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Declaratory Judgment Action Survives Dismissal of Dissolution

In 2015, the wife filed her Petition for Dissolution and the husband filed a Petition for Declaratory Judgment asserting the validity of the parties' 1984 Ante-Nuptial Agreement. The wife filed a Motion for Voluntary Dismissal, which Judge John T. Carr granted. The wife non-suited the Petition for Dissolution of Marriage but the Petition for Declaratory Judgment would stand as it was brought under the provisions of 735 ILCS 5/2-701 not under the IMDMA. The husband subsequently filed in a separate case a Petition for Dissolution. In the surviving Declaratory Judgment action, the wife claimed that the Ante-Nuptial Agreement was invalid. Judge Carr found the Agreement to be valid and enforceable. In the separate dissolution case, the parties were divorced on November 13, 2017. The case went to trial on the financial issues and Judge Carr made various findings and orders implementing its terms except that he provided a monthly payment of $8,370 per month for 100 months in lieu of the $2,500 per month provided in the Agreement.

The wife was represented by David I. Grund, Adam C. Kibort and Aura L. Lichtenberg of Grund & Leavitt, P.C. The husband was represented by David M. Goldman and Greer S. Goldberg of Davis Friedman, LLP.

The court found that neither party particularly wanted to get married and that the wife had not read the Agreement on the day she signed it; yet she was represented by counsel, had the opportunity to be advised on the Agreement and had time to read and understand it.

The court found the parties may have contemplated a short marriage and observed that the Uniform Premarital Agreement Act was enacted after the parties' marriage, which the court believed redefined penury differently than prior Act case law did. The court found that if there were any coercion on the parties, who married for religious cultural reasons, it came from their parents, but that did not amount to the coercion or duress contemplated by case law.

The court found that while the Ante-Nuptial Agreement's award of scheduled payments may have been on the low side of fair and reasonable, it was sufficient in these circumstances, especially when coupled with the award of a portion of the husband's estate and given the age difference between the parties. The husband was 17 years senior to the wife. Thus, the court found the Ante-Nuptial Agreement to be fair and reasonable and that the wife entered into the Ante-Nuptial Agreement voluntarily.

The financial issues to be determined were the classification of assets and liabilities under the Ante-Nuptial Agreement, the award of payments to the wife under the Ante-Nuptial Agreement and the application of the Ante-Nuptial Agreement to the disposition of the wife's attorney's fees to her present and prior attorneys.

Certain properties were pre-marital. The value of the husband's non-marital estate was $5,606,424, while the wife's non-marital estate was $110,245. The value of the marital estate was $734,834.

The parties jointly owned two Florida condominiums awarded to the husband, subject to the husband paying the wife $336,800 for her 50% interest. The husband accumulated retirement assets, which under the pertinent

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provisions of the Ante-Nuptial Agreement had to be awarded to him free and clear of any claim by the wife. The husband had loaned money for law school to his nephew for perhaps as much as $150,000. This receivable was clearly covered by the Ante-Nuptial Agreement and was awarded solely to the husband. The husband was also the owner of a life insurance policy with cash value. This asset was also covered under the terms of the Ante-Nuptial Agreement and was awarded solely to the husband.

The court recognized that the provisions of Section 7 of the Ante-Nuptial Agreement only provided a payout of $2,500 per month for 100 months for the wife's waiver of maintenance and all property claims. Prior to the enactment of the Illinois Uniform Premarital Agreement Act, the case law required an analysis of whether or not the provisions of an Ante-Nuptial Agreement would leave the recipient in a state of penury. *Warren v. Warren*, 169 Ill.App.3d 226 (5th Dist. 1988). Under the IUPAA, the penury standard was changed:

> (b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement undue hardship in light of circumstances not reasonably foreseeable at the time of the execution of the agreement, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid such hardship.

Maintenance under the Ante-Nuptial Agreement was waived in this case. The previously ordered payments of $7,500 per month in temporary support to the wife were intended to keep her out of a state of penury.

The Ante-Nuptial Agreement provided for 100 months of payments of $2500 by the husband to the wife in a marriage lasting more than 20 years. Judge Carr provided that payments of $8370 were to begin on the 15th day of April, 2018 and would continue on the 15th of each month for 100 months thereafter.

Each party was to pay his or her own attorney's fees, with the exception of the $100,000 previously paid to Grund & Leavitt, P.C. The wife's Petition for Contribution to Attorneys' Fees and Costs was denied as previously ordered.

Comment of Attorney David Goldman:

There really isn't any additional information about Judge Carr's position on the $2,500 vs. ultimately $8,370. Most significant was that my client did not oppose the higher number ($7,500) and as a trial strategy, we did not contest (in fact suggested) the $8,370 figure as meeting all her stated needs on her financial affidavit. With the higher number we believe that the Appellate Court would have a hard time finding that it was not enough money for the wife when she also got other cash from her condos and had a non-marital residence of her own.

Comment of the Publisher:

The husband has filed an Appeal. The matter has been fully briefed and the parties are awaiting a decision of the Appellate Court. Among the arguments the husband has made in the Appeal are the following: the trial court erred as a matter of law by applying the Illinois Uniform Premarital Agreement Act to the Ante-Nuptial Agreement and not determining that it created an unforeseen condition or penury for the wife. The trial court erred by not finding that the Ante-Nuptial Agreement was a product of duress. The trial court erred by not finding that the Ante-Nuptial Agreement was not unfair and

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unreasonable and by not finding the Ante-Nuptial Agreement was not void as a product of undue influence, and that the court erred by not finding that the Ante-Nuptial Agreement was procedurally and substantively unconscionable. The husband's attorneys did note that the husband filed a Motion for Declaratory Judgment (not a Petition) and he did not pay a separate filing fee as would be required in filing a separate action.

Jewelry Claim Illusory

The parties lived together as husband and wife for two months. The marital estate consisted of minimal assets. Much of the litigation, as well as, the vast majority of the trial centered on the wife's assertion that the husband had possession of her non-marital jewelry, which he allegedly refused to return. That non-marital property allegedly consisted of jewelry that had been gifted to the wife before the wedding from her mother, allegedly worth approximately $200,000. The wife also requested that the husband pay her maintenance and attorney's fees. Judge Neal Cerne found the wife's testimony was not plausible or credible. He denied her claims, barred both parties from receiving maintenance and required each to pay their own fees.

The wife was represented by Adeena Weiss-Ortiz and Stephanie Luetkehans of Weiss Ortiz P.C. The husband was represented by Enrico J. Mirabelli and Amy L. Jonaitis of Beerman, Pritikin, Mirabelli & Swerdlove LLC.

The husband was 31 years of age. He had been employed as a Chief Financial Officer for CXO Sync LLC earning approximately $84,000 per year. He resided in his parent's home in Bartlett, Illinois. The wife was 26 years of age.

She worked for Vings Technology for $36,000 per year and was residing in Sunnyvale, California with a roommate, although she refused to disclose her exact address, due to threats she allegedly received from her husband's family. The reason she did not return was disputed.

The parties were married in Illinois on July 8, 2016 in a civil ceremony, and the religious ceremonies took place August 4-6. The wife returned to California following the civil wedding and returned for the religious ceremonies in August. After the religious ceremonies, the parties commenced residing together on August 7, 2016 at the husband's parent's house in Bartlett, Illinois. They lived together for a short duration of two months, at which time the wife travelled to California on October 1, 2016, for a short, work related stay. Although she had a return ticket to Illinois, she did not return. The husband indicated that he was in London during her scheduled return, and then began to ignore all attempts at any communication with wife, including phone calls, text messages and emails. She re-booked her return ticket three times. She indicated that no one would pick her up at O'Hare airport, that she had no other family in Illinois and no house keys. She did not return to Illinois and remained in California.

The husband denied any knowledge of the existence of any of the jewelry and did not recall seeing any of the pieces of jewelry she wore. The husband acknowledged that she may have worn jewelry, but he did not know for sure if it was any of the pieces at issue. He asserted that the wife had possession of that jewelry.

