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ARTICLE OF THE MONTH

Unallocated Family Support Is Alive and Well

by Jay A. Frank

Structuring maintenance and child support as an award of "unallocated family support" can produce favorable tax consequences as the entire amount is deductible for tax purposes. For a high bracket tax payer in a tax bracket of, say 35%, the real cost of $100 of unallocated family support is $65.00. This allows for creative solutions in connection with support issues.

But, is there statutory or case law authority for unallocated family support? Fortunately, the answer is yes — there is authority on both levels.

Section 504 of the Illinois Marriage and Dissolution of Marriage Act, dealing with maintenance, lists a number of factors a court may consider in fashioning an award. Specifically, subsection (a) (12) lets the court consider "any other factor that the court expressly finds to be just and equitable". This catch all provision is broad enough to authorize the court to consider tax consequences and the benefit of combining a maintenance payment with a child support payment. This conclusion is reinforced by subsection (b-5) which refers to "any unallocated maintenance and child support obligation".

There are also a number of cases which address and expressly approve of an award of deductible unallocated family support. The most often cited case is the 1982 case of *In Re Marriage of Belluomini*,104 Ill.App.3d 301, 432 N.E.2d 958 (1st Dist. 1982) where, in upholding the unallocated award, the court stated "the trial court is allowed, even encouraged, to consider tax consequences in making

its determination. 104 Ill.App.3d 301,307,432 N.E.2d 958, 963.

The *Belluomini* decision was most recently cited and approved in the 2012 case of *In Re Marriage of Romano*, 2012 Ill.App.(2d) 091339, 968 N.E.2d 115 (2d Dist. 2012), with the court specifically noting that an unallocated award "may be made under the act". 968 N.E.2d 115, 152. There are also several cases that even predate *Belluomini* (see, e.g. *In Re Marriage of Schuppe*, 69 Ill.App.3d 200, 387 N.E.2d 346 (2nd Dist. 1959); *In Re Marriage of Bellow*, 94 Ill.App.3d 361,419 N.E.2d 924 (1st Dist. 1981)). There are also further cases after Belluomini (see, e.g. *In Re Marriage of Murphy*, 117 Ill.App.3d 649, 453 N.E.2d 113 (3rd Dist. 1983); *In Re Marriage of Sheber*, 121 Ill.App.3d 328, 459 N.E.2d 1056 (1st Dist. 1984)).

So, the family law practitioner should have no problem in utilizing an unallocated award and its attendant tax benefits in crafting an order for support. There is ample authority to sustain this approach.

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► ADOPTION

Aunt Fails to Prove Mother's Unfitness.

In re: the Adoption of H.B., a Minor, (GINA MARIE SHREVE, Petitioner-Appellant, v. AMY JO GILLEN, SAMUEL DOUGLAS BAKER, UNKNOWN FATHER, and ALL WHOM IT MAY CONCERN, Respondents-Appellees). September 27, 2012, Ill.App.Ct. 4th District, No. 4-12-049, 2012 IL App (4th) 120459, Arnold F. Blockman, trial judge.

Amy Jo was the mother of H.B. Samuel was the father. Karen was Samuel's mother and also the mother of Gina. Gina was H.B.'s paternal aunt, who had temporary joint custody of H.B. along with Karen since September 2005.

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Gina filed a petition for adoption of H.B. (born September 25, 2001). Gina alleged Amy Jo was unfit for various reasons under the Adoption Act. Gina appealed the trial court's finding she failed to prove Amy Jo unfit. The appellate court affirmed.

1.) Gina first argued the trial court erred in finding Amy Jo did not intend to forego her parental rights because it looked at impediments occurring outside the 12-month period allowed by statute.

2.) Section 1(D)(n) of the Act provides for a finding of unfitness where there is evidence a parent intends to forego his or her parental rights "as manifested by his or her failure for a period of 12 months: (i) to visit the child, (ii) to communicate with the child or agency, although able to do so and not prevented from doing so by an agency or by court order, or (iii) to maintain contact with or plan for the future of the child, although physically able to do so." 750 ILCS 50/1(D)(n) (West 2010).

