

(1) the financial resources of the child;

(2) the financial resources and needs of the custodial parent;

(3) the standard of living the child would have enjoyed had the marriage not been dissolved;

(4) the physical and emotional condition of the child, and his educational needs; and

(5) the financial resources and needs of the noncustodial parent or parents.

In cases involving child support alone, the Court shall determine the minimum amount of support by using the following guidelines:

Number of Children	Percent of Income (Net)
1	20%
2	25%
3	32%
4	40%
5	45%
6 or more	50%

Id. This section of the challenged statute was amended in 1985, emphasizing the discretion vested in the court. *See infra* notes 458-75 and accompanying text. This amended version, however, was not at issue before the court on this appeal. *Blaisdell*, 142 Ill. App. 3d at 1041, 492 N.E.2d at 627.

164. 142 Ill. App. 3d 1034, 492 N.E.2d 622.

165. *Id.* at 1042-48, 492 N.E.2d at 627-31.

166. *Id.* at 1035, 492 N.E.2d at 623.

167. *Id.* at 1036, 492 N.E.2d at 624. The petitioner's motion alleged that the child's needs had increased since the 1979 dissolution judgment, attributable to higher expenses for school tuition, camp, child care, and counseling. The motion also alleged that the respondent's income had increased. The trial court found the petitioner had sustained her burden of showing a substantial change in circumstances, justifying a modification of the 1979 order. *Id.*

168. *Id.* at 1036-37, 492 N.E.2d at 624. The respondent's net monthly income was approximately $2000. Following the statutory formula, the respondent was ordered to pay $400 per month, increased from $275 per month. *Id.* at 1037, 492 N.E.2d at 624.

guidelines,[169] contending that the statute violated both the Illinois Constitution's separation of powers requirement[170] and its prohibition against enactment of special legislation.[171] The respondent also argued that the statute deprived him of procedural due process[172] and equal protection under both the state and federal constitutions.[173] He also alleged that the statute violated his substantive due process rights protected by the federal constitution.[174] In making his constitutional challenges, the respondent assumed that the courts were mandated to follow the statutory guidelines without any deviation.[175]

In upholding the constitutionality of the minimum child support guidelines, the appellate court noted that the legislative history indicated that the standards should not be rigidly applied.[176] The court stated that rigid statutory application would reduce the court's role to that of merely applying the mathematical formula and calculating the correct amount of support.[177] Instead, the court regarded the statutory guidelines as a starting point for anal-

169. *Id.* at 1036, 492 N.E.2d at 623.

170. *Id.* at 1042, 492 N.E.2d at 627; ILL. CONST. art. II, § 1; *id.* at art. IV, § 1. The respondent argued that the separation of powers requirement was violated because the trial court has no discretion to also consider the five relevant factors in the statute in determining the level of child support payments. *Blaisdell*, 142 Ill. App. 3d at 1042, 492 N.E.2d at 627.

171. *Id.* at 1043, 492 N.E.2d at 627-28; ILL. CONST. art. IV, § 13. The respondent contended that the statute conferred a special benefit or exclusive privilege on a person or group of persons to the exclusion of others similarly situated. *Blaisdell*, 142 Ill. App. 3d at 1043, 492 N.E.2d at 628.

172. *Id.* at 1044-45, 492 N.E.2d at 628-29. The respondent relied on the decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), to support the contention that the statute depriving him of property created an irrebutable presumption violating his rights to procedural due process. *Id.*

173. *Blaisdell*, 142 Ill. App. 3d at 1046, 492 N.E.2d at 630. The respondent argued that while the statute was neutral on its face, it unfairly discriminated against men in favor of women in its application because men are the noncustodial parents in 88% of divorce cases. *Id.* The court noted that the respondent's additional claim that the statute deprived him of the constitutional provision mandating a remedy for every injury was disposed of with the dismissal of the due process claim. *Id.* at 1048, 492 N.E.2d at 631 (citing ILL. CONST. art. II, § 19).

174. *Blaisdell*, 142 Ill. App. 3d at 1046, 492 N.E.2d at 629-30. The respondent argued that a noncustodial parent has a right not to support his or her children beyond the provision of basic necessitites, regardless of the noncustodial parent's financial ability. *Id.*

175. *Id.* at 1038, 492 N.E.2d at 625.

176. *Id.* at 1040, 492 N.E.2d at 626. As quoted with favor by the court, the House Debates on the date of passage indicated that the statutory percentages "really are . . . guidelines that can be changed up or down, but at least it's a set of statutory guidelines, and you have to have a reason for coming in below those guidelines." *Id.* (citing House Debates, H.B. 3068, 83d Gen. Assem., May 17, 1984, at 194, 195).

177. *Blaisdell*, 142 Ill. App. 3d at 1038, 492 N.E.2d at 625.

ysis by the trial courts.[178] The parent who desires to modify the child support above or below the percentages specified by the guidelines has the burden of convincing the court to deviate from those guidelines.[179] The *Blaisdell* court cautioned, however, that a complete analysis includes proper consideration of all relevant factors dictated by Illinois law, such as need, ability to pay, and the standard of living the child would have enjoyed if the marriage had not been dissolved.[180]

Traditionally, Illinois courts required a showing of an increased need by the children and a corresponding increased ability to pay by the noncustodial parent in order for a support judgment to be modified.[181] In recent years the courts have taken a more lenient approach,[182] recognizing that the needs of the child and the financial circumstances of the noncustodial parent are not determinative, but merely factors to be taken into consideration.[183] Courts also may refer to sections 502,[184] 506,[185] and 513[186] of the IMDMA, and the Uniform Reciprocal Enforcement of Support Act.[187]

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178. *Id.* at 1040, 492 N.E.2d at 626.

179. *Id.* at 1041, 492 N.E.2d at 627.

180. *Id.* at 1040, 492 N.E.2d at 626. IMDMA section 505(a)(2) reads in pertinent part:

> (2). . .Relevant factors may include but are not limited to:
> (a) the financial resources of the child;
> (b) the financial resources and needs of the custodial parent;
> (c) the standard of living the child would have enjoyed had the marriage not been dissolved;
> (d) the physical and emotional condition of the child, and his education needs; and
> (e) the financial resources and needs of the noncustodial parent.

ILL. REV. STAT. ch. 40, para. 505(a)(2) (1985).

181. *See* Kelleher v. Kelleher, 67 Ill. App. 2d 410, 414, 214 N.E.2d 139, 141 (3rd Dist. 1966).

182. *See, e.g.*, Legan v. Legan, 69 Ill. App. 3d 304, 307, 387 N.E.2d 413, 415 (3rd Dist. 1979) (child support payments may be increased when there has been an increase in the noncustodial parent's ability to pay without a corresponding increase in the child's needs); *In re* Support of Sharp, 65 Ill. App. 3d 945, 949, 382 N.E.2d 1279, 1282-83 (3rd Dist. 1978) ("[c]hild support payments must necessarily reflect a balance of the intensity of the child's needs with the ability of the parents to provide for that need").

183. *See In re* Marriage of Daniels, 115 Ill. App. 3d 173, 450 N.E.2d 361 (5th Dist. 1983); Giamanco v. Giamanco, 111 Ill. App. 3d 1017, 444 N.E.2d 1090 (5th Dist. 1982); *In re* Marriage of Raidbard, 87 Ill. App. 3d 158, 408 N.E.2d 1021 (1st Dist. 1980).

184. ILL. REV. STAT. ch. 40, para. 502 (1985) (providing the courts with standards for giving effect to agreements between the parties as relating to child support).

185. *Id.* at para. 506 (allowing the court to appoint an attorney to represent a minor child's interests in a support action).

186. *Id.* at para. 513 (controlling support for non-minor children and educational expenses).

187. *Id.* at para. 1201-1234.

In *In re Marriage of Erickson*,[188] the Illinois Appellate Court for the Second District held the minimum statutory guidelines applicable to modification proceedings.[189] Following her remarriage, the petitioner in *Erickson* contended that the trial court erred by failing to examine the amended IMDMA section 505(a) guidelines prior to reducing the amount of child support.[190] The respondent argued that section 505(a) was irrelevant, and that section 510[191] was the only applicable statutory provision in a modification award.[192]

Rejecting the respondent's arguments, the appellate court confirmed previous holdings that trial courts must consider the same factors in modifying the amount of child support as they consider in formulating an original support order.[193] The *Erickson* court concluded that those factors were found in section 505(a), and by implication should be applied to modification proceedings under section 510.[194]

Despite the number of decisions in the area of minimum statutory child support guidelines, many important questions remain unanswered. For example, it is unsettled whether the guidelines apply where modification is sought in cases decided prior to 1984. If these guidelines are applicable to pre-1984 cases, it is unclear what threshold of proof is required before the parties may seek modification. There also is a question regarding whether parties will be permitted to apply for modifications when prior support orders do not meet the statutory minimums, but where there has been no substantial change in circumstances since the original award. While legislation providing that enactment of the minimum statutory guidelines constitutes an automatic change in circumstances has been proposed, it is no longer pending. The imposition of mandatory guidelines after negotiation of a settle-

188. 136 Ill. App. 3d 907, 483 N.E.2d 692 (2nd Dist. 1985).

189. *Id.* at 912, 483 N.E.2d at 696.

190. *Id.* at 918, 483 N.E.2d at 700; ILL. REV. STAT. ch. 40, para. 505(a) (1985). *See infra* notes 461-73 and accompanying text for a discussion of the legislative changes during the *Survey* year.

191. ILL. REV. STAT. ch. 40, para. 510 (1985). Section 510 provides *inter alia*:

> (a) Except as otherwise provided in paragraph (f) of Section 502, the provisions of any judgment respecting maintenance or support may be modified only as to installments accruing subsequent to the filing of the motion for modification with due notice by the moving party and *only upon a showing of substantial change in circumstances.*

Id. (emphasis added).

192. *Erickson*, 136 Ill. App. 3d at 918, 483 N.E.2d at 701.

193. *Id.*

194. *Id.*

ment may thwart the parties' intention when they have exchanged property or made other agreements which deviate from the mandatory minimum amounts of child support.

In this era of two income families, an important issue is unresolved and unaddressed by the statute. The statute does not provide a method to apply the guidelines when both parties have income. The statute's silence on this issue leaves available several alternatives. For example, perhaps the trial court would just look at the larger of the incomes and then apply the guidelines. Or, the child's expenses could be met by each party in proportion to their net income. Additional interpretation of the guidelines is sorely needed.