To succeed on her request, the wife bore the burden of proving that the jewelry existed, and then to present clear and convincing evidence that the property was non-marital. To support her claim, the wife submitted photographs of the

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items purchased by her mother with detailed receipts from India and the Middle East bearing her mother's name. The wife testified that they had been gifts to her from her mother and her mother testified to such, as well as to the purchases and the receipts.

The only photographs that demonstrated that the jewelry actually existed during the marriage were the jewelry worn during the wedding. The husband said he was unaware of its whereabouts and believed that the wife's parents took it back to India after the wedding or that the wife took it with her when she went to California. In either case, he denied ever seeing it after the wedding or ever having possession of any of her jewelry.

The wife provided receipts and polishing receipts to prove the value of the jewelry, as well as its existence. The court had serious reservations about the authenticity of the receipts. Some items appeared to have the same heading as they were from the same vendor. There were invoices that were similar, i.e. same vendor, but were written on different dates. Finally, there were handwritten additions to some of the documents. The court gave no weight to any of the documentary evidence that was tendered to show the value of the jewelry or its existence. In addition, even the "expert", who was not allowed to provide an opinion on value, indicated that you needed to hold jewelry to assist in determining if it is real gold, and to determine the authenticity and quality of the gems.

The wife alleged that she had given all of her jewelry to the husband's mother for safekeeping and that she kept it in her dresser. The wife asserted that the last time she saw it was on October 1, 2016, when she left for California. She denied that she took her jewelry when she left for California. The husband's mother denied ever having possession of the jewelry and only remembered seeing the wedding jewelry.

The court allowed the wife, her private investigator and two Bartlett officers, pursuant to an Emergency Order, to enter the house for inventorying of and removing her personal property in February 2017, despite husband's vehement assertion that he had none of his wife's belongings. The wife indicated that she did not find any of her jewelry at that time, although eight suitcases and two boxes of items were removed. The wife indicated that the husband's father, uncle and brother would not allow her to search various parts of the home, including her bathroom. When she entered the mother in law's bedroom, she was allowed to retrieve her clothing. However, when she attempted to open the dresser drawer where her jewelry was kept, her father in law shouted and prevented her from doing so. However, they were not parties to the case and the court had no jurisdiction over them, so their refusal was not unreasonable. Nevertheless, the court ruled in February 2017 that the residence was the wife's regular place of abode and for all intents and purposes was her home. The order of February 2017 did not restrict access in any way. Pursuant to the court order, the wife tendered to the court immediately 1) a list of items she saw that belonged to her, but she was not able to retrieve.

The wife alleged that her mother in law was wearing her jewelry in a social media post following the wedding, which would have supported her claim that the mother in law had her jewelry. She asserted that it was her jewelry as depicted. However, the husband produced the original jewelry worn by his mother. The court found it more closely resembled the jewelry in the social media post than the piece of jewelry asserted by the wife, despite enlargements depicting it was identical to wife's jewelry.

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The court found the wife to be angry and combative when cross examined when there was no need to be as the cross examination was very "soft". The suspicious invoices for the jewelry, were some of the examples that led the court to place very little weight in her testimony as it did not seem plausible or credible.

The wife argued that the jewelry had to exist. Why else was she barred from opening her mother in law's dresser drawer? She expended so much in attorney fees and costs, and she would not have done so if it did not exist. The court found that the husband could make the exact same argument.

Each party was awarded their own personal property or the personal property in their possession and each was assigned their individual debts. Each party was barred from receiving maintenance and required to pay their own fees.

Comments of Attorney Enrico Mirabelli:

I think the court correctly rejected the notion that the "expert" was an expert or could opine on jewelry that he had not seen, based upon fuzzy photos. I think Amy can give more comments. The bottom line is that it was very hard to figure out who had the jewelry.

Comments of Attorney Amy Jonaitis:

Judge Cerne's ruling was spot on: the wife was claiming the husband had her jewelry, but she could not and did not sustain her burden that: (a) the jewelry existed during the marriage; (b) that husband had her jewelry; or (c) the value of jewelry. As she did not sustain her burden on any of those elements, she could not succeed in her claim. This was one of those cases that never should have gone as far as it did. It was a multi-day trial over nothing. The parties were married for less than three months, and lived together for two. The litigation went on for 18 months, costing an exorbitant amount of money for both sides.

Comments of Attorney Adeena Weiss-Ortiz:

I think the evidence as to the jewelry supported an award to wife. It was obvious the husband still had the jewelry, as there was such a big commotion when the wife attempted to open a dresser drawer. Why else did the husband's family obstruct her from opening the drawer? The private investigator and the wife testified to the same, and it was documented on video footage played for the court taken by the private investigator. The husband himself testified that his mother kept the jewelry in her dresser drawer. It was also obvious from the picture that the husband's mother posted on Instagram, that she was wearing the wife's necklace; both images were enlarged (wife's necklace and mother in law wearing wife's necklace), and identical. The wife also testified to same.

A review of the evidence shows the wife presented enough evidence to have been awarded her jewelry. Rare is a case where you have pictures and detailed receipts of jewelry, and video footage of husband/his family blocking access to the very place he said it was stored.

Publisher's Note:

When contacted, the wife's expert said "that he does not want to be listed. He said he felt attacked and tarnished, and never wants to be in another legal proceeding again!"

Unvested Stock Units Awarded to Husband

The parties were married on August 11, 2001. They had two children, ages 10 and 7, both girls. The parties had reached an Allocation Agreement as to the children and agreed primarily that they would be living with the wife. The marital estate was valued at $2,603,292.42, not inclusive of various stock

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options and restricted stock units, which were in dispute. Judge Timothy P. Murphy awarded the wife maintenance in the amount of $3,333 per month and child support of $1,169 per month plus 10% of any additional income the husband might have received in excess of a gross income of $250,000 per year. Each of the parties were ordered to pay their own attorney's fees after an equalization of fees paid by each out of the marital estate.

The wife was represented by Andrew P. Cores and Wendy M. Musielak of Esp Kreuzer Cores, LLP. The husband was represented by Stuart I. Gordon of Mattenson & Gordon Ltd. Howard P. Rosenberg of the Law Offices of Howard P. Rosenberg, LLC was the Child Representative.

The husband was employed as a Senior Director of Trade Analytics with Optum RX described his duties as "help to do the financial planning for the revenue channels for the company" and described Optum RX and its predecessor, Catamaran LLC, as "prescription benefit managers". He was employed by Catamaran, LLC under a written Employment Agreement with a gross salary of $195,000 in 2015. His employment contract included, inter alia, provisions related to stock options and restricted stock units awarded to him in conjunction with his employment.

The wife was employed as a Material Supervisor by Molex and reported a gross income of $96,836 for the year of 2017 based on a salary of $90,000 and a discretionary bonus. She had worked for Molex for 18 years and was promoted to Materials Supervisor in September, 2017 after 10 years as a quality engineer.

Both parties appeared to have secure employment, although the court noted that the husband's Employment Agreement acknowledged that he was an at-will employee. The court assumed that the wife was also an at-will employee in that she was a member of management.

The parties continued to reside together with the children in the marital home in Bartlett, Illinois and had reached and entered into their Allocation Judgment of Parenting Responsibilities and Agreed Parenting Plan on January 18, 2018. Both of the parties testified that the Bartlett marital residence was to be listed for sale at $399,000.

The testimony and evidence showed that in addition to his base salary of $200,000 per year, the husband did or could have received additional compensation from Optum RX in the form of a standard bonus, retention bonus, Synergy bonus, forced stock retirement, United Healthcare Executive Savings Plan, stock options, and/or restricted stock units. The court's projection of the husband's 2018 minimum gross income included a base salary of $200,000, Synergy Bonus of $375,000, and a standard bonus of $50,000.

The court concluded that the Synergy bonus was the last of such payments that the husband expected to receive from Optum RX. The court treated this payment as a marital asset in its consideration of the allocation and division of the marital estate. The court recognized that the husband was not guaranteed the standard bonus given its discretionary nature to be determined by the management on an annual basis.