3.) In order to rebut a finding of unfitness for intent to forego parental rights, any evidence submitted explaining why the parent has had no contact with the child must have occurred within the 12 months following the parent's last contact with the child. This 12-month line of demarcation begins with the parent's last contact or communication with the child because any impediments preventing future contact must have necessarily occurred during or after the last contact or communication with the child.

In this case, the relevant period of review was September 23, 2009, through September 22, 2010. To the extent the trial court considered evidence occurring prior to September 23, 2009, the trial court erred. However, the trial court's determination that Amy Jo did not intend to forego her parental rights was not manifestly erroneous.

4.) Gina next asserted the trial court erred by considering alleged impediments which occurred outside of the "3 months next preceding the commencement of the Adoption proceeding" to excuse Amy Jo's unfitness for desertion.

5.) Section 1(D)(c) provides for a finding of unfitness where the parent deserts the child "for more than 3 months next preceding the commencement of the Adoption proceeding." Desertion connotes conduct which indicates an intention to permanently terminate custody over the child while not relinquishing all parental rights. Thus, the subjective intent of a respondent is a proper consideration.

6.) While Amy Jo had not proactively attempted to regain custody of H.B., this was not proof she intended to permanently relinquish custody.

7.) Gina next contended the trial court should have found Amy Jo failed to maintain a reasonable degree of interest, concern, or responsibility as to H.B.'s welfare.

8.) In determining whether a parent has failed to maintain a reasonable degree of interest, concern, or responsibility as to a child's welfare, the trial court must examine the parent's conduct concerning the child in the context of the circumstances in which that conduct occurred. A trial court may consider the parent's difficulty in obtaining transportation to the child's residence, the parent's poverty, the actions or statements of others hindering or discouraging visitation, and whether the parent's failure to visit the child was motivated by a need to cope with other aspects of his or her life or by true indifference to, and lack of concern for, the child. The trial court must examine the parent's efforts to communicate with and

show interest in the child, not the success of those efforts.

Although the evidence was closely balanced on this issue it was not clearly evident Amy Jo failed to maintain a reasonable degree of interest, concern, or responsibility as to H.B.'s welfare.

9.) Last, Gina asserted the trial court's finding Amy Jo was not habitually addicted to drugs was against the manifest weight of the evidence.

10.) Habitual drunkenness or addiction to drugs, other than those prescribed by a physician, for at least one year immediately prior to the commencement of the unfitness proceeding is a ground for unfitness. Evidence of indulgence without intermission is not necessary to prove addiction. It is sufficient to show that a person has demonstrated an inability to control his or her habitual craving.

Gina failed to prove Amy Jo had a habitual addiction to drugs. Amy Jo participated in drug treatment programs and continued to attend AA and NA meetings. At the time of the fitness hearing, she had been clean for seven months. Thus, the trial court's determination Amy Jo is not unfit under this ground was not against the manifest weight of the evidence.

► CHILDREN

Father Overcomes any Presumption in Favor of Mother as the Primary Caregiver. Sole Custody to Father, Affirmed.

IN RE: Marriage of LEANNA A. BEILER, n/k/a LEANNA A. BECK, Petitioner-Appellant, and DONALD L. BEILER, III, Respondent-Appellee. September 13, 2012, Ill.App.Ct. 4th District, No. 4-12-0406, 2012 IL App (4th) 120406-U, Thomas E. Little, trial judge. Rule 23.

Leanna appealed from the trial court's child-custody decision awarding custody of the parties' two minor children to Donald. The appellate court affirmed.

1.) The trial court separately identified and analyzed the relevant statutory factors, finding, in summary, as follows:

> "The court finds that [Leanna] has demonstrated, by her actions, an unwillingness to place the needs of her children above her own interests and desires...As to [Donald], the court finds that while it is true that he spends a significant portion of his time working, he has credibly testified to the arrangements that he has made to provide for the proper care of the children while he is away at work. Perhaps most importantly, the evidence clearly showed that he has, by his actions, placed the interests of his children above his own interests...Therefore, the court finds that it is in the best interests of the children for custody to be awarded to Donald, subject to Leanna's right of reasonable visitation."