B. Educational and Post Majority Support

Child support obligations are terminated when the child has reached the age of eighteen or been emancipated.[195] However, section 513 of the IMDMA[196] provides an exception, authorizing the courts to award support for disabled children even after they have reached the age of majority.[197] This section also establishes the parental obligation to provide for the educational expenses of their children regardless of the children's ages.[198]

In *In re Marriage of Bates*,[199] the Illinois Appellate Court for the Second District departed from previous decisions denying support for emancipated children.[200] The *Bates* court held that section

195. ILL. REV. STAT. ch. 40, para. 510(c) (1985); ILL. REV. STAT. ch. 110½, para. 11-1 (1985) (the age of majority in Illinois is eighteen). A child may become emancipated by marriage, People *ex rel* Mitts v. Ham, 206 Ill. App. 543 (3rd Dist. 1917), by entering the armed forces, Iroquois Iron Co. v. Industrial Comm'n, 294 Ill. 106, 128 N.E. 289 (1920), or by becoming economically self-sufficient, unless the self-sufficiency results from a parent's failure to meet his child support obligations. Shuff v. Fulte, 344 Ill. App. 157, 100 N.E.2d 502 (3rd Dist. 1951).

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

197. *Id.* Section 513 provides:

> The Court also may 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 or both of its parents as equity may require. . . . 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.

Id.

198. *Id.*

199. 141 Ill. App. 3d 566, 490 N.E.2d 1014 (2nd Dist. 1986).

200. *See* Finley v. Finley, 81 Ill. 2d 317, 410 N.E.2d 12 (1980) (unless otherwise

513 includes the obligation to support children who have attained or exceeded majority while they are attending school.[201] In contesting the trial court's order requiring him to pay the medical expenses of the non-minor children while they were attending school,[202] the father in *Bates* relied upon the earlier decision of *In re Marriage of Moore*,[203] which overturned an order requiring the supporting parent to pay the medical and dental expenses of all of the children until they reached the age of twenty-two.

The *Bates* court interpreted section 513 as authorizing a court to provide for the education *and maintenance* of the child.[204] The court distinguished *Moore*, noting that the order in that case did not require that the non-minor attend school for the father to remain obligated, as did the *Bates* order.[205] The court reasoned that because the reasonable living expenses of the child may include medical expenses, a parent may be required to pay his child's medical expenses while the child attends college, regardless of the child's age.[206] With respect to educational expenses, a divorced parent has substantially greater finanical obligations than a parent of a child in an intact marriage.

Section 513(b) provides that in fashioning a child support order, a court must consider the "standard of living" the child would have enjoyed if the parents were not divorced.[207] In *In re Support*

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agreed or provided in decree, child support obligations terminate upon emancipation of child); *In re* Marriage of Moore, 117 Ill. App. 3d 206, 453 N.E.2d 102 (5th Dist. 1983) (father not required to pay the medical and dental expenses of the children after they reach the age of majority); *In re* Marriage of Thompson, 79 Ill. App. 3d 310, 398 N.E.2d 17 (1st Dist. 1979) (error to order further support for a child who had reached his majority and was not disabled);*In re* Marriage of Raski, 64 Ill. App. 3d 629, 381 N.E.2d 744 (5th Dist. 1978) (IMDMA provisions pertaining to child support do not extend parental obligations past the age of minority except in limited situations); Kreitner v. Kreitner, 285 Ill. App. 602, 2 N.E.2d 569 (4th Dist. 1936) (father not liable for support and maintenance of his adult daughter who was mentally and physically sound and healthy).

201. *Bates*, 141 Ill. App. 3d at 574, 490 N.E.2d at 1019.

202. *Id.* at 573, 490 N.E.2d at 1018.

203. 117 Ill. App. 3d 206, 453 N.E.2d 102 (5th Dist. 1983).

204. 141 Ill. App. 3d at 574, 490 N.E.2d at 1019 (emphasis in original). *See also In re* Marriage of Marg, Nos. 84-3066, 85-1086 (1st Dist. Oct. 7, 1985) (the requirement for payment to the custodial parent for the living expenses of a child while attending college locally was proper); *In re* Marriage of Pauley, 104 Ill. App. 3d 100, 432 N.E.2d 661 (4th Dist. 1982) (father ordered to reimburse the mother for reasonable living expenses for children attending college, whether living on campus or with mother).

205. *Bates*, 141 Ill. App. 3d at 573-74, 490 N.E.2d at 1018-19.

206. *Id.* at 574, 490 N.E.2d at 1019. It should be noted that the trial court order was applicable to the periods when the children were attending "school" and while the appellate court affirmed this order as written, the opinion later qualified the language as "college." *Id.*

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

of Pearson, [208] the Illinois Supreme Court held that this section allows courts to consider the amounts spent for the college education of the other children of the parties prior to the dissolution when determining how much a divorced parent should be ordered to pay for a child's education.[209] The availability of alternative educational programs, such as a public institution, was also recognized by the court as a relevant factor in this determination.[210]

C. Modifications

During the *Survey* year, the supreme court held that a child is not limited to support in the amount of his actual needs while the noncustodial parent enjoys a much higher standard of living than the child in *In re Marriage of Bussey*.[211] In that case, the trial court permitted an increase in child support because the noncustodial parent had the ability to pay in excess of and regardless of the stated needs of the child.[212] On appeal, the husband objected to this increase, contending that the trial court erred in failing to equate the "present combined ordinary expenses" of the children with their demonstrated needs.[213] The supreme court disagreed, relying on the trial court's order, which stated that the "present combined ordinary expenses" failed to reflect the standard of living to which the children were entitled.[214] The *Bussey* court held that present ordinary expenses do not set a limit on the noncustodial parent's support obligation when that parent is enjoying a decidedly higher standard of living than the child.[215]

While acknowledging that the child's financial needs are the most important consideration when modifying a support award,[216] the Illinois Appellate Court for the Third District held that the available means of the parties also should be considered in a modification proceeding.[217] In *Ingwerson v. Woeckener*,[218] the court reasoned that in a modification proceeding predicated upon the

208. 111 Ill. 2d 539, 490 N.E.2d 1274 (1986).
209. *Id.* at 551, 490 N.E.2d at 1277.
210. *Id.* at 551-52, 490 N.E.2d at 1277.
211. 108 Ill. 2d 286, 297, 483 N.E.2d 1229, 1234 (1986). For a discussion of the jurisdictional issues raised in *Bussey*, see *infra* notes 238-47 and accompanying text.
212. *Bussey*, 108 Ill. 2d at 296, 483 N.E.2d at 1233.
213. *Id.* at 297, 483 N.E.2d at 1234.
214. *Id.*
215. *Id.* at 297-98, 483 N.E.2d at 1234.
216. Ingwerson v. Woeckener, 141 Ill. App. 3d 647, 649, 490 N.E.2d 1008, 1010 (3rd Dist. 1986).
217. *Id.* at 649, 490 N.E.2d at 1009.
218. *Id.* at 647, 490 N.E.2d 1008.

increased needs of the child, the judge must evaluate the financial position of the non-supporting parent.[219] The obligation of the supporting parent should correspondingly increase or decrease depending upon this evaluation.[220] Thus, the *Ingwerson* court held that, when making a modification order, trial courts must determine which party is better able to meet the increased needs of the child.[221] After *Ingwerson*, a non-custodial supporting parent can bring an action for modification based on a change in the custodial parent's ability to pay.

Section 510 of the IMDMA provides that all modifications of child suppport are prospective only.[222] In *Nerini v. Nerini*,[223] the Illinois Appellate Court for the Second District held that a retroactive modification of child support was precluded when the divorce decree awarded no child support but retained jurisdiction to enter orders for future support.[224] In *Nerini*, the mother was awarded custody of the child pursuant to a 1964 dissolution order.[225] The trial court, however, did not make an award of child support, but expressly retained jurisdiction for the purpose of entering future maintenance and child support orders.[226] Twenty years later, the plaintiff sought retroactive child support, dating from the child's birth in 1963, as well as a portion of the child's college expenses.[227]

On appeal, the defendant contended that IMDMA section 510(a)[228] governed the petition, and thus barred an award of retroactive child support.[229] The plaintiff, however, claimed that this

219. *Id.* at 649, 490 N.E.2d at 1010. While both parents share an equal duty to support their children, the courts consider the income and assets of both parents when setting the amount awarded. *In re* Marriage of Riordan, 47 Ill. App. 3d 1019, 1023, 365 N.E.2d 492, 497 (1st Dist. 1977). Therefore, the parent less able to bear the financial burden of supporting the child generally is considered the non-supporting parent.

220. *Ingwerson*, 141 Ill. App. 3d at 649-50, 490 N.E.2d at 1010.

221. *Id.*

222. ILL. REV. STAT. ch. 40, para. 510(a) (1985). Section 510(a) provides in part that "the provisions of any judgment respecting maintenance or support may be modified only as to installments accruing subsequent to the filing of the motion for modification with due notice by the moving party and only upon a showing of a substantial change in circumstances."

223. 140 Ill. App. 3d 848, 488 N.E.2d 1379 (2nd Dist. 1986).

224. *Id.* at 856, 488 N.E.2d at 1384.

225. *Id.* at 849, 488 N.E.2d at 1381.

226. *Id.*

227. *Id.*

228. *See supra* note 222.

229. *Nerini*, 140 Ill. App. 3d at 852-53, 488 N.E.2d at 1382. Specifically, the defendant relied upon that portion of the statute which states: "[T]he provisions of any judgment respecting maintenance or support may be modified only as to installments accruing subsequent to the filing of the motion for modification. . . ." ILL. REV. STAT. ch. 40, para. 510(a) (1985).

section did not apply because she was not seeking a modification; the 1964 judgment contained no order awarding child support, so there was no order for the court to modify.[230] The appellate court, however, concluded that the trial court's order not requiring child support payments in effect created an order which could only be modified in compliance with section 510.[231]

Generally, dating the retroactivity of child support modifications back to the time of the filing of a petition is within the discretion of the trial court.[232] The Illinois Appellate Court for the Second District recently held that modifications of unallocated maintenance and child support may be awarded retroactively in *In re Marriage of Ingrassia*.[233] In that case, the trial court modified the original unallocated maintenance and child support award, and also issued an oral order applying the increase retroactively to the date of the petition seeking modification.[234] Before the order was drawn, the trial judge allowed reconsideration, reducing the award by fifty dollars a month and changing the retroactive date by nearly two years.[235] Because of the source of the evidence presented by the petitioner, as well as the fact that she had filed a bankruptcy petition, the appellate court found the trial court had not abused its discretion in ordering the modification.[236]

D. Jurisdiction

In Illinois, in any post-judgment proceeding to enforce or modify the judgment of another state, the foreign judgment must first

230. *Nerini*, 140 Ill. App. 3d at 853, 488 N.E.2d at 1382-83.