The husband's net after subtracting the $375,000 Synergy bonus would be $309,600. In 2018, the projected net after subtracting the $375,000 Synergy bonus would be $250,000.

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The parties had provided the court with an itemized listing of their marital assets and estate with an aggregate value of $2,603,292.42 with an addition $295,551.36 in stock options and Restricted Stock Units. The parties' dispute was not in what constituted the marital estate but the relative apportionment.

During the term of his employment and the marriage, the husband was awarded various stock options and restricted stock units (RSU's).

The wife sought an award of 56% of all of the vested and unvested stock options and RSU's. She argued that the stock option awards and their value, whether present or future, were all marital in nature and awarded to the husband for his past efforts for the company, and should be allocated along with all of the marital estate in greater proportion to her.

The husband argued that the grant of the stock options and RSU's were incentives to keep him at the company and to use his best efforts in the future, and required him to continue to work for the company after the dissolution of the marriage and to make post-marital contribution via his continued efforts and employment in order for the grants to fructify and reach their full value. He argued that the awards were both marital and non-marital in nature and he sought an allocation based upon the "time value" or coverture fraction method.

Section 503(b)(3) of the IMDMA, 750 ILCS 5/503(B)(3), controls the allocation and distribution of unvested stock options and Restricted Stock Units (RSU's) and required the court to presume that stock options granted during the marriage were marital property whether vested or non-vested or whether their value was ascertainable. *In Re Micheli*, 15 N.E.2d 512; 383 Ill.Dec. 734; 2014 Ill.App. LEXIS 551 (2nd Dist., 2014).

For the employee to realize the benefit of this stock option, the employee must continue to work and meet whatever other conditions were required by the stock option plan. *Stock Options in Divorce Situation, William J. Stogsdill, Jr. and Bruce L. Richman, Illinois State Bar Association Family Law Update June 23, 2000, pages 20-21.* If the employee can only meet these conditions after the Judgment of Dissolution of Marriage, then the granting of the unvested stock options is really non-marital property because the value is unascertainable at the time of the Judgment of Dissolution of Marriage and only appreciates in value after the Judgment of Dissolution of Marriage by reason of the performance of the divorced employee (i.e. his non-marital efforts).

The court felt obliged to apply a formula, whether called a coverture fraction or time rule, to determine the portion earned by a spouse's marital effort. A coverture fraction is used to calculate how much of the present value of an asset was earned during the marriage. *Trant v. Trant*, 545 So. 2d 484 (1989). The court could use a coverture fraction to separate that portion of the benefits which were earned during the marriage, from that portion of the benefits which were earned outside of the period of marriage. The numerator was the number of months in which marital labor was devoted to earning the award. The dominator was the total time the employee had been employed, earning the award.

The court found and concluded that the stock options and RSU's awarded to the husband were an award to him as an incentive for his future service and performance rather than as compensation for past services performed for the company; nor were they awarded as some form of deferred compensation. There was both a marital

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and non-marital component to the awards of stock options and RSU's. The court did find that a "time value" or coverture fraction approach was the appropriate method of allocation after the courts considered the factors set forth in both Section 503(d) as discussed above, and the factors in Section 503(b)(3) related to the division and allocation of the stock options and RSU's.

The court determined that the vested stock options and vested stock units that were determined to be marital would be divided 55% to the wife and 45% to the husband. All of the unvested stock options and Restricted Stock Units were awarded to the husband free of any claim of the wife.

The parties stipulated that the wife was to be awarded maintenance in this cause, but disagreed as to its terms and whether it should be paid on any additional compensation. After considering the foregoing review of the parties' incomes, the court found that the parties' anticipated combined gross income was less than $500,000 per year, and that the statutory guidelines had to be considered. The court found that the husband's gross income for purposes of the maintenance calculation was $250,000 gross per year comprised of his base salary of $200,000 plus a contemplated $50,000 bonus. The wife's income was $100,000 per year.

The husband stipulated that the resulting maintenance calculation resulted in $3,333 per month as maintenance to the wife. The wife agreed with the monthly amount of $3,333, although she sought a "true-up" on any additional earnings the husband might receive.

The parties disagreed as to whether and how any additional income earned by the husband would affect the issue of maintenance; i.e. whether the award of $3,333 was sufficient to meet the needs of the wife and the children coupled with child support, or whether the husband should pay a percentage of any income over $250,000 as additional maintenance. Such an order was directly overruled by the *Micheli* court. An award of maintenance was generally determined by the needs of the spouse seeking maintenance and the ability of the other spouse to pay, in relation to the standard of living to which they were accustomed during the marriage. *In Re Anderson*, 409 Ill.App.3d 191, 198; 951 N.E.2d 524; 2011 Ill.App.LEXIS 296 (1st Dist., 2011).

Per the parties' Allocation Judgment, the wife would be moving with the children to either Glen Ellyn or Wheaton, Illinois necessitating the purchase of a new home and her new monthly mortgage would be "around $2,500" without taxes and homeowner's insurance.

The children were to attend public schools rather than the current private school, and there would no longer be the monthly "tuition" expense of $762.67 as reflected on her Financial Affidavit.

The wife anticipated that the utilities for the home and the like would also be about the same. That various expenses itemized in her Affidavit for the children would be shared equally by the parties post-divorce under their Allocation Judgment including extra-curricular activities and sports, any school fees and costs, and out of pocket medical expenses. She testified that the parties enjoyed a comfortable standard of living, including both trips as a family and as a couple on a regular basis, and that the couple accumulated their marital estate as a result of their mutual efforts and focus on savings and investment.

The court declined to include the husband's Synergy bonus of $375,000 as his base income for the years of 2017 or 2018 in its determination of maintenance in this cause in that

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those bonuses were being treated as assets and part of the marital estate that was being divided between the parties. To include those monies as income in calculating maintenance also would be inappropriate "double dipping" by the wife, and contrary to law.

The husband convincingly argued that the monthly amount of $3,333 in maintenance combined with the wife's monthly income of $8,333 clearly allowed her to meet all of her anticipated monthly living expenses for her and the children, even before adding in the child support that he would be required to pay. These expenses included a home costing $450,000 to $500,000 compared to the current home valued at $386,640.

The wife was awarded her portion of the marital estate that included cash and investments from which additional income could be derived; all of which was evidence that she would enjoy a similar standard of living that the parties enjoyed together during the marriage.

The court found that an award of statutory maintenance in the amount of $3,333 per month as maintenance to the wife was sufficient to allow her to meet her own needs at a standard comparable to that which she enjoyed during the parties' marriage. The court denied the wife's request that the husband be ordered to pay additional maintenance on any bonuses, stock or RSU awards, or any other income he may receive after the entry of the Judgment dissolving the parties' marriage, and found that such request was contrary to the holding in *In Re Micheli*, 15 N.E.2d 512; 383 Ill. Dec. 734; 2014. Ill.App. LEXIS 551 (2nd Dist., 2014) and not warranted under the facts and evidence in this cause.

Based upon the length of the parties' marriage and the statutory provisions of 750 ILCS 5/504(b-l)(l)(B) the court calculated that maintenance was to be payable for a term of nine years and would then terminate, and was modifiable under a showing of a substantial change of circumstances pursuant to Section 510 of the IMDMA.

The facts in the instant case provided a perfect storm for the argument and consideration of the legislature's choice to implement a redline rule related to the number of days that a child was in the overnight care of a parent and its effect on the obligation of child support. The husband argued that child support should be set at $885 per month based on the court finding that he had more than 146 overnights per year; i.e. an average of 147.7 per year over a three year period. The wife argued that the husband did not have 146 overnights in any given year.

If the court were to find that the husband had 145 overnights in a year, the guideline child support would be $1,821 per month as opposed to $885 if he had 146 nights. The court found the resulting difference of $936 in child support bore no rational basis to having one additional overnight of parenting time, and deemed it appropriate to deviate from the guidelines by looking at the children's reasonable needs and expenses. Child support was set at $1,169 per month.