2.) Leanna argued the trial court should have awarded her custody of the children when she had been the primary caretaker and where the children had lived with her since separation. She claimed that in the interests of "stability and continuity," custody of the children would be better with her. She relied upon the "absence of change" definition of stability as a basis for her argument. See *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 410 (1994) (" 'Stability' is also used in the sense of continuity, the absence of change.") Indeed, many child-development experts believe interrupting a child's bonded, loving, and continuous relationship with one parent permanently harms the child. *Wycoff*, 266 Ill. App. 3d at 410. However, there is another definition of "stability." "Some decisions where there is quiet." *Wycoff,* 266 Ill. App. 3d at 410. This latter definition is the one the trial court applied to this case.

3.) The trial court noted three major concerns regarding Leanna's conduct: (1) she spent a significant amount of time away from the children; (2) she demonstrated a lack of judgment by leaving the children unattended or unsupervised; and (3) she and her family had not demonstrated a willingness to encourage the children's close relationship with Donald and his family. Evidence presented at trial sufficiently supported the court's findings. Several witnesses testified to incidents that presented valid concerns for the safety and well-being of the children when in the care of Leanna and/or her parents. Testimony regarding (1) the children being unattended in vehicles or unsupervised outside, (2) the development of Taylor's severe diaper rash, (3) the incident when the maternal grandmother "chased" Donald's vehicle with the children inside, and (4) Leanna's habitual practice of taking Hayley to school late amply supported the trial court's judgment.

The trial court found no safety concerns relating to Donald's or his parents' care of the children.

4.) The fact the children were displaced every other night with their alternating sleeping arrangements between their maternal grandparents' home and Leanna's home further supported the trial court's decision. Although it was admirable that Leanna relied upon her parents, rather than non-family members, to provide care for the children, the evidence suggested the grandparents were the primary caregivers, not Leanna. As the trial court noted, Leanna "has demonstrated, by her actions, an unwillingness to place the needs of her children above her own interests and desires." Her decision to engage in a course of conduct that caused her to spend a great deal of time away from her children could not be condoned or support an award of custody. Further, the fact that Leanna, (1) brought a boyfriend into the children's lives, (2) made negative comments to the children about Donald, and (3) refused to provide clothes to Donald during weekend visitation, suggested a lack of maturity and a lack of concern for the children's well-being. The court found award of custody to Donald, given his lifestyle, attitude, and support system, resulted in a healthier environment for the children.

5.) Apparently, the trial court found Donald's testimony more credible regarding his mental health. Donald denied he had thoughts of suicide, attempted to harm himself, or feared harming the children, as Leanna had testified. He and his parents testified that he had difficulty adjusting to losing his wife and children, but not to the extent as suggested by Leanna. Donald's mental health was not a stated concern in the trial court's custody determination. There was no error on this basis.

6.) The evidence presented did not so overwhelmingly favor Leanna as to warrant reversal of the trial court's custody determination.

Father's Income Imputed to Child Support Obligation Because his Termination was Voluntary. Dissent Filed.

IN RE THE MARRIAGE OF MARIA E. CUPI, Petitioner-Appellee v. CHRISTOPHER M. CUPI, Respondent-Appellant. October 9, 2012, Ill.App.Ct. 3rd District, No. 3-11-0590, 2012 IL App (3d) 110590-U, Jerelyn D. Maher, trial judge. Rule 23.

Christopher appealed the trial court's custody judgment awarding Maria sole custody of the parties' two minor children. Christopher also alleged that the trial court erred in establishing child support based upon imputed income from his prior employment. The appellate court affirmed.

1.) The trial court considered the factors in section 602 of the Dissolution Act and there was evidence supporting the trial court's factual findings.

Christopher's argument for custody was simply a request to reweigh the evidence, which the appellate court will not do. *In re Marriage of Pfeiffer*, 237 Ill. App. 3d 510, 513 (1992). It was not dispositive that the GAL recommended that Christopher be awarded sole custody.