231. *Id.* at 853-54, 488 N.E.2d at 1383. Under the express provisions of section 510, modification of an existing order for child support can only be had as to installments accruing after the filing of the modification petition. At the time of the filing in this case, the child had already reached the age of majority, so no award of child support could be made. *Id.* at 854, 488 N.E.2d at 1383.

232. *In re* Marriage of Ingrassia, 140 Ill. App. 3d 826, 832, 489 N.E.2d 386, 390 (2nd Dist. 1986) (citing *In re* Marriage of Roth, 99 Ill. App. 3d 679, 687, 426 N.E.2d 246, 249 (1st Dist. 1981)).

233. *Ingrassia*, 140 Ill. App. 3d at 832, 489 N.E.2d at 390.

234. *Id.* at 827, 830, 489 N.E.2d at 387, 389.

235. *Id.* at 830, 489 N.E.2d at 389. The trial court heard the modification petition on February 23, 1984. The oral order was entered March 15, 1984, at which time the judge requested the petitioner to draw up the order. At the hearing on the respondent's motion to reconsider, the trial judge again asked the petitioner to draw up the order. The petitioner never did so. On April 30, 1984, the judge submitted a letter opinion allowing reconsideration, reducing the unallocated child support and directing the respondent to draft such an order. *Id.*

236. *Id.* at 832, 489 N.E.2d at 390. Part of the financial evidence presented by the petitioner was based on past due debts. Additionally, her 1982 budget, received into evidence, was based on her 1984 budget. *Id.*

be enrolled under section 511 of the IMDMA.[237] In *In re Marriage of Bussey*,[238] the Illinois Supreme Court held that a foreign judgment is properly enrolled in Illinois when a certified copy of the judgment is attached to a petition seeking its modification.[239] The parties were divorced in Indiana. The Indiana decree awarded custody of the children to the mother.[240] Approximately four years later, the father took physical custody of the children, and in 1981 filed a petition in Illinois requesting that the Indiana custody award be modified to give him custody.[241] This petition referred to the Indiana divorce decree and included a certified copy of that decree.[242] The father's petition was denied, and a few months later the mother filed her own petition requesting an increase in child support.[243] The father then contended that the trial court lacked subject matter jurisdiction to modify the Indiana decree because it was not properly enrolled in Illinois.[244]

The Illinois Supreme Court held that the language of IMDMA section 511 indicates that only one petition is required in order to commence a proceeding to modify a judgment.[245] Because a party is not required to file one petition to enroll the foreign judgment and another to modify the same judgment,[246] the father's original petition to change custody was held sufficient to constitute a "petition to enroll" the judgment, as contemplated by the statute.[247]

During the *Survey* period, the Illinois Supreme Court extended the boundaries of the jurisdiction of the Illinois courts. In *In re Marriage of Highsmith*,[248] the court held that a father's sending of his child to Illinois, and his failure to fulfill his obligation of child support, constituted a tortious act within the meaning of the Code of Civil Procedure.[249] Following these actions by the father, the mother filed a petition for rule to show cause in Illinois, alleging an

237. ILL. REV. STAT. ch. 40, para. 511 (1985).

238. 108 Ill. 2d 286, 292-93, 483 N.E.2d 1229 (1985). For a discussion of the modification of child support issues in *Bussey*, see *supra* notes 211-15 and accompanying text.

239. *Bussey*, 108 Ill. 2d at 292-93, 483 N.E.2d at 1232.

240. *Id.* at 290, 483 N.E.2d at 1230.

241. *Id.* at 290, 483 N.E.2d at 1231.

242. *Id.* The father's petition included a certified copy of the Indiana decree sworn to be true and correct, as required by the statute. ILL. REV. STAT. ch. 40, para. 511(c) (1985).

243. *Bussey*, 108 Ill. 2d at 291, 483 N.E.2d at 1231.

244. *Id.*

245. *Id.* at 292, 483 N.E.2d at 1231-32.

246. *Id.* at 292, 483 N.E.2d at 1232.

247. *Id.* at 293, 483 N.E.2d at 1232.

248. 111 Ill. 2d 69, 488 N.E.2d 1000 (1986).

249. *Id.* at 74, 488 N.E.2d at 1003.

arrearage in child support.[250] The father contended that the court lacked personal jurisdiction over him.[251] The court found that the father's removal of the child to Illinois, without obtaining either a modification of custody or of the child support award, constituted a tortious act sufficient to subject the father to the jurisdiction of the Illinois court.[252] Therefore, the father's actions satisfied the requirements of due process, making him amenable to the court's jurisdiction in custody and support proceedings.[253]

The court concentrated on the father's act of sending the child to Illinois, yet stretched the long-arm jurisdiction of the court based upon his failure to support the child. Though it is undetermined whether different facts would warrant the same finding, the *Highsmith* case must be considered when one is attempting to assert jurisdiction for a child support award.

E. Enforcement of Child Support Awards

Past due installments of child support are the vested right of the designated recipient and may not be reduced by the court either as to the amount or time of payment.[254] Current child support awards or awards in arrearage, however, may be modified by agreement between the parties.[255] Courts also may consider the defense of equitable estoppel in reducing the amount of child support arrearages.[256]

In *Elliott v. Elliott*,[257] the mother filed a petition for rule to show cause based on child support arrearages.[258] The father alleged that he had entered into an oral agreement with the mother to reduce the amount of his child support obligations, and therefore he had reduced the payments accordingly.[259] The lack of proof regarding an agreement between the parties reducing the child support payments convinced the Illinois Appellate Court for the Fourth District that such an agreement did not exist.[260] The court also

250. *Id.* at 71, 488 N.E.2d at 1002.
251. *Id.* For further discussion of the procedural aspects of *Highsmith*, see the *Survey* article entitled *Civil Procedure*.
252. *Highsmith*, 111 Ill. 2d at 74, 488 N.E.2d at 1003.
253. *Id.* at 76, 488 N.E.2d at 1004.
254. Elliott v. Elliott, 137 Ill. App. 3d 277, 278-79, 484 N.E.2d 482, 483 (4th Dist. 1985).
255. *Id.* at 279, 484 N.E.2d at 483-84.
256. Hoos v. Hoos, 86 Ill. App. 3d 817, 408 N.E.2d 752 (1st Dist. 1980).
257. 137 Ill. App. 3d 277, 484 N.E.2d 482 (4th Dist. 1985).
258. *Id.* at 277-78, 484 N.E.2d at 483.
259. *Id.* at 278, 484 N.E.2d at 483.
260. *Id.* at 279, 484 N.E.2d at 484.

determined that the mother's silence with respect to the husband's unilateral reduction and the passage of over five years did not create a defense of equitable estoppel on behalf of the father.[261] Therefore, the court held that the father's unilateral reduction of child support payments was improper and the mother was entitled to receive the full amount of unpaid child support.[262]

The difficulty in using the defense of equitable estoppel against an arrearage claim also was demonstrated in *Meirink v. Osborne*.[263] In that case, the father sought to invoke the doctrine of equitable estoppel against a child support arrearage claim of $24,600.[264] To do so, the father had to show that he relied in good faith on the voluntary conduct of the mother and suffered a detriment as a result.[265] Although the assessment of an accumulated arrearage would presumably affect the father's lifestyle, the court refused to find this a detrimental change justifying relief.[266] Thus, the *Meirink* court denied the father's equitable estoppel claim.[267]

In *Reagan v. Baird*,[268] the Illinois Appellate Court for the Fourth District held the plaintiff was not required to obtain a judgment, or even initiate legal action, with respect to a claim for past due child support in order to challenge a conveyance between family members allegedly intended to frustrate collection of the support payments.[269] Because obligations arising out of the marital relationship have been held to be of the same class as obligations to "creditors" or "other persons",[270] the *Reagan* court held that an allegation of a child support arrearage is sufficient to provide protection under the fraudulent conveyance statute.[271]

Illinois has adopted the Uniform Reciprocal Enforcement of Support Act (the "Act" or "URESA").[272] The Act was designed to facilitate enforcement of support duties[273] and compel support of dependents by obligated parties both within and outside of Illi-

261. *Id.*
262. *Id.* at 279, 484 N.E.2d at 484.
263. No. 84-0117 (5th Dist. Aug. 15, 1985).
264. *Id.* at 3.
265. *Id.* at 4.
266. *Id.*
267. *Id.* at 5.
268. 140 Ill. App. 3d 58, 487 N.E.2d 1028 (4th Dist. 1985).
269. *Id.* at 59, 65, 487 N.E.2d at 1030, 1034.
270. *Id.* at 65, 487 N.E.2d at 1034.
271. *Id.* The fraudulent conveyance statute is found at ILL. REV. STAT. ch. 59, para. 4 (1985).
272. ILL. REV. STAT. ch 40, paras. 1201-1242 (1985).
273. *Id.* at para. 1201.

nois.[274] In *Gribbins v. Skoptiz*,[275] the Illinois Appellate Court for the Fifth District held that a URESA action is a separate and independent action to enforce support obligations.[276]

In *Gribbins*, the father's obligations had been retroactively terminated under an Indiana court order.[277] The mother counterclaimed in Illinois in an attempt to recoup the amount terminated by the Indiana court.[278] The Illinois court upheld the dismissal of the mother's claim, finding that Illinois should not redetermine a duty of support already established by a sister state unless special circumstances exist.[279] The *Gribbins* court recognized that the Act merely creates the means by which a duty of support existing under the law of another state may be enforced.[280] The court thus concluded that a URESA proceeding is an inappropriate action for seeking relief from an objectionable judgment.[281] Rather, relief should be sought through the appeals process or through a modification of that judgment.[282] The *Gribbins* decision is consistent with other decisions of the *Survey* period curtailing forum shopping by the parties.[283]

Once an arrearage of child support payments is established, the court may hold an obligated party in contempt, as did the trial court in *In re Marriage of Lueck*.[284] It appears, however, that some contempt proceedings will be stayed under the automatic stay provisions of the Bankruptcy Act.[285] In *Lueck*, the father, having been found in contempt for failing to pay child support, was sentenced to serve thirty days in jail, unless the contempt was

274. *See* People *ex rel* Noah v. Gasik, 91 Ill. App. 3d 980, 415 N.E.2d 452 (1st Dist. 1980).