Comments of Attorney Andrew Cores:

We appeared in court on June 6, 2018 on this case, at which time Judge Murphy told us that his decision is NOT final and appealable, and James Littman has filed a Motion to Clarify. Based on this, I believe this article may be premature and not representative of what Judge Murphy ordered ultimately.

Comments of Attorney Stuart Gordon:

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The case presented three novel and interesting matters, two of which are a direct result of the new statute. The issue of child support as it relates to overnights and the bright line demarcation requiring a higher payment if the non-custodial parent has less than 146 nights. Judge Murphy analyzed the facts and evidence, children's needs, lifestyle, and deviated from the guidelines set forth in the statute while commenting on this bright line demarcation.

The issue of maintenance and that it is based on needs rather than simply plugging numbers into the Section 504 formula and ignoring a maintenance recipient's needs based on the lifestyle of the parties. Again, Judge Murphy analyzed the wife's needs, available income from employment, income from investments, and determined that payment of a percentage of the husband's bonus for additional maintenance was unnecessary.

The issue of stock options and Restricted Stock Units that were granted during the marriage but require husband's continued employment to vest and become worth something. Judge Murphy analyzed this under 750 ILCS 5/503(b)(1)(3) and determined that a portion of the stock options and RSU's were husband's non-marital property because he was required to put forth his non-marital efforts after the marriage was over to cause the options and RSU's to vest and become worth something. A most instructive Memorandum Opinion that should be read in full. To read the entire Opinion, please visit www.illinoisdivorcedigest.com.

Comments from the Publisher:

Should there be a significant change in the decision because of the Motion to Clarify, the Digest will disseminate that information.

Children to Spain after Hague Hearing

The husband and wife were married in Spain on August 5, 2012. They had two children, a son who was 13, and a daughter who was 6. The wife filed for divorce in Spain in September, 2015. While the divorce was pending in Spain, the mother removed the children to the United States on October 6, 2015. In November, 2017, the father filed his Verified Petition for Return of the Minor Children Under the Hague Convention. Following a trial from April 3-5, 2018, Judge John Z. Lee of the United States District Court of Northern Illinois granted the father's Petition and ordered the children to return to Spain for a determination of custody rights.

The mother was represented by Sean Patrick MacCarthy and Kaitlyn Luther of Chittenden, Murday & Novotny LLC. The father was represented by Timothy K. Sendek and Robyn M. Bowland of Akerman LLP; and by Sara Barnowski of Lathrop Gage, LLP.

At trial the father demonstrated a prima facie case for the return of the children under the Hague Convention of the Civil Aspects of International Child Abduction (42 U.S.C Section 11601). The Hague Convention is an anti-abduction treaty. Its purpose is to secure the prompt return of children wrongfully removed or retained in another signatory state. The court's role in enforcing the convention is not to settle a custody dispute, but rather to restore the status quo before any wrongful removal or retention. The father demonstrated that the children were wrongfully removed by showing that his Spanish custody rights were breached. The father also demonstrated that he was actually exercising his custody rights (though his involvement with the children in Spain was limited) when the mother removed the children to the United States. The burden of proof shifted to the mother to establish one of her three claimed affirmative defenses.

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At trial, the mother asserted that the "grave risk" exception (Article 13(b)) applied given the father's alleged history of domestic violence against her and corporal punishment of the son. However, Judge Lee found that both parents had used physical punishment (with a horse whip) on the older child. He concluded that the mother failed to meet her burden of showing that the risk to the children of harm was truly grave.

The mother's second defense asserted that the "mature child" exception applied given that the son was 13 and he testified (in chambers) that he did not want to return to Spain, in part because he was afraid of his father. However, Judge Lee found that the son was not sufficiently mature for it to be appropriate to consider his views. Judge Lee concluded that the son's testimony was potentially "guided", however unintentionally, by his interactions with his mother.

The mother's third defense claimed that the Petition should be denied because the children were "well settled" in Chicago. The "well settled" exception applies if the moving party (the father) commences the judicial proceedings more than one year after the wrongful removal. Here the alleged wrongful removal from Spain to Chicago occurred in October, 2015 and the father waited until November, 2017 to file the Petition in federal court in Chicago. Judge Lee relied on the immigration status of the children and the mother (they were undocumented), and the fact that the children had no relatives in Chicago. Judge Lee discounted the fact that the mother lived with her boyfriend in Chicago and that they had plans to marry someday. Accordingly, Judge Lee found that the mother failed to meet her burden of proving that the narrowly construed "well settled" exception applied.

Comments of Attorney Sean MacCarthy:

This was my first Hague Convention trial. These matters are expedited in federal court. Even the appeals can be expedited. Overall, it was a good experience and the Hague cases raise interesting legal issues for the divorce practitioners. Obviously Hague trials are not custody trials, but at the same time the cases are almost more emotional because children can be ordered to leave the United States and return to a different country. There are some interesting defenses available to the parent who has "removed" the child from a different country. But the law is set up to provide a presumption that they should be returned to fight the custody battle in their "home" country. I was appointed to this case through the Northern District federal trial bar pro bono program. It was a great experience. The costs can add up with the need for a translator. But, these costs were reimbursed through the federal court.

Maintenance Denied, Disability Unproven

The parties were married on August 16, 1996. They had no children. They separated on or about September, 2008 or April of 2009. The wife sought maintenance due to her alleged disability. Judge Edward A. Arce denied her maintenance in part based on her failure to produce medical documentation. Also, the wife's Facebook posts belied her claims. Maintenance was reserved for a period of three years.

The wife was represented by Peter R. Olson of Chicago Family Law Group. The husband was represented by Ross H. Weisman of Weisman & Weisman, P.C.

The husband was 57 years old and resided in Chicago, Illinois. He was employed full-time as a software engineer/analyst with Wheatland Tube LLC, aka Zekeleman, and earned gross pay of

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$4,544.69 every two weeks. He had a gross annual income of $95,948 in 2016 and $123,576.04 in 2017.

The wife was 53 years old and resided in Chicago, Illinois in a building owned by her father. She was not employed and testified that she had not been gainfully employed since about 2005.

An Order was entered on August 2, 2016 pursuant to 750 ILCS 5/501, which awarded the wife the sum of $900 per month for temporary maintenance. The wife claimed that she was entitled to an award of maintenance based on the disparity in income between the parties, her inability to obtain and maintain gainful employment due to her medical health, the standard of living enjoyed by the parties during the marriage and the length of the marriage.

The wife submitted a Financial Affidavit dated July 10, 2017, which listed her reasonable and necessary monthly expenses as $2,292.30 excluding debt service. She testified that she had debts payable to People's Gas and Commonwealth Edison but it was unclear whether those debts were for utility service to the building, which included a second unit or the wife's unit alone. She testified that the bills were not in her name.

The husband submitted a Financial Affidavit dated February 4, 2018 into evidence which listed his reasonable and necessary monthly living expenses as $3,444 excluding debt service, which he listed as an additional $1,350.

Based on the parties' income tax returns, the husband earned his highest amount of income in 2017. The lowest amount of money earned by the husband since 2014 was $90,446 in 2015. Based upon the evidence in the record, the husband was at his earning capacity. There was no evidence in the record of his future earning capacity.

The wife's earning capacity was unclear. She testified that when she was last employed as a digital graphic designer in 2004 or 2005, she earned approximately $80,000. Thereafter, she worked as an independent contractor earning about $30,000 when she stopped due to illness. She testified that her medical condition precluded her from gainful employment and that her earning capacity was non-existent. She had last applied for a job in 2012. There was no evidence in the record other than her uncorroborated testimony that she was unable to work due to a medical condition.

The court found little or no evidence in the record of the lifestyle established during the marriage. There was no evidence in the record of the earnings prior to 2012. Since 2012, the evidence established that the parties enjoyed a middle-class lifestyle. There was some evidence that the lifestyle the parties enjoyed exceeded their income. The wife testified that she filed for bankruptcy in 2013 and received a discharge in 2014 prior to the filing of this case.