2.) Christopher also argued that the trial court abused its discretion in "imputing his Caterpillar income for child support." Because Christopher's own conduct of failing to control his staff was the reason he was terminated, it was appropriate for the trial court to impute Christopher's previous Caterpillar income when determining his child support obligation.

3.) In order to impute income, a court must find that one of the following factors applies: (1) the payor is voluntarily unemployed; (2) the payor is attempting to evade a support obligation; or (3) the payor has unreasonably failed to take advantage of an employment opportunity. If none of these factors are in evidence, the court may not impute income to the noncustodial parent. See *Gosney v. Gosney*, 394 Ill. App. 3d 1073, 1077 (2009)

4.) Christopher admitted he was fired because he did not have control over his staff. *In re Marriage of Imlay*, 251 Ill. App. 3d 138 (1993) was dispositive as to the question of whether Christopher's termination and subsequent unemployment was voluntary or involuntary.

In *Imlay*, the respondent was fired from his sales job after getting a DUI and then sought a reduction in his support obligations. Even though the change in employment had been 'technically involuntary,' the *Imlay* court found many of the events underlying respondent's discharge to be within respondent's control, and denied the reduction in child support.

In light of *Imlay* and Christopher's own admission, Christopher was voluntarily unemployed. Accordingly, the trial court acted within its discretion in imputing his previous Caterpillar income when determining his child support obligation.

5.) As an alternative basis to affirm, the appellate court noted that Christopher was fired from a job paying him $90,000 a year. His subsequent employment search consisted of approximately one hour a week, which resulted in no in-person interviews. He then began working for his father for $32,000 a year. On February 16, 2011, Christopher testified that he had not applied for any jobs over the previous six months. Considering the totality of the circumstances, Christopher was attempting to evade his support obligation.

JUSTICE HOLDRIDGE, concurred in part and dissented in part:

> "The holding in *Imlay* does not stand for the proposition that a single act of poor performance which results in discharge renders that discharge "voluntary." The majority's holding in the instant matter would render any terminations for even one infraction "voluntary" and would, in effect, turn every employment termination into a purposeful attempt to evade a child support obligation. Such an arbitrary and capricious conclusion is not supported by the facts in this case and does not comport with the goal of preventing a payor from "purposefully" evading a child support obligation.

Income Tax Refunds Properly Considered in Net Income to Determine Child Support.

IN RE MARRIAGE OF RANDALL EUGENE FOUTCH, Petitioner-Appellant, and JOYCE ANN FOUTCH, Respondent-Appellee. November 5, 2012, Ill.App.Ct. 5th District, No. 5-11-0316, 2012 IL App (5th) 110316-U, Brian D. Lewis, trial judge. Rule 23.

Randall appealed an order determining an arrearage in child support for the period 2002 through 2010. The amount determined for that period of time was $32,647.54, based upon the trial court's determination that an excessive amount of federal income tax was withheld from Randall's paycheck which resulted in substantial income tax refunds. The appellate court affirmed.

1.) Joyce argued that Randall had excessive federal income tax withheld yielding a lower net and resulting in a lesser amount of child support. Randall on the other hand argued that the actions he took as to his taxes and deductions were legitimate and, therefore, the refunds he received were appropriate and the trial court erred in considering them.

2.) Whether improperly calculated withholding results from a conscience effort to lessen the taxpayer's net income or whether the withholding results from uninflated appropriate deductions was not a relevant consideration in determining this question.

3.) If a noncustodial parent overwithholds, thereby overpaying income tax, that amount should be added back to his net income for the purposes of determining his support obligation pursuant to section 505(a) of the Act. *In re Marriage of Pylawka*, 277 Ill.App.3d at 733.

4.) The proper method of computing net income is to calculate the amount of Federal and State income tax which a person actually pays by taking into consideration the disparity that may exist between the amount of tax withheld, as reflected on a W-2 form, and the tax eventually paid. Thus, if the noncustodial parent overwithholds on his W-2, thereby overpaying his Federal income tax, the amount should be added back to his net income for purposes of determining his support obligation under section 505(a) of the Act. *Pylawka*, 227 Ill. App. 3d at 732-33.