275. 135 Ill. App. 3d 76, 481 N.E.2d 815 (5th Dist. 1985).

276. *Id.* at 78, 481 N.E.2d at 817. The remedies provided by the statute are "in addition to and not in substitution for any other remedies." *Id.* (citing ILL. REV. STAT. ch. 40, para. 1203 (1985)).

277. *Gribbins*, 135 Ill. App. 3d at 78, 481 N.E. 2d at 817.

278. *Id.*

279. *Id.* at 79, 481 N.E.2d at 817.

280. *Id.* at 78, 481 N.E.2d at 817.

281. *Id.*

282. *Id.*

283. *See infra* notes 337-45.

284. 140 Ill. App. 3d 836, 837, 489 N.E.2d 443, 444 (2nd Dist. 1986).

285. *Id.* The pertinent provisions of the Bankruptcy Act provide:

> [A] petition filed under . . . this title . . . operates as a stay, applicable to all entities, of
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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding

purged by his payment of the arrearage.[286] Subsequently, the father filed a voluntary chapter 13 petition in bankruptcy[287] and requested the trial court to stay all proceedings, including the jail sentence, until either the completion or dismissal of his bankruptcy petition.[288]

The issue before the Illinois Appellate Court for the Second District was whether the sentence for contempt invoked the automatic stay of section 362(a) of the Bankruptcy Code[289] or whether it fell within the exceptions under section 362(b) of that Code.[290] Under normal circumstances, the stay of contempt proceedings predicated upon a failure to pay a judgment will serve to protect a debtor.[291] When the contempt is imposed in order to uphold the dignity and integrity of the court, however, the automatic stay provisions of the Bankruptcy Act will not apply.[292]

Weighing the competing considerations of the Bankruptcy Code and the contempt powers of the court, the *Lueck* court determined that the contempt order was a sanction to compel payment of the past due child support from the estate of the bankrupt father, rather than a means to uphold the dignity of the court.[293] Accordingly, the father's filing of the bankruptcy petition served to stay the jail sentence imposed on him by the court.[294]

VI. CUSTODY

A. Joint Custody

Perhaps the most significant custody issue addressed during the

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against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate . . . .

11 U.S.C. § 362(a) (Supp. III 1985).

286. *Lueck*, 140 Ill. App. 3d at 837, 489 N.E.2d at 444.

287. 11 U.S.C. §§ 1301-1330 (1982).

288. *Lueck*, 140 Ill. App. 3d at 837, 489 N.E.2d at 444.

289. 11 U.S.C. § 362(a) (Supp. III 1985); *see supra* note 285 for the pertinent portion of the statute.

290. 11 U.S.C. at § 362(b) (Supp. III 1985). The Bankruptcy Act further provides that the filing of an action under this title does not operate as a stay of "the collection of alimony, maintenance, or support from property that is not property of the estate. . . ." *Id.*

291. *Lueck*, 140 Ill. App. 3d at 837, 489 N.E.2d at 444.

292. *Id.* at 837, 489 N.E.2d at 445.

293. *Id.* at 838, 489 N.E.2d at 445.

294. *Id.*

Survey period was the interrelationship of joint custody and the standards necessary for the removal of a child from the state. If one feature of joint custody is a continued and frequent access to the child by both parties, the question arises as to whether removal from the state should be governed by the "best interest of the child" standard. Or is the removal, in effect, a modification of custody which should be governed by the higher "serious endangerment to the child" standard, if brought within two years of the original custody determination? In *In re Marriage of Bednar*,[295] the Illinois Appellate Court for the First District held that when both parents are granted custody, a removal petition filed by the residential custodial parent will not be considered a petition for modification of custody which requires a showing of endangerment to the child.[296]

In *Bednar*, the parents were awarded joint custody of the only child of the marriage.[297] Subsequently, the father filed a petition to remove the child from the state, alleging that the removal met the "best interest of the child" standard established by section 609 of the IMDMA.[298] The mother contended that, when custody is held jointly by the parents, a petition for removal is tantamount to a petition for modification of custody and therefore subject to the stricter standards of scrutiny found under section 610 of the IMDMA.[299]

Examining the applicable provisions of the IMDMA,[300] the court held that a petition for removal should be subject to the same analytical standards and in the same manner, as any other petition regarding parental involvement.[301] While the IMDMA distinguishes between removal petitions and requests to modify cus-

295. 146 Ill. App. 3d 704, 496 N.E.2d 1149 (1st Dist. 1986).

296. *Id.* at 708, 496 N.E.2d at 1152.

297. *Id.*

298. *Id.* at 705, 707, 496 N.E.2d at 1150. The father based his petition on section 609 of the Illinois Marriage and Dissolution of Act which states in part that "[the] court may grant leave . . . to any party having custody of any minor child or children to remove such child or children from Illinois whenever such approval is in the best interests of such child or children." ILL. REV. STAT. ch. 40, para. 609 (1985).

299. *Bednar*, 146 Ill. App. 3d at 708, 496 N.E.2d at 1152. Section 610(a) states in part that "no motion to modify a custody judgment may be made earlier than two years after its date, unless the court . . . [has] reason to believe the child's present environment may . . . endanger seriously his physical, mental, moral or emotional health." ILL. REV. STAT. ch. 40, para. 610(a) (1985).

300. ILL. REV. STAT. ch. 40, paras. 601-611 (1985).

301. *Bednar*, 146 Ill. App. 3d at 711, 496 N.E.2d at 1154.

tody,[302] the court could find no justification for applying the IMDMA differently to joint and sole custody situations.[303] Thus, the court held that a petition for removal should be evaluated under the "best interest" standards of section 609.[304]

The argument may be made that removal is a de facto change of joint custody, making joint custody impossible on a practical level. Removal of a child from the state under a joint custody arrangement may, in practice, amount to a modification of the intended arrangement of the parties. Nevertheless, the question of which standards are to be used, when removal is sought under a joint custody arrangement, has been resolved for now. While the test is clear, allowing a removal under these circumstances could, in effect, defeat the purpose and advantages of joint custody.

B. Standards for Modification of Custody

Several cases arising during the *Survey* period illustrate the type of factors weighed by the courts when modifying custody orders.[305] Integration of the child into the family is such an evidentiary factor

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302. *Compare* ILL. REV. STAT. ch. 40, para. 609 (1985) (removals) *with* ILL. REV. STAT. ch. 40, para. 610 (1985) (modifications).

303. *Bednar*, 146 Ill. App. 3d at 709, 496 N.E.2d at 1152.

304. *Id.* at 706, 496 N.E.2d at 1150. In upholding the contention that the "best interest" standards of section 609 apply to the granting of leave to remove a child from Illinois where custody is held jointly, the court emphasized that removal may nevertheless fail to meet even this less rigid standard. The court stated:

> [T]he impact of removal upon the rights of the non-residential custodial parent is a significant and important factor the trial court considers in its adjudication of whether removal would be in the child's best interests. . . . [W]here removal to a distant state will substantially alter the parent's involvement with the child, it is for the trial court to examine the potential harm to the child which may result.

Id. at 711, 496 N.E.2d at 1153. Thus, while a joint custodial parent may now seek to remove a child from this jurisdiction, such a request will be given close judicial scrutiny. *Id.* at 712, 496 N.E.2d at 1154. It is incumbent upon the petitioning parent to establish that the removal, and the resulting reduction of maximum parental involvement, would not interfere with the child's best interests. *Id.* at 711, 496 N.E.2d at 1154.

305. *See, e.g., In re* Custody of Sussenbach, 108 Ill. 2d 489, 485 N.E.2d 367 (1985); Mullins v. Mullins, 142 Ill. App. 3d 57, 490 N.E.2d 1375 (1st Dist. 1986). In *Sussenbach*, the Illinois Supreme Court upheld the trial court's examination of the custodial parent's lifestyle and emphasized the broad discretion the trial court possesses in determining whether to modify a custody order. *Sussenbach*, 108 Ill. 2d at 498, 500, 485 N.E.2d at 370, 371. In *Mullins*, the appellate court held that the trial court did not abuse its discretion in changing custody to the father when the mother falsely accused the father of sexual abuse of one of the children, used the stepfather's name for the children, and denied the father's visitation rights. *Mullins*, 142 Ill. App. 3d at 58-59, 81, 490 N.E.2d at 1376, 1391.

recognized by the courts in a custody modification proceeding.[306] Prior to 1982, the Illinois courts held that a finding that the child had been integrated into the petitioner's family with the custodial parent's consent was necessary before a custody order could be modified.[307] In 1982, the Illinois legislature amended section 610(b) of the IMDMA[308] to provide that integration with consent is only a factor for the court to consider, rather than a requirement for modification of custody.[309] The Illinois Appellate Court for the Second District, in *In re Marriage of Stuckert*,[310] utilized this amendment.

In *Stuckert*, following summer visitation with the father, the child was allowed to remain, by agreement of the parties, because the mother developed health problems.[311] The father petitioned for a modification of custody in his favor.[312] The trial court denied the petition.[313] The father argued that his physical custody of the child for fifteen months and the child's display of happiness and adjustment should have been weighed more heavily in the father's favor by the trial court.[314] The court held that the mother's illness did not create a consensual relinquishment of custody.[315] Therefore, the integration of the child into the father's family was not a factor subject to consideration in the custody modification proceeding.[316]

C. Standing and Jurisdiction

Under section 601(b)(2) of the IMDMA,[317] a nonparent who is

306. Rippon v. Rippon, 64 Ill. App. 3d 465, 381 N.E.2d 70 (3rd Dist. 1978); Holloway v. Holloway, 10 Ill. App. 3d 662, 294 N.E.2d 759 (1st Dist. 1973).

307. *In re* Marriage of Wechselberger, 115 Ill. App. 3d 779, 785, 450 N.E.2d 1385, 1390 (2nd Dist. 1983) (citing *In re* Marriage of Pease, 106 Ill. App. 3d 617, 435 N.E.2d 1361 (2nd Dist. 1982)).

308. ILL. REV. STAT. ch. 40, para. 610(b)(1)-(3) (1981)),

309. ILL. REV. STAT. ch. 40, para. 610(b) (1985). *See Wechselberger*, 115 Ill. App. 3d at 787, 450 N.E.2d at 1390.

310. 138 Ill. App. 3d 788, 486 N.E.2d 395 (2nd Dist. 1985).

311. *Id.* at 790, 486 N.E.2d at 396.

312. *Id.* at 789, 486 N.E.2d at 396.

313. *Id.*

314. *Id.* at 791-92, 486 N.E.2d at 397.