The parties were married between 12 to 13 years when they separated in 2008 or 2009 and were married a total of 19 years from the date of the marriage to the date the wife filed her Petition for Dissolution of Marriage.

The issue most disputed at trial was the wife's health. She testified that she became ill in 2005 due to extreme stress and developed a digestive disorder she described as Crohn's Disease, which caused her to experience severe diarrhea up to 12 times per day. In addition, she testified that she experienced cramping, joint pain, chronic fatigue and heart palpitations. She

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testified that she had endured seven surgeries, including four rectal surgeries, cervical surgery and surgery for removal of an abscess. The effect on the wife's life style, per her own testimony, was that she was unable to leave her house unless she refrained from eating food in advance. To attend court for the trial, she testified that she did not eat food so as not to experience a diarrhea episode. Her medical contention, per her testimony, made any gainful employment prohibitive. She testified that her application for Social Security Disability was denied in 2015 and that she had filed an appeal of the denial.

The wife acknowledged that no medical evidence was being submitted at trial to corroborate her testimony concerning her health and total disability and that she posted trips she had taken on her Facebook page including Lake Tahoe in 2008, 2010, 2016 and 2017 and Florida in 2013, Baltimore and New York in 2016 and Los Angeles in 2017. She further acknowledged that her Facebook page contained posts concerning a seven mile speed walk in 2016 and her membership with LA Fitness.

During the marriage, but after the separation of the parties, the husband fathered a child out of wedlock with another woman. A paternity complaint was filed against the husband on April 13, 2015 in Cook County, Illinois under case 15 D 90434. Pursuant to an Order entered on March 3, 2016 the husband was ordered to pay child support of $1,284.29 per month.

The court considered the applicable factors under Section 504 and found that maintenance was not appropriate. The wife's basis for maintenance was her total and permanent disability due to her medical condition resulting from Crohn's Disease. Since the only evidence in the record on this issue was her testimony, her credibility as a witness had to be considered. Her testimony concerning the significant impact on her day to day life was impeached when confronted with the post she herself placed on her Facebook page documenting her travel experiences and physical fitness. Her explanation that a third party family member paid for the trips failed to rehabilitate her credibility. She further failed to establish why she could not work as a digital graphic designer as an independent contractor from her home as she had in 2006. In the absence of any additional evidence, the court found that the wife had the ability to earn what she earned when last employed, $80,000 per year.

The husband had an interest in a Fidelity Rollover IRA with a value of $87,939.25. He also held an interest in a 401(k) Plan which had a value of $20,932.28. The court found both retirement accounts were marital property subject to division between the parties. There was no evidence in the record that established what portion was contributed after the parties' separation in 2008 or 2009.

The marital estate primarily consisted of the equity in the marital residence of $60,606 and retirement funds. As to the residence, the husband alone had paid the mortgage while enjoying de facto exclusive possession since 2008. He was seeking a disproportionate award of the marital estate based on his contribution to the increase of the equity in the residence. Similarly, he sought a disproportionate award of the retirement benefits because he alone contributed to such during the extended separation of the parties.

The wife sought a disproportionate award of the marital estate based on the disparity in income between the parties and the husband's superior ability to accumulate assets and income after entry of the Judgment as a result of his employment. Based on the evidence, both parties were correct. The husband had been the sole

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source of the increase in value of the marital estate during the 10 year separation. He also possessed a superior ability to accumulate income and assets after the entry of the Judgment. The court found that the factors supporting each claim for a disproportionate award cancelled each other out and an equitable distribution would be 50% of the marital estate to each party, including the husband's IRA valued at $87,939.25, the 401k valued at $20,932.28 and the equity in the marital residence of $60,606.

The wife's request for maintenance from the husband was denied. Her right to request maintenance in the future was reserved for a period of 3 years from the date of entry of the Judgment.

The wife's Petition for Contribution to Attorney's Fees was granted and a Judgment was entered in favor of the Chicago Family Law Group LLC and against the husband in the amount of $2,000 for attorney's fees incurred by the wife pursuant to 750 ILCS 5/503(j). Each party was to be responsible for the balance of their own attorney's fees.

Comments of Attorney Peter Olson:

Nothing to add. The article is accurate.

Comments of Attorney Ross H. Weisman:

Although I was prepared to accept the pre-trial recommendation on behalf of the husband, the wife was not so inclined. It turned out we were better off trying the case.

Valuation Expert Discredited

The parties were married on February 19, 1994. A Custody Judgment and Joint Parenting Agreement was entered on July 31, 2015 assigning the wife the primary responsibility for the children. The parties were at odds with respect to the value of the husband's interest in his company. Each presented experts. Judge Renee G. Goldfarb found that the husband's expert, Dr. Stan Smith's testimony and opinion deserved little credence and the Judge relied primarily on the wife's expert Erin Durand Hollis.

The wife was represented by James A. Palmisano and Kathryn M. Lyons of The Palmisano Law Group. The husband was represented by Michael W. Ochoa and Austin Vandeveer of the Law Offices of Jeffery M. Leving, Ltd.

The parties had four children, two of whom were emancipated. A son born on July 15, 1990, age 28, was not otherwise emancipated and lived in a group home which was funded by IDHS and Social Security Disability. A daughter born on November 2, 2002, was now age 15.

The husband was 52 years of age and resided in Oak Lawn, Illinois. He was employed as an independent financial constant for Fastfill Inc., located in Chicago, Illinois.

The wife was 51 years of age and a resident of Oak Lawn, Illinois. She was employed by Independence Plus, Inc., as a home health specialist.

The husband testified that CE & J Comm Tech, Inc. was officially formed in the Spring of 2010. He was the sole owner of the company. The company employed his younger brother and two other individuals who were integral to the business. He testified that he was the book-keeper and payroll person and the person rounding off the bids to see if they fit the financial picture. He was paid a salary, and the business paid rent for office space and storage at The Clubhouse Hills Golf Course. He also owned a banquet facility and restaurant at The Clubhouse Hills Golf Course.

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The husband testified the company was no longer making money.

The primary issue between the parties was the value of the company. Each party presented a valuation expert. Dr. Stan Smith of Smith Economics Group, Ltd. testified on behalf of the husband. Dr. Smith was provided documents and had multiple conversations with the husband. He concluded that CE & J Comm Tech, Inc. had no market value and had a modest liquidation value of $21,000. Dr. Smith valued the Union Bond held by CE & J Comm. Tech, Inc. at $20,000, although he concluded that it might not be collectible. He valued the 2014 Silverado truck, purchased on November 14, 2014 for $28,502, at $1,000.

Dr. Smith testified that he accepted the $1,000 value of the one year old $28,502 truck at the time of his report, because the husband told him that was what it was worth. His report also indicated he valued the Silverado at $1,000 because the accumulated depreciation taken for the truck had been $27,504. He reviewed the tax returns and the books of the company. The tax returns and company books listed "loans" in the amount of $64,861 as assets to the company at the end of 2015. He stated in his report that the balance sheet of CE & J Comm Tech, Inc. at the end of 2016 showed assets of $111,327.

Dr. Smith characterized the loans as advances and a form of compensation, because that was what the husband told him they were, even though that was in direct contravention of the company books and tax returns of CE & J Comm Tech, Inc. Dr. Smith simply deemed these loans uncollectible and of zero value based on the husband's representations. He admitted at trial that he knew nothing about two significant employees or their incomes. He only knew what the husband told him.

Dr. Smith's report evidenced no methodology whatsoever because he viewed the company as having no value as an ongoing business and treated it as a liquidation. Yet, the question arose, if Dr. Smith simply viewed CE & J Comm Tech, Inc. as a liquidation, why would an expert take into account depreciation of the truck, a legal accounting practice, but one that had no meaning in the real world of resale value. Additionally, Dr. Smith accepted that the loans were not really loans but advances on wages, contrary to the company books and tax returns.