5.) Rather than reviewing Randall's specific deductions, credits and exemptions, the controlling factor was whether Randall received a refund, not what that refund was based upon.

Removal to Michigan, Affirmed.

In re MARRIAGE OF JOY MARZ, Petitioner-Appellee, and STEVEN W. MARZ, Respondent-Appellant. September 24, 2012, Ill.App.Ct. 3rd District, No. 3-12-0476, 2012 IL App (3d) 120476-U, Joseph C. Polito, trial judge. Rule 23.

During their marriage, Joy and Steve had one child, Kayla, born on June 20, 2003. In May of 2011, Joy petitioned for dissolution of marriage. The parties suffered severe financial hardship during the marriage. According to the terms of the joint parenting agreement, the parties were awarded joint custody of Kayla, and Joy was named as the residential parent. The parties agreed that Kayla would be enrolled in New Lenox schools. Six weeks later, Joy petitioned for removal, seeking to remove Kayla to Michigan to pursue a well paying job. The trial court granted Joy's petition for removal.

On appeal, Steve argued that the trial court erred when it granted Joy's petition for removal. Steve claimed that the trial court (1) improperly concluded that the living conditions would be better in Monroe, (2) erred in finding that the schools in Monroe were comparable to the schools in New Lenox, and (3) failed to consider the loss of contact with New Lenox family and friends on Kayla's quality of life. The appellate court affirmed.

1.) The paramount question presented by a removal case is whether the move is in the best interests of the child. See 750 ILCS 5/609(a) (West 2010).

2.) In *In re Marriage of Eckert*, 119 Ill. 2d 316 (1988), the Supreme Court set forth five factors for courts to consider when deciding a removal petition: (1) "the proposed move in terms of likelihood for enhancing the general quality of life for both the custodial parent and the children"; (2) "the motives of the custodial parent in seeking the move to determine whether the removal is merely a ruse intended to defeat or frustrate visitation"; (3) "the motives of the noncustodial parent in resisting the removal"; (4) "the visitation rights of the noncustodial parent"; and (5) "whether *** a realistic and reasonable visitation schedule can be reached if the move is allowed."

3.) The *Eckert* factors are not exclusive, however, and the trial court should consider any and all relevant evidence in arriving at its decision. *In re Marriage of Collingbourne*, 204 Ill. 2d 498 (2003). No single fact or factor is controlling, and the weight to be given each varies from case to case. The trial court may further consider the potential of the relocation to increase the general quality of life for both the custodial parent and the child, including any benefit the child may receive from enhancement of the custodial parent's well-being. *Ford v. Marteness*, 368 Ill. App. 3d 172 (2006).

4.) Here, the trial court heard extensive testimony and properly considered the evidence in light of *Eckert* and its progeny. The proposed move would enhance the quality of life for both Kayla and Joy. The proposed visitation schedule was realistic and reasonable and preserved Steve's visitation rights to the greatest extent possible.

5.) Steve contended that the trial court improperly concluded that the Monroe schools were comparable to the New Lenox schools and failed to consider the loss of close contact with Kalya's friends and family in New Lenox. The evidence did not support either of these contentions.

6.) Joy testified that although she lived in Monroe, Kayla would most likely attend the Ida school district, a nearby school district with superior academic marks than those of the Monroe school district. Since Joy's other children attended school in Ida, the trial court did not err in comparing the New Lenox schools to the Ida schools.

Second, the trial court considered the loss of family and friends and determined that the loss would be minimal, given that Steve would have visitation with Kayla every other weekend. The trial court found that Kalya and Steve would still be able to maintain a close relationship with the 4½-hour drive.

► CIVIL PRACTICE

Evidentiary Hearing should be held before Finding that there was No Support Arrearage, Trial Court Reversed.

In re MARRIAGE OF JOHN FAIVRE, Petitioner-Appellee, and JODI FAIVRE, Respondent-Appellant. September 21, 2012, Ill.App.Ct. 2nd District, No. 2-12-0233, 2012 IL App (2d) 120233-U, Kevin T. Busch, trial judge. Rule 23.