315. *Id.* at 792, 486 N.E.2d at 397-98.

316. *Id.* at 792, 486 N.E.2d at 398.

317. ILL. REV. STAT. ch. 40, para. 601(b)(2) (1985). Section 601(b)(2) states in pertinent part:

> (b) A child custody proceeding is commenced in the court:
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> . . . .
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> (2) by a person other than a parent, by filing a petition for custody of the child in the court in which he is permanently resident or found, *but only if he is not in the physical custody of one of his parents* (emphasis added).

petitioning for legal custody first must show that the child is not in the physical custody of one of his parents. After making this showing, the nonparent may proceed with the custody request under the "best interest of the child" standards enunciated by the IMDMA.[318] The nonparent does not have to fulfill the standing requirement of section 601 if he can show that the natural parents are unfit.[319] Mere actual physical possession of a child, however, may not be enough to establish standing. In *In re Custody of Peterson*,[320] the Illinois Supreme Court held that physical possession of a child was insufficient to satisfy the standing requirement for nonparents seeking a custody modification under section 601(b)(2) of the IMDMA.[321]

In *Peterson*, the custodial mother and the child lived with the maternal grandparents, and following the death of the mother, the grandparents filed a petition for modification of the custody order.[322] At the time of the filing, the child resided with the grandparents.[323] The father contended that the grandparents did not have standing to file the modification petition because custody of the child passed to him after the mother died.[324] The question before the Illinois Supreme Court was whether the death of the mother transferred physical custody from the mother to the grandparents in satisfaction of the standing requirement.[325]

Though an issue of first impression for the supreme court, previous appellate court decisions had refused to recognize the actual physical possession of a child as determinative of the standing question.[326] The *Peterson* court concluded that the appellate court decisions had correctly interpreted the effect of actual physical cus-

318. *In re* Custody of Peterson, 112 Ill. 2d 48, 53, 491 N.E.2d 1150, 1151 (1986); ILL. REV. STAT. ch. 40, para. 602 (1985).

319. *Peterson*, 112 Ill. 2d at 52, 491 N.E.2d at 1152 (citing the Juvenile Court Act, ILL. REV. STAT. ch. 37, paras. 701-1 to 708-4 (1985)).

320. 112 Ill. 2d 48, 491 N.E.2d 1150.

321. *Id.* at 55, 491 N.E.2d at 1152 (citing ILL. REV. STAT. ch. 40, para. 601(b)(2) (1985)).

322. *Peterson*, 112 Ill. 2d at 50, 491 N.E.2d at 1151.

323. *Id.*

324. *Id.*

325. *Id.* at 53, 491 N.E.2d at 1153.

326. *See In re* Custody of Menconi, 117 Ill. App. 3d 394, 398, 453 N.E.2d 835, 838 (1st Dist. 1983) (grandparents had standing to petition for custody because the father had voluntarily relinquished physical custody of the child and the child had lived with the grandparents for an extended period of time); *In re* Custody of Barokas, 109 Ill. App. 3d 536, 541, 440 N.E.2d 1036, 1039 (1982) (third party did not satisfy the standing requirement because the mother had not relinquished custody of the child within the meaning of the statute when child was placed by her mother in the temporary care of her adult sister and later turned over to a third party).

tody on the standing question.[327] The court stated that a contrary conclusion would encourage abductions of minors for purposes of satisfying the literal terms of the standing requirement and defeat the statute's intent.[328]

The court found that mere physical possession does not establish custody.[329] Analyzing the facts, the *Peterson* court concluded that the mother never transferred physical custody to the grandparents during her lifetime because she and the child had never been separated for a long period of time.[330] Furthermore, the father had never relinquished custody because he exercised his visiting rights and would never expect that the grandparents would have custody merely because the child lived with the mother.[331] Therefore, the grandparents' actual physical possession of the child did not provide them with standing under the "best interest of the child" standards of the IMDMA.[332]

The Uniform Child Custody Jurisdiction Act (the "UCCJA")[333] states that the Illinois courts have jurisdiction to make a child custody determination if Illinois is the home state of the child or if it would be in the best interest of the child for the Illinois courts to assume jurisdiction.[334] If the court relies on the "best interests" grounds, a showing must be made that the child and at least one parent have significant contacts with the state.[335] The availability of substantial evidence in Illinois concerning the child's present or future care, protection, training, and personal relationships weigh in favor of an Illinois court assuming jurisdiction under the UCCJA.[336]

In *In re Marriage of Rogers*,[337] the Illinois Appellate Court for the Fifth District, facing a jurisdictional question under the UCCJA, determined that the circuit court's exercise of jurisdiction was a patent violation of the UCCJA.[338] In *Rogers*, the marriage of the parties was dissolved under a foreign judgment, with custody of

327. *Peterson*, 112 Ill. 2d at 53, 491 N.E.2d at 1152.
328. *Id.* at 54, 491 N.E.2d at 1153.
329. *Id.* at 55, 491 N.E.2d at 1153.
330. *Id.* at 54, 491 N.E.2d at 1153.
331. *Id.*
332. *Id.* at 55, 491 N.E.2d at 1153.
333. ILL. REV. STAT. ch. 40, paras. 2101-2126 (1986).
334. *Id.* at paras. 2104(a)(1)(2).
335. *Id.* at para. 2104(a)(2)(i).
336. *Id.* at para. 2104 (a)(2)(ii).
337. 141 Ill. App. 3d 561, 490 N.E.2d 1000 (5th Dist. 1986).
338. *Id.* at 564, 490 N.E.2d at 1002.

the minor child awarded to the father.[339] The mother moved to Illinois and successfully filed a petition to register the judgment of dissolution in Illinois.[340] Subsequently, she filed a petition for a rule to show cause, claiming her Christmas visitation rights had been ignored by the father.[341] The father objected to the court's jurisdiction over the matter on the grounds that the UCCJA was improperly applied and that the Illinois court was an inconvenient forum.[342]

The *Rogers* court held the Illinois court did not have jurisdiction because neither the child nor the father was ever an Illinois resident, as required by the UCCJA.[343] The court also determined that no evidence satisfied the jurisdictional requirements under the "best interest of the child" standard accepted by the UCCJA.[344] Because the custodial parent and the child lived in another state under a foreign dissolution judgment, Illinois had no jurisdiction to rule upon a custody modification petition filed by the non-custodial parent residing in Illinois.[345] In effect, the *Rogers* court has curtailed potential forum shopping by parents in custody cases.

D. Appealability

The appealability of final judgments that do not dispose of the entire proceeding generally are governed by Supreme Court Rule 304.[346] This rule provides that when multiple claims for relief are involved in an action, an appeal may be taken from a final judgment concerning one or more of the claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal.[347] When an interlocutory order affecting the care and custody of unemancipated minors is involved, however, a petition for leave to appeal is governed by Illinois Supreme Court Rule 306.[348] In 1983, the Illinois Supreme

339. *Id.* at 562, 490 N.E.2d at 1002.
340. *Id.* at 563, 490 N.E.2d at 1002.
341. *Id.*
342. *Id.*
343. *Id.* at 564, 490 N.E.2d at 1002.
344. *Id.* at 564, 490 N.E.2d at 1002-03.
345. *Id.* at 566, 490 N.E.2d at 1004.
346. ILL. S. CT. R. 304, ILL. REV. STAT. ch. 110A, para. 304(a) (1985).
347. *Id.*
348. ILL. S. CT. R. 306, ILL. REV. STAT. ch. 110A, para. 306(a)(1)(v) (1985). Illinois Supreme Court Rule 306 states in part:

> (1) An appeal may be taken in the following cases only on the allowance by the Appellate Court of a petition for leave to appeal:
>
> . . . . .
>
> (v) from interlocutory orders affecting the care and custody of unemancipated

Court, in *In re Marriage of Leopando*,[349] held that a custody order was not a separate claim in a dissolution proceeding and thus was not final or appealable under Supreme Court Rule 306.[350]

During the *Survey* period, the Illinois Supreme Court, in *In re Marriage of Purdy*,[351] however, held a post-dissolution custody modification order properly appealable under Rule 304.[352] Following the dissolution of the parties' marriage, a modification of the custody order was entered by the trial court changing custody from the mother to the father.[353] The trial court reserved ruling on the issue of the mother's summer visitation which was to begin the following summer.[354]

The mother appealed the trial court's custody modification order under Illinois Supreme Court Rule 304(a).[355] The Illinois Appellate Court for the Fourth District dismissed the mother's appeal on the ground that the trial court's order was not final or appealable, based on the *Leopando* decision.[356]

The supreme court, in *Purdy*, concluded that the decision in *Leopando* was limited to orders issued in the context of dissolution proceedings.[357] The court reasoned that *Leopando* did not extend to the custody modification order being appealed in *Purdy* because the issue of custody arose as a post-dissolution proceeding, rather than as a matter ancillary to the issue of the original dissolution.[358]

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minors, if the appeal of such orders is not otherwise specifically provided for elsewhere in these rules.

349. 96 Ill. 2d 114, 449 N.E.2d 137 (1983).

350. *Id.* at 120, 449 N.E.2d at 140. In *Leopando*, the trial court entered an order to dissolve the parties' marriage, awarding permanent custody of the child to the defendent. *Id.* at 116, 449 N.E.2d at 138. The statute requires an express written finding by the trial court that there is no just reason for delaying enforcement or appeal. ILL. REV. STAT. ch. 110A, para. 304(a) (1985) The order contained this necessary language and reserved for future consideration the issues of maintenance, property division and attorney fees. *Leopando*, 96 Ill. 2d at 116, 449 N.E.2d at 138. The *Leopando* court reasoned that a petition for dissolution presents a single claim and the other issues involved, such as custody, child support, maintenance, or property division, are merely separate issues relating to the same claim. *Id.* at 119, 449 N.E.2d at 140. The court found that to allow an appeal of a custody order in a dissolution proceeding would encourage "piecemeal litigation" arising out of the same proceeding and discourage the courts from deciding matters incident to the dissolution in a single judgment. *Id.* at 118, 120, 449 N.E.2d at 139, 140.

351. 112 Ill. 2d 1, 490 N.E.2d 1278 (1986).

352. *Id.* at 5, 490 N.E.2d at 1279-80.

353. *Id.* at 3, 490 N.E.2d at 1278. The modification order granted the mother reasonable visitation on alternating weekends and holidays. *Id.*

354. *Id.*

355. *Id.* at 3, 490 N.E.2d at 1279.

356. *Id.* at 3, 490 N.E.2d at 1278-79.

357. *Id.* at 4, 490 N.E.2d at 1279.