In his report, Dr. Smith stated that the husband viewed his employees like family. Perhaps that was why the husband, as owner of CE & J Comm Tech, Inc. no longer sought to recover assets in the form of loans and had given the 2014 Chevy Silverado to his two employees to use in a business which coincidentally was nearly identical to CE & J. Comm., Inc. in name, work, workers and customers. The court gave very little credence to Dr. Smith's report.

Furthermore, putting aside the husband's largesse by forgiving loans to these gainfully employed/owners of a strikingly similar business, as well as generously giving them a $28,502 truck purchased in November 2014 to accommodate that business, did not overcome the fact that the husband was the sole owner of CE & J Comm Tech, Inc., which was a marital asset.

750 ILCS 5/503(t) of the Illinois Marriage and Dissolution of Marriage Act stated that, "The court, in determining the value of the marital and non-marital property for purposes of dividing the property, has the discretion to use the date of the trial or such other date as agreed upon by the parties, or ordered by the court within its discretion, for purposes of determining the value of assets or property." This statute allowed the

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court to select a date that was most equitable given the parties' circumstances. The wife's expert valued CE & J Comm Tech, Inc. as of December 31, 2015. The corporation was a viable business at the close of 2015 and ceased doing business as a going concern when the husband laid off the employees who then formed their own company to bid on jobs with the same contractors and do the same work with the truck given to them by the husband. They have not been without work since.

The wife's expert, Erin Durand Hollis, was the Director of Financial Evaluation of Marshall & Stevens, Inc. She was an Accredited Senior Appraiser, certified by AIRA, the Association of Insolvency and Restructuring and certified in Distress Business Evaluation. Ms. Hollis evaluated hundreds of businesses since 2000 and she provided the court a detailed and cogent report as well as credible and convincing testimony relating to the value of CE & J Comm Tech, Inc. through utilizing traditional methods of valuation.

In her testimony and her report, Ms. Hollis indicated that the cost approach, or book value, was not utilized to opine value. As of December 31, 2015, CE & J Comm Tech, Inc. had earnings capacity that when capitalized, exceeded that of the company under the premise of an ordinary liquidation. Using traditional valuation methods and taking the equal weighting of the income approach and market approach, Ms. Hollis's report indicated that the fair market value of CE & J Comm Tech, Inc. was $115,000. At trial, Ms. Hollis testified that after receiving updated financial information she valued the company at $125,000. Even assuming book value, Ms. Hollis reported the value of CE & J Comm Tech, Inc. at $119,844 as of December 31, 2015, although she valued the Silverado at its purchase price of $28,502. The husband testified that the truck had about 200,000 miles on it, although how he knew that was never explained. Nonetheless, the truck was over three years old.

The testimony at trial of the husband and his employees, although not entirely consistent, was that each contributed $5,000 toward a $20,000 union bond. Dr. Smith's report stated that the balance sheet of CE & J Comm Tech, Inc. at the end of 2016 showed assets of $111,327, even though the company had ceased to bid on any jobs and the employees had been laid off. Given all of the circumstances since 2015, the most equitable evaluation of CE & J Comm Tech, Inc., suggested a value of $80,000.

The marital estate was valued at $1,139,072. The allocation was approximately equal. The husband was charged with $179,443.54 as an advance toward his fees and with dissipation of $29,766. Neither party sought maintenance and both were barred as to such. The husband was to pay $640 monthly as child support in accordance with the guidelines until the fifteen year old daughter was otherwise emancipated. Since the expenses of the oldest child, who was disabled, were being paid by Social Security and Disability, there was no need for an order of support relative to him.

Comments of Attorney James Palmisano:

During the course of the marriage, the husband claimed he loaned the owners of the Goal Post Inn $80,000 and he received an unsecured note which provided no interest until two years after execution. It carried interest of 3%. The note was signed in 2007. It had a provision for no assignment. The husband claimed that the note was barred by the statute of limitations. The Judge disagreed because the statue did not begin to run until two years after it was signed, which took it within the ten year statute. The husband admitted he went to the bar

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every day, took the receipts to the bank, did work there, but denied that he owned 50%. He claimed he took no monies from the bar. It was common knowledge within the neighborhood that he had an interest in the bar. Judge Goldfarb stuck him with the full amount of the note plus interest.

The husband presented as his expert, Stan Smith. At his deposition he was condescending and arrogant. I suspended the deposition and decided to deal with him in court. His testimony was not credible. I would not recommend him as an expert.

Imputed Income of $25,000

The parties were married on May 27, 2006. They had no children. The husband earned $104,000 per year while the wife was unemployed and had no income. Judge Timothy J. McJoynt awarded the wife maintenance of $2,148 per month for a period of 76 months and equalized the division of the parties' assets.

The wife was represented by Brian N. Nigohosian of Nigohosian & Dahlquist, P.C. The husband was represented by Michael E. Powers of the Law Offices of Michael E. Powers Ltd.

The wife sought maintenance in addition to an equal division of the parties' assets, which consisted of a 401(k) and an annuity, two IRA's and a brokerage account with an aggregate value of $641,365.93. Judge Timothy J. McJoynt equalized the various assets and ordered the husband to equalize the allocation by making a payment to the wife of $59,346.11. The court used the values of the assets as of the date of trial and found that both parties contributed to the marital estate through their joint efforts and accordingly the wife's request to receive additional assets pursuant to Section 503(d)(1) was denied. The court did find that the husband committed dissipation of marital assets in the amount of $3,700 during the time the marriage was breaking down.

Pursuant to Section 504 of the Illinois Marriage and Dissolution Act, the wife was entitled to maintenance. The husband was ordered to pay her $2,148 per month. This sum was calculated by the court considering statutory guidelines with the husband having an income of $104,000 per year and the wife having imputed income of $25,000 per year. She was obliged to improve her economic circumstances going forward and maintenance was to be reviewed after duration of 76 months per the statute. Maintenance was modifiable in the event of a substantial change of circumstances.

The court rejected an earlier review of maintenance requested by the husband. The wife sought $8,000 in attorney's fees from the husband and argued that the husband's actions in this case caused needless fees to be expended. The court found that pursuant to Section 508 factors, the husband had the greater ability to pay fees and ordered him to contribute $7,500.

Comments of Attorney Michael Powers:

There was an issue over the wife's includable income. Her last employment consisted of hourly wages as a retail clerk with Bed, Bath & Beyond. Her W-2 was only about $12,000 gross. The court imputed income to her of $25,000 based on underemployment. I lost my legal position, although I argued that the court should impute $40,000 based on employment history.

The second issue was the duration. The court applied the 503 Guidelines, calculating from the date of the marriage to the date of filing. I wanted it reviewable earlier and there is a Motion to Reconsider on file raising that issue. The court made a finding that she has a duty to rehabilitate but because he gave her the full duration, she does not have any incentive to

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rehabilitate. She had a prior personal history that was problematical that spoke to the need for rehabilitation.

Comments of Attorney Brian Nigohosian:

The husband's Motion to Reconsider was denied except for a minor change in terms of a payment schedule relative to the car. I do not think that the case should have gone to trial. The husband wanted the Judge to apply the Hunt formula to the pension and divide it accordingly. The Judge found that it was all marital. Also, because of the wife's personal issues and lack of contribution, the husband felt he should get a greater proportion of the marital estate, however the court disagreed. Overall, I thought the Judgment was fair and accurate.

Judgment Reopened After 18 Years, Amended QDRO Entered

The Judgment for Dissolution of Marriage was entered on December 21, 2000. It provided that the husband's retirement benefits were to be equally divided by the parties. The husband argued that the wife waived her interest in the Hartford Excess Pension Plan II because she had entered into several agreed orders subsequent to the Judgment wherein she agreed that all property issues had been resolved between the parties. Judge Neal W. Cerne disagreed and ordered that an Amended QDRO be prepared allowing the wife 50% of the marital monthly portion of the Hartford Excess Pension Plan II.

The wife was represented by Cynthia L. Petersen of the Law Offices of Tedone & Morton PC. The husband was represented by Terry D. Slaw of Shifrin & Associates, LLC.