Pursuant to the judgment for dissolution of marriage John was ordered to pay a percentage of his income as unallocated support. Jodi filed a petition for rule to show cause, alleging that John did not pay a percentage of his income as unallocated support. Without hearing evidence, the trial court found that there was no support arrearage owing from John to Jodi, and it dismissed the petition for rule to show cause.

Jodi appealed this finding in the absence of an evidentiary hearing. The appellate court affirmed the trial court's order dismissing the rule to show cause, but reversed that portion of the trial court's order finding that there was no support arrearage, and remanded the cause for an evidentiary hearing on that issue.

1.) Jodi maintained that, without hearing any argument or examining any relevant documents, it was impossible for the trial court to determine if John had "paid all amounts due." Jodi asserted that this was a disputed factual issue that the trial court could not possibly have ascertained without an evidentiary hearing.

2.) In *Gentile v. Gentile*, 87 Ill. App. 3d 311, 313 (1980), the court held that the failure to issue a rule was not final and appealable, as the petitioner was not precluded from filing a petition specifically requesting arrearage. Here, after it became clear that the trial court would not issue the rule to show cause, Jodi's counsel specifically asked for leave to amend the petition just to request arrearage relief. The trial court then simply found that there was no arrearage. Jodi was entitled to request the amendment of her petition to seek an arrearage.

3.) An evidentiary hearing is required if a disputed factual issue exists material to whether relief is justified. See *S.C. Vaughan Oil Co. v. Caldwell, Troutt, and Alexander*, 299 Ill. App. 3d 892, 898 (1998). Clearly, a factual dispute existed over whether John was in arrears. Whether or not there is an arrearage raises a factual issue requiring an evidentiary hearing.

4.) John cited *K4 Enterprises v. Grater, Inc.*, 394 Ill. App. 3d 307, 318 (2009), and *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 32 (2008), in support of his contention that Jodi waived her right to claim she was

denied an evidentiary hearing by failing to present an offer of proof. A proper offer of proof is the key to preserving a trial court's alleged error in excluding evidence. Here, however, the alleged error was not the trial court's denial of the admission of evidence, but the trial court's ruling on a factual issue without conducting a required evidentiary hearing.

Man Did Not Have Standing to Seek Parentage and Custody of a Child Adopted by his Former Fiancé.

See *In re PARENTAGE OF SCARLETT Z.-D.,* page 168.

► MAINTENANCE

Wife's Financial need was Irrelevant to determining whether a *De Facto* Marriage existed. Wife was in a *De Facto* Marriage, Trial Court Reversed.

In re MARRIAGE OF GERELYN PACIOLLA, Petitioner-Appellee, and JACK PACIOLLA, Respondent-Appellant. October 30, 2012, Ill.App.Ct. 1st District, No. 1-12-0028, 2012 IL App (1st) 120028-U, Samuel J. Betar, trial judge. Rule 23.

Jack appealed from the trial court's granting an extension of maintenance to Gerelyn and denying his motion to reconsider. On appeal, Jack contended that the trial court should have found that Gerelyn had entered into a continuing conjugal relationship and terminated maintenance on that basis. The appellate court agreed and reversed and remanded.

1.) Under section 510(c) of the Dissolution Act, unless otherwise agreed by the parties, a maintenance award is terminated upon the death of either party, the recipient's remarriage, or "if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis."

2.) A party seeking termination of maintenance based on the existence of a resident, continuing, conjugal relationship must show that his or her ex-spouse is involved in a *de facto* husband and wife relationship with a third party. Courts examine this issue by considering the totality of the circumstances, and in particular, the following factors: (1) the length of the relationship; (2) the amount of time the couple spends together; (3) the nature of activities engaged in; (4) the interrelation of their personal affairs; (5) whether they vacation together; and (6) whether they spend holidays together.