358. *Id.* at 5, 490 N.E.2d at 1279. The court reasoned:

Furthermore, the cause of action was a petition for change of custody, with all related issues, except for the mother's summer visitation, having been previously decided.[359] Under *Purdy*, therefore, custody modification orders will be considered final and appealable when matters left for future determination are merely incidental to the ultimate custody rights adjudicated by the decree.[360]

VII. DISSOLUTION

One major issue during the *Survey* period concerned a constitutional interpretation of the no-fault provision of the IMDMA.[361] The no-fault provision allows for a dissolution of marriage on the basis of irreconcilable differences of the parties, leading to irretrievable breakdown of the marriage, when the parties have been living separate and apart for a period in excess of two years.[362] The courts also addressed the rights of wards and guardians to institute dissolution proceedings.

A. Constitutionality of No-Fault Provision

In *In re Marriage of Semmler*,[363] the Illinois Supreme Court held that retroactive application of the no-fault provision of the IMDMA[364] is constitutional.[365] In *Semmler*, the husband, in com-

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> Unlike the situation in *Leopando* in which the cause of action was a petition for dissolution of marriage and only the issue of custody had been decided, here the cause of action is a petition for a change of custody and *all* related claims have been decided except for the extent of the mother's summer visitation, a matter that is always subject to revision. Thus, the kind of piecemeal litigation that the decision in *Leopando* was intended to prevent cannot occur in this context.

Id.

359. *Id.*

360. *Id.*

361. 146 Ill. App. 3d 704, 496 N.E.2d 1149 (1st Dist. 1986).

362. *Id.*

363. 107 Ill. 2d 130, 481 N.E.2d 716 (1985).

364. ILL. REV. STAT. ch. 40, para. 401(a)(2) (1985). Section 401(a)(2) provides in pertinent part:

> (a) The court shall enter a judgment of dissolution of marriage if at the time the action was commenced, one of the spouses was a resident of this State . . . and if one of the following grounds for dissolution has been proved:
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> . . . .
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> (2) That the spouses lived separate and apart for a continuous period in excess of 2 years and irreconcilable differences have caused the irretrievable breakdown of the marriage and the court determines that efforts at reconciliation have failed or that future attempts at reconciliation would be impracticable and not in the best interests of the family . . . .

365. *Semmler*, 107 Ill. 2d at 136-37, 481 N.E.2d at 719. *See also In re* Marriage of Bates, 141 Ill. App. 3d 566, 569, 490 N.E.2d 1014, 1016 (2nd Dist. 1986) (citing *Semmler* 107 Ill. 2d at 136-37, 481 N.E. 2d at 719).

pliance with the IMDMA,[366] alleged a period of separation in excess of two years, although nearly all of the two-year period had occurred prior to the effective date of the no-fault section of the statute.[367] The wife contested the husband's petition, claiming that he could not include as part of the required period of separation the time of separation prior to the effective date of the no-fault provision.[368] The wife claimed the statute was unconstitutional because it applied a substantive right retroactively and interfered with the vested rights she acquired when a previous petition was denied.[369]

The court acknowledged that a presumption exists in favor of prospective application of all legislation.[370] When it is clear that the legislature intended to apply a statute retroactively, the courts must follow the legislative intent unless due process would be violated.[371] The proper due process analysis requires a balancing of the interests of the state against the interests of the individual.[372]

Applying these guidelines, the *Semmler* court found that the legislature intended for the no-fault provision to encompass periods of separation which occurred before its passage.[373] The court noted that the language and legislative history of the IMDMA indicated that the purpose of the separation period is to insure that the family unit has indeed broken down and that reconciliation is impossible.[374] Thus, the court concluded that the aim of the two year separation period requirement is satisfied whether the separation was prior to or subsequent to the effective date of the statute.[375] The court noted that to hold otherwise would mean that those spouses separating prior to July 2, 1984 would have to be separated for a longer period of time than those who separated after the statute's effective date.[376]

366. ILL. REV. STAT. ch. 40, para. 401(a)(2) (Supp. 1984).

367. *Semmler*, 107 Ill. 2d at 134, 481 N.E.2d at 718. In July 1984, the husband filed a two-count petition for dissolution. The first count alleged constructive desertion and count two was based upon the no-fault provision which had become effective the day before the filing. *Id.*

368. *Id.*

369. *Id.* In 1979, the husband filed a petition for dissolution alleging mental cruelty. The trial court denied the relief sought under the 1979 petition. *Id.* at 133, 481 N.E.2d at 718.

370. *Id.* at 136, 481 N.E.2d at 719.

371. *Id.*

372. *Id.* at 137-38, 481 N.E.2d at 720.

373. *Id.* at 136, 481 N.E.2d at 719.

374. *Id.*

375. *Id.*

376. *Id.* at 137, 481 N.E.2d at 719.

Analyzing the due process balancing test, the *Semmler* court concluded that the state interests outweighed the individual interests involved.[377] Access to no-fault dissolutions promotes the public interest.[378] The separation requirement further protects that interest by allowing for the possibilty of reconciliation.[379] The state's objectives would be postponed for two years if retrospective application of the statute had been denied.[380] The court noted that the enactment of the no-fault provision was clearly foreseeable and the wife in *Semmler* failed to allege that she had changed her position in reliance on the prior law.[381] The court reasoned, therefore, that her interest was not abridged in such a way as to violate due process.[382] Thus, the *Semmler* court held that the no-fault provision of the IMDMA permits a retroactive application of the required two-year separation period.[383]

B. Standing of Wards and Guardians

The IMDMA frequently must be interpreted in conjunction with other Illinois statutes. The Illinois appellate courts, in *In re Marriage of Kutchins*,[384] and *In re Marriage of Drews*,[385] examined the effect of incompetency and guardianship under the Probate Act in dissolution proceedings.

Illinois follows the majority of states, holding that a mentally incompetent person cannot sue for dissolution of marriage, either on his own behalf or through a guardian or next friend.[386] This rule is based upon the idea that the decision to seek a dissolution of marriage is so strictly personal that consent is a necessary prerequisite, and a mentally incompetent party is incapable of giving such consent.[387] The standards for determining mental capacity for an appointment of an estate guardian and those for entering or dissolving a marriage, however, are not identical,[388] and the courts

377. *Id.* at 138, 481 N.E.2d at 720.
378. *Id.*
379. *Id.*
380. *Id.* at 138-39, 481 N.E.2d at 721.
381. *Id.* at 139, 481 N.E.2d at 720.
382. *Id.*
383. *Id.* at 141, 481 N.E.2d at 721.
384. 136 Ill. App. 3d 45, 482 N.E.2d 1005 (2nd Dist. 1985).
385. 139 Ill. App. 3d 763, 487 N.E.2d 1005 (1st Dist. 1986), *aff'd*, 113 Ill. 2d 201, 503 N.E.2d 339 (1986).
386. *Kutchins*, 136 Ill. App. 3d at 47, 482 N.E.2d at 1006 (citing *Iago v. Iago*, 168 Ill. 339 (1897); *Bradford v. Abend*, 89 Ill. 78 (1878)).
387. *Kutchins*, 136 Ill. App. 3d at 47, 482 N.E.2d at 1006.
388. *Id.* at 47, 482 N.E.2d at 1007.

must balance the IMDMA and the Probate Act.[389] In *In re Marriage of Kutchins*,[390] the Illinois Appellate Court for the Second District refused to permit a blanket application of one act to the other.[391]

In *Kutchins*, the court held that a person found disabled and placed under a "guardianship of the estate", pursuant to the Probate Act,[392] does not necessarily lack the requisite legal capacity to petition for a dissolution of his marriage.[393] After a guardian was appointed over his estate, the petitioner filed for dissolution of marriage.[394] The trial court dismissed the petition,[395] reasoning that the petitioner lacked legal capacity to sue based upon the guardianship judgment declaring him disabled.[396]

The appellate court reversed the trial court's decision.[397] The court asserted that while the petitioner was judged mentally incompetent for the purposes of handling his own financial affairs under the Probate Act, this was not an indication that he did not understand the nature of his petition for dissolution.[398] The reviewing court, therefore, concluded that the appointment of a guardian of an estate is not a finding of incompetency sufficient to bar the ward from seeking a dissolution of marriage.[399]

While the *Kutchins* court stated that a person who has been

389. *See* ILL. REV. STAT. ch. 110½, para. 11a-3(a)(2) (1985).

390. 136 Ill. App. 3d 45, 482 N.E.2d 1005.

391. *See id.* at 47-49, 482 N.E.2d at 1006-08.

392. ILL. REV. STAT. ch. 110½, para. 11a-3 (1985). Section 11a-3 provides:

> (a) Upon the filing of a petition by a reputable person or by the alleged disabled person himself or on its own motion, the court may adjudge a person to be a disabled person and may appoint (1) *a guardian of his person*, if because of his disability he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person or (2) *a guardian of his estate*, if because of his disability he is unable to manage his estate or financial affairs or (3) a guardian of his person and his estate.

Id. (emphasis added).

393. *Kutchins*, 136 Ill. App. 3d at 47-48, 482 N.E.2d at 1007.

394. *Id.* at 49, 482 N.E.2d at 1008. In *Kutchins*, the petitioner had been placed under a guardianship of the estate, although a guardianship of the person had been denied. *Id.* at 46, 482 N.E.2d at 1006. The personal guardian has the duty to provide for the support, care, comfort, health, education and maintenance of the ward and his minor and dependent adult children, ILL. REV. STAT. ch. 110½, para. 11a-17(a) (1985), while the estate guardian has the duty of care, management and investment of the estate for the estate for the comfort and suitable support and education of the ward and his minor and dependent adult children. *Id.* at para. 11a-18(a).

395. *Kutchins*, 136 Ill. App. 3d at 46, 482 N.E.2d at 1006.

396. *Id.* at 46-47, 482 N.E.2d at 1006.

397. *Id.* at 49, 482 N.E.2d at 1008.