The husband further argued that the wife was not entitled to receive any portion of the Hartford Excess Pension Plan II for several reasons: a) it was not specifically listed in the Judgment; b) it is a "top hat" plan and currently cannot be paid directly from the plan to the wife; c) the wife's interest was bargained away and offset by receipt of other assets; or d) the wife waived her interest in the Hartford Excess Pension Plan II because she had entered into several agreed orders subsequent to the Judgment wherein she agreed that all property issues had been resolved between the parties.

The wife argued that the specific plan names were not included in the Judgment and the Plan provided no information to indicate that there were two (2) separate pension plans or benefits, and she had no way to know that the plan had made an error when it approved the original pension QDRO. The wife did not learn until early 2012 that there was a problem with her receiving the monthly amount of $3,104.00 pursuant to the Qualified Domestic Relations Order that had been entered in 2002, and in September, 2012, she received a letter that explained the plan's error in including the Hartford Excess Pension Plan II in the division without the plan being specifically named in the Qualified Domestic Relations Order ("QDRO"). The plan further explained that it no longer accepted the division of the plan whereby the plan would pay anything from the Hartford Excess Pension Plan II to the wife.

Judge Neal Cerne found that the Hartford Excess Pension Plan II was marital property to be divided and ordered that an Amended QDRO be prepared allowing the wife 50% of the marital monthly portion of the Hartford Excess Pension Plan II by including the dollar amount awarded to her in the amount to be received via QDRO from the Hartford's qualified pension plan. In the alternative, if the Plan would not accept such a QDRO, the Judge ordered that the husband was to pay the wife her monthly portion directly. In

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addition, he ordered a retroactive sum to be paid to the wife from the date the husband retired through the date of the ruling.

Throughout the parties' marriage, at the time of the Judgment, and until the present time, the husband had been involved in the pension industry. At the time of the Judgment, he was employed as a Senior Pension Consultant for The Hartford. The husband remained employed by The Hartford until his current employment at Paychex. At Paychex he assists companies with their retirement plans. Subsequent to the entry of the Judgment, Qualified Domestic Relations Orders were entered. The actual names of the Plans did not exactly mirror the identified plans in the Judgment as the Judgment did not correctly list all plan names, and the wife argued that the Judgment only referred to the types of benefits to be divided between the parties. The Judgment was entered on December 21, 2000. On October 10, 2001 a QDRO was entered regarding The Hartford Investment and Savings Plan, which QDRO was subsequently amended by agreement to include the husband's non-qualified deferred compensation plan. This apparently misidentified the Hartford 401(k) Savings Plan, and later included the non-qualified deferred compensation plan. On October 10, 2001, a QDRO was entered regarding The Hartford Fire Insurance Company Retirement Plan for U.S. Employees. The retirement plan QDRO was approved, but 10 years later the wife was informed that an error had been made when the QDRO relative to the retirement plan, Hartford Fire Insurance Company Retirement Plan for U.S. Employees, was approved in February, 2002 and the wife was informed that she would receive a monthly benefit of $3,104.40.

In a letter dated September 19, 2012, the wife was informed that the $3,104 monthly benefit was determined upon the husband's interest in both a Qualified and Non-Qualified plan, and that due to IRS regulations an amended QDRO had been required to specifically include The Hartford Excess Pension Plan II - Final Average Pay, a non-qualified plan, to maintain the monthly benefit of $3,104. As the Plan no longer accepted QDROs to divide the non-qualified plan, wife, the Hartford would only pay the wife the benefits from the qualified plan, which would reduce the benefit to $1,892.89 per month.

A subsequent or amended QDRO was not able to be submitted to the plan to be approved regarding The Hartford Excess Pension Plan II and the husband has been receiving the entire benefit since June, 2012. In 2017, the husband received $40,510.56, or $3,375.88 per month, from The Hartford Excess Pension Plan II. The issue in controversy was whether the Hartford Excess Pension Plan II was included in The Hartford Pension Plan to be divided between the parties as provided in the Judgment.

The husband's expert witness was Todd Solomon, Phd, the head of McDermott Will and Emery's Benefits, Compensation and Employment Practice Group. He indicated that The Hartford Excess Pension Plan II was a non-qualified plan that supplemented the pension benefit of the husband, and as a non-qualified plan it was not necessarily subject to a qualified domestic relations order. It was at the discretion of The Hartford as to whether or not to fund The Hartford Excess Pension Plan II. If funded, it would supplement the pension benefit of its participants. The husband argued, among other things, that the Judgment did not specifically award the wife an interest in the non- qualified plan known as The Hartford Excess Pension Plan II and that she had bargained away her interest. However, the Judgment did not specifically award it to the husband only, and there was no wording to indicate that the wife had waived her interest.

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As admitted by all parties, the Judgment did not precisely identify the exact names of the retirement assets enjoyed by the husband through his employer, The Hartford. Considering that the husband was a Senior Pension Consultant for The Hartford, it was surprising he did not correctly identify those interests. The phrase "Hartford Pension Plan" was obviously a generic term, as it did not precisely and exactly identify the plan, to include any pension benefits from either a qualified or non-qualified plan. The exact and precise name of the plan(s) was not an important fact for the parties at the time of the Judgment, but rather that the "retirement benefits" of the husband were to be divided. The Excess Pension Plan II was a "retirement benefit" of the husband as it supplemented his monthly pension benefit and was therefore included within the Judgment. The amount received was dependent upon the amount realized from The Hartford Fire Insurance Company Retirement Plan for U.S. Employees. Whether they were qualified or non-qualified plans was irrelevant. All retirement benefits were divided between the parties whether it was a qualified or non-qualified plan. Both parties agreed to this division of the retirement benefits.

The husband was a participant in The Hartford Excess Pension Plan II during the marriage. The wife was not a participant as she was the spouse, not the employee. While it may have had no ascertainable value because it was not funded, and no guarantee that it would ever be funded, it was still a right that could vest in the future.

The Judgment contemplated that the pension rights of the husband were derived from qualified and possibly non-qualified plans. The Judgment specifically allowed the court to retain jurisdiction to divide non-qualified plans if a qualified domestic relations order was not effective in dividing the interest. As described by Mr. Solomon, this was a "top hat" plan, one that supplemented/augmented the benefits of the qualified pension plan. Although the husband believed that he could not pay the wife directly because it would somehow violate the terms of the non-qualified plan, Mr. Solomon did not back up this position. Instead, he stated that the parties could agree to pay it out some other way than directly from the plan. The husband further argued that in order to receive benefits, the wife had to file a claim with The Hartford. This position had no merit. The wife was not a party to the contract that created The Hartford Excess Pension Plan II and therefore had no standing to file a claim. Only employees could be participants. Her rights flowed from the agreed Judgment, which she was seeking to enforce.

The Judgment provided for the division of the non-qualified plan if it was not subject to a qualified domestic relations order, and allowed the court to retain jurisdiction to effectuate that division. The Judgment expressly contemplated that there were non-qualified plans that were to be divided between the parties. The aforesaid assets were to be divided pursuant to Qualified Domestic Relations Orders if said orders were acceptable to the plans. In the event such orders were not acceptable the court reserved jurisdiction regarding the division of these assets. Laches does not apply. The wife had timely brought her motion. There was no harm to the husband in granting the relief, the enforcement of the agreed Judgment. Barring the wife would have resulted in a large financial windfall for the husband.

The husband argued that the wife waived her interest in The Hartford Excess Pension Plan II because she had entered into several agreed orders subsequent to the Judgment wherein she agreed that all property issues had been resolved between the parties. The husband relied on the

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agreed orders of June 10, 2005, and October 30, 2008, and the fact that the wife withdrew her motion of November 22, 2010 on February 14, 2011. The wife did not specifically waive any interest in the husband's retirement benefits. The wife did not learn until 2012 that there was a problem with her receiving the monthly amount of $3,104 pursuant to the 2002 qualified domestic relations order. She had never taken the position that she was not entitled to those funds, nor had she agreed that all property issues had been resolved after 2012. The wife's request for sanctions was denied. The wife's request to receive her share of The Hartford Excess Pension Plan II as provided by the agreed Judgment was granted.