3.) In *In re Marriage of Susan*, 367 Ill. App. 3d 926 (2006), as here, the only factor that weighed against a finding of a *de facto* marriage was the fourth factor, the interrelation of financial affairs. A finding of a *de facto* marriage rests on consideration of the six factors set out above, with no one factor controlling. A distinction exists between consideration of the fourth factor, i.e., interrelation of financial affairs, and consideration of a recipient's financial needs, as the import of the fourth factor is not whether the new *de facto* spouse financially supports the recipient, but rather whether their personal affairs, including financial matters, are commingled as those of a married couple would typically be. Where the asserted ground for termination of maintenance is the existence of a *de facto* marriage, the goal is not to determine whether the relationship leaves the recipient financially secure, but rather to determine whether the relationship leaves the recipient effectively married.

4.) Here, as in *Susan*, all the factors, save for the fourth, supported a finding of a *de facto* marriage. The trial court granted continuation of maintenance due to the non-existence of the fourth factor, reasoning that the absence of this factor controlled because the purpose of providing maintenance is to attempt to have the recipient enjoy the standard of living enjoyed during marriage, because Gerelyn was "living hand to mouth," and because Jack had significantly more income. However, the trial court was mistaken in equating the fourth factor with a determination of financial need, as well as in giving that single factor dispositive weight. A recipient's financial need is irrelevant to determining whether a *de facto* marriage exists, and no one factor is controlling in making that determination. Looking at the totality of the circumstances, in light of all six factors, the trial court's finding that there was no cohabitation was against the manifest weight of the evidence.

MSA limited the Termination of Maintenance to either Party's Death. Husband's Request to Terminate based on Cohabitation or Remarriage, Denied.

IN RE MARRIAGE OF JENNIFER L. TOVO, Petitioner-Appellee, and JOSEPH R. TOVO, Respondent-Appellant. September 10, 2012, Ill.App.Ct. 2nd District, No. 2-11-1193, 2012 IL App (2d) 111193-U, Rodney W. Equi, trial judge. Rule 23.

Joseph and Jennifer were married on July 19, 1997. They adopted two children during their marriage. The parties divorced in January 2008. During the dissolution proceedings, Jennifer was represented by an attorney while Joseph was *pro se*. The MSA stated that Joseph represented that his gross income was $330,000, and it provided for $4,000 per month in child support. The agreement stated that the child support was less than the statutory guidelines "in part because of the maintenance Jennifer is receiving." The maintenance provision stated:

> "Joseph shall pay to Jennifer as and for maintenance the sum of $107,000.00 per year ($8,916.67) per month. Payments shall be made on the 1st day of each month following the execution of this Agreement, and on the first day of each successive month thereafter. Joseph's obligation to pay maintenance shall terminate upon Jennifer's death or on Joseph's death."

On August 7, 2010, Jennifer married Michael. Shortly thereafter, on August 12, 2010, Joseph filed a petition to terminate maintenance under section 510 alleging cohabitation.

The trial court denied Joseph's request to terminate maintenance ruling that under the language of the MSA, maintenance did not terminate upon Jennifer's cohabitation or remarriage. The trial court granted Joseph's alternative request, as plead in count II, to modify maintenance. It reduced maintenance to $4,000 per month retroactive to September 1, 2010. Joseph timely appealed. The appellate court affirmed.

1.) In *Rosche* (163 Ill. App. 3d at 308 (1987)), the MSA stated that maintenance would be nonmodifiable except in specified circumstances, which included " 'by

operation of law.' " The appellate court held that this phrase included the section 510 factors. Joseph argued that all three of section 510(c)'s termination factors were implied terms of a MSA unless they are clearly and specifically excluded.

Joseph recognized that a case from the second district, *In re Marriage of Arvin*, 184 Ill. App. 3d 644 (1989), was contrary to his position. There, the parties' MSA stated: " 'The husband agrees to pay to the wife as and for maintenance the sum of Two Hundred Dollars ($200.00) per month. The parties agree that the maintenance provided for herein shall be terminable upon the wife's remarriage or upon the wife's death.' " *Id*. at 646. The husband thereafter sought to terminate maintenance based on the wife's conjugal cohabitation. The trial court found that the wife had engaged in conjugal cohabitation, but it ruled that it was not a ground for termination of maintenance because the MSA provided for termination only in the event of the wife's death or remarriage.