398. *Id.*

399. *Id.* at 47, 482 N.E.2d at 1006.

placed under a guardianship of the estate may file a petition for dissolution on his own behalf, the Illinois Appellate Court for the First District, in *In re Marriage of Drews*,[400] held that a guardian lacks the power to institute dissolution proceedings on behalf of his ward.[401] In *Drews*, the husband's legal guardian initiated a dissolution action by filing a petition for the dissolution of marriage on his behalf.[402] The wife claimed that the petition was void because the guardian's power did not encompass the personal decision to implement a dissolution of marriage.[403] The guardian, however, contended that her plenary guardianship placed upon her the duty for the "care, management and investment of the ward's estate and the custody of the ward to do all things required by law."[404]

The *Drews* court analyzed both the Probate Act and the IMDMA, but stated that there was no statutory basis for either party's contentions.[405] The court determined that a guardian generally lacks the authority to institute an action for dissolution of a ward's marriage when the ward is unable to form an intelligent decision to seek such a dissolution.[406] In reaching this conclusion, the *Drews* court emphasized the state's perceived interest in the institution of marriage and the family relationship, together with the personal nature of the decision to seek a dissolution of that bond.[407]

Nevertheless, the court left the door open for such litigation by recognizing that there may at times be compelling reasons, as reflected in the Probate Act,[408] for allowing the courts to consider

400. *Id.* at 49, 482 N.E.2d at 1008.

401. 139 Ill. App. 3d 763, 487 N.E.2d 1005 (1st Dist. 1986), *aff'd*, 113 Ill. 2d 201, 503 N.E.2d 339 (1986).

402. *Id.* at 765, 487 N.E.2d at 1007.

403. *Id.* at 766, 487 N.E.2d at 1006. The petition sought dissolution of the marriage, distribution of the marital estate, and the award of maintenance and attorney fees. *Id.*

404. *Id.* at 767, 487 N.E.2d at 1007.

405. *Id.* at 767, 487 N.E.2d at 1007-08. The guardian also urged the court to extend application of the substituted judgment doctrine to the context of marriage dissolution proceedings. *Id.* at 775, 487 N.E.2d at 1013. The doctrine of substituted judgment requires the court to step into the mental position of the incompetent, substituting the motives and considerations of the incompetent for its own. *Id.* Under contemporary analysis, the doctrine has been expanded in order to provide justification for the authorization of certain medical treatments by the guardian on behalf of the ward. *Id.* The court in *Drews*, however, found that the particular facts lacked any indication that the ward would have desired a dissolution and refused to accept the expansion of this doctrine to a dissolution proceeding. *Id.* at 776, 487 N.E.2d at 1013.

406. *Id.* at 767-70, 487 N.E.2d at 1008-10.

407. *Id.* at 774, 487 N.E.2d at 1012.

408. ILL. REV. STAT. ch. 110½, para. 11a-3(b) (1985). The compelling reasons stated in section 11a-3(b) include the protection of the disabled person from neglect, exploita-

such an action.[409] The court, however, found no such facts in this case.[410]

The personal aspects of marriage and dissolution have been the historical basis for many decisions in the family law area. Recent Illinois decisions illustrate that the practical implications which flow from marriage and dissolution must also be considered. As noted by the *Semmler* court, dissolution creates a set of substantive rights protected by due process.[411] These rights belong to the petitioners as well as to the respondents. The parties have the right to a distribution of the marital assets and property, each entitled to his just proportion. Had the *Semmler* court refused to permit the retroactive application of the no-fault statute, the petitioner's rights in any property or its value may have been substantially affected by an additional two year delay. Though a ward possesses the same substantive rights to the assets of the marriage as the competent party, the *Drews* decision refused to permit a ward the same ability to adjudicate his rights. A ward may be a party to a dissolution as a respondent, but he may not actively seek a dissolution of his marriage through the actions of his guardian.

VIII. GRANDPARENTAL VISITATION

Under current Illinois law, grandparents have the right to seek and be granted visitation with their grandchildren pursuant to a petition for dissolution of the marriage involving the childrens' parents.[412] During the *Survey* year, the Illinois Supreme Court addressed the novel issue of grandparental visitation when a parent has been deprived of his parental rights under the Illinois Adoption

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tion, or abuse, and to encourage development of his maximum self-reliance and independence." *Id.*

409. *Id.* The court stated:

> [W]e are equally mindful of the consideration that dissolution of a marriage has an enormous impact not only upon the ward, but also upon the ward's spouse. Dissolution severs, terminates and extinguishes an entire panapoly of legal, social, family, and personal rights, benefits, advantages and opportunities. Given the magnitude of these consequences, we determine that the decision to so radically transmute a relationship is usually best exercised by the partners to the marriage, rather than by someone alien to it.

Id. at 774-75, 487 N.E.2d at 1012-13.

410. *Drews*, 139 Ill. App. 3d at 776, 487 N.E.2d at 1014.

411. *Semmler*, 107 Ill. 2d 130, 136-40, 481 N.E.2d 716, 719-21.

412. *Lingwall v. Hoener*, 108 Ill. 2d 206, 210-11, 483 N.E.2d 512, 514 (1986) (citing ILL. REV. STAT. ch. 40, para. 607(b) (1985)). Section 607(b) states in part: "the court may grant reasonable visitation to a grandparent or great-grandparent of any minor child upon the grandparent's or great-grandparent's petition to the court . . . if the court determines that it is in the best interests and welfare of the child . . . ."

Act.[413]

In *Lingwall v. Hoener*,[414] the Illinois Supreme Court held that the statutory termination of a natural parent's rights when the other natural parent and that parent's new spouse ("stepparent") adopt the child does not, as a matter of law, terminate the rights of grandparents.[415] In that case, the respondents challenged the grandparent's visitation rights, urging the court to rely upon the section of the Illinois Adoption Act which terminates the non-custodial parent's visitation rights after a child has been adopted by the stepparent.[416] The respondents argued that this provision served to extinguish the grandparents' visitation rights after adoption as well.[417]

The *Lingwall* court asserted that while the Adoption Act governs adoption and removes some issues from the continuing jurisdiction of the court that granted the divorce,[418] the IMDMA continues to govern other issues connected with divorce.[419] These issues may include support and property settlements, as well as grandparental visitation when the child has been subsequently adopted by the stepparent.[420]

The court noted that the respondents' arguments failed to recog-

413. *Lingwall*, 108 Ill. 2d 206, 483 N.E.2d 512; ILL. REV. STAT. ch. 40, para. 1521 (1985).

414. *Lingwall*, 108 Ill. 2d 206, 483 N.E.2d 512.

415. *Id.* at 210, 216, 483 N.E.2d at 514, 517. The Adoption Act states that when a husband or wife desire to adopt the child of the other spouse, the adoption shall be by both spouses jointly. ILL. REV. STAT. ch. 40, para. 1502(2)(A)(a) (1985). The requirement of adoption by the natural parent is not considered in this article.

416. *Lingwall*, 108 Ill. 2d at 211, 483 N.E.2d at 515. ILL. REV. STAT. ch. 40, para. 1521 (1985) provides in part:

> After the entry either of an order terminating parental rights or the entry of an order of adoption, the natural parents of a child sought to be adopted shall be relieved of all parental responsibility for such child and shall be deprived of all legal rights as respects the child, and the child shall be free from all obligations of maintenance and obedience as respects such natural parents.

The respondents also relied upon a portion of the Probate Act, which provides that grandparental visitation rights may be granted only if the minor has not been adopted and if that visitation would not be detrimental to the best interests and welfare of the minor. *Id.* (citing ILL. REV. STAT. ch. 110 ½, para. 11-7.1 (1985)). The court disposed of this argument because the Probate Act applies when both parents of a minor are deceased and the adoption necessarily involves persons other than the child's parents. This is a different factual situation than the present case where the adoption is by one of the parents as well as a stepparent. *Id.* at 212, 483 N.E.2d at 515.

417. *Id.* at 211, 483 N.E.2d at 515.

418. *Id.* at 211-12, 483 N.E.2d at 515.

419. *Id.* at 212, 483 N.E.2d at 515. The issues excluded by the Adoption Act include custody, child support, and parental visitation. *Id.*

420. *Id.* at 212-13, 483 N.E.2d at 515.

nize the inherent differences between an adoption by strangers and an adoption by a stepparent.[421] The natural parents of an adopted child may be required to support the child after adoption if the adoptive parents are unable to do so.[422] Moreover, an adopted child may inherit through the estate of the natural parents.[423] The parental relationship is not completely severed, as the respondents presumed.[424]

The *Lingwall* court also noted that the respondents failed to recognize that both the IMDMA and the Adoption Act proceed on the basic statutory "best interest of the child" standard.[425] The standard does change, however, when the child is adopted by strangers rather than adopted by the stepparent.[426] In an adoption by strangers, maximizing the pool of potential adoptive parents is a basic policy concern.[427] The termination of the rights and responsibilities of the natural parents accomplishes this goal by guaranteeing that the adoptive parents will have an opportunity to create a stable family environment free from outside intrusion.[428] This policy is inapplicable in the adoption by the new stepparent, because the act of becoming a stepparent usually occurs before adoption, and regardless of the previously established visitation rights between the child and the natural parent.[429] The court thus determined that the termination of the parental relationship is a legal fiction created specifically for the "adoption by strangers" situation.[430] The *Lingwall* court refused to apply the fiction to the termination of grandparental visitation rights when the child is adopted by the stepparent unless such termination would be in the child's best interest.[431]

In granting visitation privileges to a grandparent under section 607(b),[432] when the grandchild has been adopted by the stepparent,

421. *Id.*
422. *Id.* at 213, 483 N.E.2d at 515.
423. *See* Dwyer v. Dwyer, 366 Ill. 630, 634, 10 N.E.2d 344, 346 (1937) (natural parent may, if necessary, be required to assume the duty of supporting of his minor child).
424. *See In re* Estate of Tilliski, 390 Ill. 273, 285, 61 N.E.2d 24, 29 (1945) (natural child has a right to inherit from the natural parent regardless of that child's previous adoption).
425. *Lingwall*, 108 Ill. 2d at 213, 483 N.E.2d at 515-16.
426. *Id.* at 213, 483 N.E.2d at 516.
427. *Id.* at 213-14, 483 N.E.2d at 516.
428. *Id.* at 214, 483 N.E.2d at 516.
429. *Id.*
430. *Id.*
431. *Id.*
432. There is no reason to assume that grandparental visitation is in the child's best interest; likewise, there is no presumption that grandparental visitation would harm the

the *Lingwall* court relied solely on an evaluation of the child's best interests. This standard illustrates a practical balancing between the IMDMA and the Adoption Act. Because of the difference between adoption by a stepparent and adoption by a stranger, however, the *Lingwall* decision probably will be applied only to the adoption of a child under the former scenario.