An Amended QDRO was to be prepared relative to The Hartford Fire Insurance Company Retirement Plan for U.S. Employees to provide that the wife's monthly benefit was to increase by the amount of $1,200.31. This was 50% of the marital monthly portion of The Hartford Excess Pension Plan II as provided in the agreed Judgment. Further, she was to receive 35.56% (50% of the marital portion (71%) of the survivor benefits as agreed to in the Judgment) of any pre or post retirement survivor benefits. Should a QDRO not be possible as provided above, then the husband was to pay directly to the wife the sum of $1,200.31 per month and maintain a life insurance policy, or name her as a beneficiary of his estate or other asset, with a death benefit of $250,000.

Until the QDRO was enacted, the husband was to pay directly to the wife the sum of $1,200.31 effective May 1, 2018. For the time period of June, 2012 until April, 2018, the husband owed $84,021.90 (70 months x $1,200.31). This sum was to be paid to the wife on or before June 1, 2018. The wife was granted leave to file a fee petition within 21 days. Subsequent to the ruling by the court, the husband filed a motion for the court to reconsider its ruling.

Comments of Attorney Terry Slaw:

"The wife filed two petitions, one a Motion for Entry of a QDRO and a Motion for Division of Pension Plan Benefits and for Sanctions pursuant to Illinois Supreme Court Rule 137. The concurrent Petitions were heard for trial by the court on October 31, 2017, November 6, 2017, November 8, 2017, November 13, 2017, and it finished up on March 19, 2018. Both sides filed written closing arguments and on April 26, 2018, the court entered a written order. Counsel for the husband believes that the trial court had no legal authority to rule in favor of the wife regarding her two Petitions to divide the Hartford Excess Pension Plan II pursuant to the terms set forth in the December 21, 2000 Judgment for Dissolution. This involved interpretation of a Judgment over seventeen years old. That at no time or place was the Hartford Excess Pension Plan II specifically mentioned in the Judgment. It is the husband's position that the court incorrectly entered judgment in favor of the wife to divide the Hartford Excess Pension Plan II because 750 ILCS 5/510(b) reads as follows: the provisions as to the property disposition may not be revoked or modified unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

It was the husband's position at trial that the two Petitions filed by the wife were to reopen a Judgment which is over eighteen years old. In argument, the husband states that for the court to have proper legal authority to modify a Judgment or reopen a Judgment, some eighteen years after it was entered, the proper law of the State of Illinois requires that a movant who seeks to modify or vacate an order after entry of Judgment, which is in excess of 30 days old must file a Petition to Modify pursuant to 735 ILCS

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5/2-1401. At no time did the wife, through counsel, file a Motion to Vacate or modify the December, 2000 Judgment. Therefore, the trial court had no legal authority to modify the December 21, 2000 Judgment order to now include the Hartford Excess Pension Plan II. In support of this position, the trial court on reconsideration needs to look at two cases: In re Marriage of Redmer, 111 Ill.App.3d 317 (2nd dist. 1982); and, In re Marriage of Hubbard, 215 Ill.App.3d 113 (2nd dist. 1981).

The second point on reconsideration was that the court's April 26, 2018 order, ordering the husband to direct Hartford to approve a QDRO is illegal in possibility and therefore void as a matter of law. In support of that, we argue that the Hartford Excess Pension Plan II is a non-qualified, unfunded, "top hat" excess retirement benefit. That such a plan is incapable of being divided by a QDRO as a matter of law. That the husband presented an expert witness, Todd Solomon, who testified on November 13, 2017 that such a non-qualified, unfunded, "top hat" plan is not and was not subject to be divided by a QDRO. That the testimony went in unrebutted. In our Motion to Reconsider, we argue that counsel for the wife acknowledged that that Hartford Excess Pension Plan II is not subject to a QDRO. Based on this, we believe that the April 26th order, which directed a QDRO be entered, is void as a matter of law and should be reconsidered.

Finally, the court appears to give an alternative ruling that in the event the order is not subject to be divided by QDRO that the husband shall pay directly to the wife $1,200.31 per month plus an arrearage of $84,021,90. We believe this is also void as a matter of law. It is our position that the trial court had no legal authority to enter this agreement. When the judge entered this alternative resolution, he did not take into consideration that the husband pays taxes on this so the sums of monies ordered are in essence, pre-taxed dollars.

Comments of Attorney Cynthia Petersen:

Part of the problem presented in this matter was the language used in the parties' Judgment for Dissolution of Marriage entered on December 21, 2000. Although it provided for all of the husband's retirement benefits to be equally divided by the parties, the language was not specific enough regarding the names of the plans and what the wife was to receive for each of the types of retirement benefits. A further complication was the information provided regarding the husband's pension plan in the discovery process, because although the Hartford sent information pursuant to a subpoena, the information referred to the benefits as "The Hartford Retirement Plan" and as discovered by the wife in 2012, that included both the qualified and the non-qualified benefits without stating the names of the plans for either benefit.

Another complicating issue was the fact that the wife received a cash settlement in the Judgment, but the Judgment did not specify why she received it. In the current litigation, the husband argued that the cash settlement was to pay the wife for her portion of his non-qualified pension benefits as an "offset," which resulted in the non-qualified pension plan benefits being awarded to him alone. The wife argued that the cash settlement was to pay her for her portion of the bonus the husband had received during the divorce litigation which he had not previously paid to her.

The last problem arose as a result of the Hartford approving the initial Qualified Domestic Relations Order ("QDRO") which was drafted by the wife's attorney with the intent to divide all of the husband's pension benefits, then determining years later that they had made an error, and the QDRO could not be processed as previously done so as to include the benefits from both the qualified and the non-qualified plan because the non-qualified plan was not specifically listed in

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the QDRO, and unfortunately, at the time the error was discovered and the wife attempted to correct the problem, the plan no longer accepted QDROs to pay out any benefits directly from the plan to an alternate payee.

Wife argued in the present litigation that case law provides for "triangular payment" if a plan will not pay the alternate payee directly, meaning if a person has the right to receive monies from the plan because the benefits accrued during the parties' marriage, then the court can order the participant to pay the other party from the benefits paid to him/her from the plan. (See In re the Marriage of Menken (334 Ill.App.3d 531, 534, 778 N.E. 2d 281, 297 - 8 (2nd Dist. 2002.) The Petitioner's expert witness in the current litigation only corroborated that position. The husband was a participant in The Hartford Excess Pension Plan II during the marriage. As he is being paid this benefit from the plan, and the plan will not pay it directly to the wife, this court can order the husband to pay it from his benefit to the wife.

The court in this matter has determined that the wife's position was the correct one. The husband has now filed a motion asking the present trial court to reconsider that ruling. However, in this attorney's opinion, the motion to reconsider, as well as the arguments of the husband during the present litigation, have no merit as the benefit was clearly partially accrued during the parties' marriage and has become fully realized as a monthly benefit to the husband.

Comments from the Publisher:

It is worth noting that Cynthia Petersen's niche is dividing retirement plans, litigating such and being an expert witness in retirement plan division litigation.

Appellate Review:

Award of $21,129,655 Plus Permanent Maintenance of $30,000 Monthly

In Volume 7, Issue 9 of the Digest, an article published under the title "Award of $21,129,655 Plus Permanent Maintenance of $30,000 Monthly" was published. On May 31, 2018, the Second District Appellate Court issued its opinion, affirming the trial court's decision of Judge Neal W. Cerne. 2018 IL App (2d) 160973. To read the entire Opinion, visit www.illinoisdivorcedigest.com.

Following a trial in the circuit court of DuPage County, the court entered a Judgment dissolving the marriage of the husband and wife. As part of that order, the court sanctioned one of the wife's attorneys, Howard Rosenfeld, in the form of a $50,000 judgment against him and in favor of the husband. The wife appealed, challenging the court's factual findings as well as numerous rulings both prior to and during trial. Rosenfeld separately appealed the sanctions entered against him.

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