IX. LEGISLATION

A. Spousal Health Insurance Rights Act

The Spousal Health Insurance Rights Act ("SHIRA" or the "Act"),[433] effective December 1, 1985, provides for the continuation of insurance coverage for the former spouse and dependent children of an employee covered under an employer-provided group policy. Prior to passage of the Act, divorced and widowed spouses were entitled to continued coverage despite the divorce or death of the other spouse.[434] The benefits, however, could be substantially reduced because of age or prior medical problems, and the premiums could be extraordinarily high in comparison to the coverage received.[435] Under the new Act, the same coverage will continue at a premium cost equal to the amount formerly contributed by the employer and employee, with some modification made

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child. *Id.* at 214-15, 483 N.E.2d at 516. Additionally, the court presented factors courts should consider when determining whether a grandparent and grandchild relationship would be in the best interest of the child:

> Of course the child's best interest is not entirely severable from the interests of the parents in a reconstituted family, and certainly the parent's attitude toward grandparental visitation is an important factor for the court to consider in determining whether such visitation should be ordered. However, their attitude is not the only, or even the paramount, consideration. Such factors as the length and quality of the relationship between the grandparents and child, the child's need for continuity in his relationships with people who may have played a significant nurturing role in his life, and the effect of the termination of the child's relationship with the parent who has relinquished his rights and responsibilities must also be considered. These factors will certainly outweigh the opposition of parents that is based on the mere inconvenience to them of such visits, or on their animosity toward the child's natural parent.

Id. at 215, 483 N.E.2d at 516-17. The court further concluded that such a determination is to be made by the court granting the dissolution. *Id.* at 215, 483 N.E.2d at 517.

433. ILL. REV. STAT. ch. 73, para. 979.2 (1985).

434. ILL. REV. STAT. ch. 73, para. 979.2(A) (1983).

435. Yavitz, *Spousal Health Insurance Rights Act Passes Legislature*, 8 ILL. FAM. L. REP. 227 (1985). For example, an employed spouse has group health insurance that includes major medical coverage at a cost of $243 per month for the family. Once divorced, the unemployed spouse may be unable to find insurance because of age or previous health problems. Otherwise, insurance may be obtained at a maximum rate because of these reasons. Under the previous law the group insurer could offer a conversion policy paying maximum benefits less than $12,000 to the unemployed spouse for $81 per month. *Id.*

when the former or widowed spouse reaches age fifty-five.[436]

To qualify for coverage under SHIRA, the former spouse must notify both the employer and the insurance company, within thirty days from the dissolution of the marriage or the death of the employee, of the desire to continue the coverage.[437] The employer is required to notify the insurance company within fifteen days of the receipt of this notice from the former spouse and to send a copy of this notice to the former spouse.[438] The insurance company then has thirty days from receipt of the notice of the former spouse or the employer to send, by certified mail, notification to the former spouse that coverage may be continued.[439] This notice must include an election form, the premium amount, and instructions for completing and returning the election form.[440] If the insurance company fails to notify the former spouse, all benefits will continue and all premiums will be waived from the date notice was to be sent until it is actually sent.[441] If, however, the former spouse fails to exercise the election by notifying the insurer by certified mail, within thirty days of the date the insurer mailed the notice, or fails to pay the premium amount within thirty days of receipt of the notice, the right to continue receiving benefits will terminate.[442]

The provisions for continued coverage apply to health care service corporations,[443] medical service plan corporations,[444] the Voluntary Health Services Plans Act,[445] vision service plan corporations,[446] dental service plan corporations,[447] and pharmaceutical plan corporations.[448] The new law exempts self-insured employers, employee benefit trust funds, and other ERISA exempt organizations, as well as employers whose policies are written in another state.[449]

The Act contains significant eligibility and termination provisions. If the former spouse is under age fifty-five, the coverage au-

436. ILL. REV. STAT. ch. 73, para. 979.2(D), (E).
437. *Id.* at para. 979.2(B).
438. *Id.*
439. *Id.* at para. 979.2(C).
440. *Id.* at para. 979.2(C)(i)(ii)(iii).
441. *Id.* at para. 979.2(C).
442. *Id.* at para. 979.2(C)(iii).
443. ILL. REV. STAT. ch. 32, para. 562a.6-1(1), (2) (1985).
444. *Id.* at para. 572.
445. *Id.* at para. 604.
446. *Id.* at para. 682.
447. *Id.* at para. 690.47.
448. *Id.* at para. 691.46.
449. Yavitz, *supra* note 435, at 228.

tomatically ceases after two years,[450] or when the former spouse fails to pay the premium, remarries, becomes an insured employee under another group health plan, or when the coverage would otherwise terminate under the policy as if the parties were still married.[451] If the former spouse is age fifty-five or older, the premium amount will remain the same as would be contributed by the employer and the employee for the first two years of coverage.[452] At that time the monthly premium may be increased by an amount not to exceed twenty percent for the costs of administration.[453] The dates for termination are the same as for those persons under age fifty-five, except that the two year limit is removed and the outside limitation on coverage is when the party becomes eligible for Medicare benefits.[454]

Congress has enacted a federal form of SHIRA, the Consolidated Omnibus Budget Reconciliation Act ("COBRA").[455] Though there is some overlapping coverage, differences exist where one statute grants coverage in areas not covered by the other.[456] Thus, the practitioner must be aware of the balance between the federal and state acts.[457]

B. Maintenance and Child Support Amendments

The IMDMA was amended effective September 25, 1985, to repeal the use of minimum percentage guidelines as the basis for determining maintenance obligations. Those provisions regarding the formula for determining child support payments under the

450. ILL. REV. STAT. ch. 73, para. 979.2(D)(v) (1985). It has been noted that while the two year expiration period is rather restrictive, the compromise was necessary for passage of the Act. The expiration period may be amended by future legislatures. Yavitz, *supra* note 435, at 227.

451. ILL. REV. STAT. ch. 73, para. 979.2(D) (1985). A protection period under the Act provides that the existing coverage can not be modified or terminated during the first 120 days from the date of the dissolution or the death of the spouse. *Id.* at para. 979.2(D)(ii), (ii).

452. *Id.* at para. 979.2(E).

453. *Id.*

454. *Id.*

455. 29 U.S.C.A. §§ 1161-1168 (West Supp. 1986).

456. Yavitz, *Federal Spousal Health Insurance*, 9 ILL. FAM. L. REP. 134-36 (1986). For example, SHIRA applies only to health insurance policies issued or delivered in Illinois which are regulated by the Illinois Insurance Code. ILL. REV. STAT. ch. 73, para. 979.2(A). COBRA applies to self-insureds, union plans, HMO's, and other state and government group health plans written in other states. 29 U.S.C.A. § 1167(1) (West Supp. 1987). SHIRA provides for a two year continuation of coverage for spouses under age 55, ILL. REV. STAT. ch. 73, para. 979.2 (D)(v), while COBRA provides a three year continuation to all who qualify, 29 U.S.C.A. § 1162(2)(A)(ii) (West Supp. 1987).

457. Yavitz, *supra* note 456, at 136.

minimum percentage guidelines also were amended. The amended act further requires that all final orders setting child support state the specific dollar amount of support.[458]

The legislature deleted the provisions of the maintenance section of the IMDMA which set forth minimum guidelines in cases involving child support and maintenance.[459] The removal of this mandatory language leaves determinations of maintenance payments to judicial consideration of the statutorily relevant factors enunciated in the Act.[460]

The child support section of the IMDMA as amended applies only to child support orders, changing the previous law's application to maintenance as well.[461] The legislature also changed the significance of the relevant statutory factors used for determining awards of child support. Under the present Act, the factors for consideration are to be used in determining whether deviation from the statutory guidelines is appropriate,[462] rather than for making threshold inquiries. The amendment requires the court to make express findings when it makes an award lower than the statutory requirement.[463] The court, however, may continue to make awards higher than those prescribed by the statute or recognize an award by agreement of the parties without being required to make express findings.[464]

Under the amended Act, the figures used for calculating child support awards will be based upon a percentage of the supporting party's net income[465] as opposed to the previous "percent of income [net]" determination.[466] Net income is defined under section 505(a)(3) of the IMDMA as the total of all income minus only the deductions the legislature has statutorily permitted for the purposes of this Act.[467] The statute now provides that only those mandatory retirement contributions which are "required by law as a condition of employment" may be considered deductible.[468] Additionally, the reasonable costs of adding a child to the supporting parent's existing insurance policy under a court order may be de-

458. ILL. REV. STAT. ch. 40, para. 505(a)(5) (Supp. 1986).
459. *Id.* at para. 504(b).
460. *Id.* at 504(b)(1-7).
461. ILL. REV. STAT. ch. 40, para. 505(a) (1985).
462. *Id.*
463. *Id.*
464. *Id.*
465. *Id.* at para. 505(a)(1).
466. ILL. REV. STAT. ch. 40, para. 505(a) (Supp. 1984).
467. ILL. REV. STAT. ch. 40, para. 505(a)(3) (Supp. 1986).
468. *Id.* at para. 505(a)(3)(d).

ducted.[469] The court also may reduce net income by the amount of expenditures for repayment of employment or business debts and expenses, necessary medical expenses and reasonable expenditures for the benefit of the child and the other parent, excluding gifts.[470] These deductions will be allowed only for the period that such payments are due and and will be modified by operation of law.[471] Further deductions are permitted for federal and state income tax, social security payments, union dues, dependent and individual health or hospitalization insurance premiums, and prior court ordered obligations of support or maintenance which are actually paid.[472]

The relationship between the minimum support guidelines and the list of statutory factors contained in the Act is clarified by this amendment.[473] The courts are now directed to apply the guidelines unless a departure is justified by an examination of the relevant factors. Therefore, practitioners arguably may assume that prior case law relating to the application and interpretation of the statutory factors will control child support awards where the court is asked to depart from the statutory guidelines.

X. CONCLUSION

Family law practitioners are awaiting the effects and possible controversies surrounding the enactment of SHIRA and the amendments respecting maintenance and child support. With regard to dissolution, the courts have clung to their traditional philosophy that the personal nature of a dissolution action precludes a guardian from filing such an action on behalf of his ward. While judicial treatment of dissolution has remained narrow, the courts have expanded in other areas, such as the visitation rights of grandparents and the support duties of non-custodial parents. The upcoming *Survey* year also promises to be a blend of traditional principles and new developments.

469. *Id.* at para. 505(a)(4).
470. *Id.* at para. 505(a)(3)(h).
471. *Id.*
472. *Id.* at para. 505(a)(3)(a)-(g). The previous $25 per month cap on the deduction of premiums for individual health/hospitalization insurance coverage has been removed. *See id.* at para. 505(a).
473. ILL. STAT. ANN. ch. 40, para. 505, Hist. & Prac. Notes (Smith-Hurd Supp. 1986).