The appellate court agreed reasoning that because the agreement stated that the maintenance obligation was terminable upon the wife's death or remarriage, the "omission of conjugal cohabitation as a condition for termination indicates that the parties did not intend to have this statutory condition apply."

2.) Section 510(c) clearly allows the parties to supercede, by agreement, the statutory termination factors. See also *In re Marriage of Kozloff*, 101 Ill. 2d 526, 534 (1984) (the provision "clearly enable[s] parties to enter into separation agreements which may call for maintenance payments beyond the recipient's remarriage").

3.) Consistent with *Arvin*, this language unambiguously limited the termination of maintenance to either party's death. Further, as stated, marital settlement agreements are construed like a contract. As in *Arvin*, Joseph's interpretation, which automatically incorporated all of the statutory terminating factors, would render the MSA's actual termination provision superfluous; the provision has meaning only if it is construed as limiting termination to either party's death.

4.) Contrary to Joseph's argument, the parties' termination provision cannot be explained away as a means "to comply with the Internal Revenue Code," which defines maintenance as payments where, among other things, there is no liability to make any payments after the payee's death. See 26 U.S.C. § 71(b)(1)(D) (2006).

A dissolution judgment is not always required to expressly provide for the payments to terminate upon the payee's death for it to be deductible for tax purposes. See *Johanson v. C.I.R.,* 541 F.3d 973, 977 (9th Cir. 2008). Moreover, the Internal Revenue Code's definition does not include the death of the payor, which the parties also listed, and the parties already stated that they intended for the payments to be "within the meaning and intent of the Internal Revenue Code ***."

5.) Joseph relied on *Sweders's* language that there is a strong presumption against provisions that could have easily been included in the agreement but were not (*Sweders*, 296 Ill. App. 3d at 922) to argue that the parties would have included the word "only" if they intended to limit the section 510(c) to just death. This argument was not persuasive as the language "Joseph's obligation to pay maintenance shall terminate upon Jennifer's death or on Joseph's death" was unambiguous even without the inclusion of "only."

Although Joseph argued that it was unbelievable that he would agree to permanent maintenance, such a provision was not facially absurd or inequitable considering that the agreement states that Joseph was earning $330,000 per year and allowed him to retain any funds from the sale or transfer of the business "DNJ."

6.) Joseph also raised his lack of representation in the dissolution proceedings, but his significant income and the report of proceedings made it apparent that he deliberately chose to proceed *pro se.*

► PARENTAGE

Standing, Statute of Limitations, and *Res Judicata* Bar Legal Father from Contesting Parentage.

In re: the Parentage of H.L.B., a Minor (HEATHER L. BOARD, Petitioner-Appellee, v. BRADLEY A. ENTRICAN, Respondent-Appellant, and THE DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES, Intervenor-Appellee). September 27, 2012, Ill.App.Ct 4th District, No. 4-12-0437, 2012 IL App (4th) 120437, Matthew L. Sullivan, trial judge.

Pursuant to a Department of Healthcare and Family Services (DHFS) administrative paternity order, Bradley was adjudicated the legal father of H.L.B. on April 18, 2001 after failing to appear for genetic testing. In 2004, Bradley filed a petition to determine parentage. The trial court in that case dismissed the petition on the basis of *res judicata*. In summer 2011, Bradley met H.L.B. for the first time. He then requested a DNA test for H.L.B. to which Heather consented. The test indicated Bradley was not the natural father. Bradley then filed a petition to establish the nonexistence of a parent-child relationship under section 7(b-5) of the Parentage Act. In response, Heather and DHFS each filed 2-619 motions for involuntary dismissal. The trial court granted the motions, finding that (1) Bradley did not have standing to file the action, (2) the action was barred by the running of the statute of limitations, and (3) the action was barred as a matter of *res judicata*. Bradley appealed. The appellate court affirmed.

1.) Section 7(b-5) references the presumptions set forth in section 5. "Section 5 contains four types of presumptions of paternity, two arising out of marriage (750 ILCS 45/5(a)(1), (a)(2) and two arising out of voluntary acknowledgments (750 ILCS 45/5(a)(3), (a)(4)." *People ex rel. Department of Public Aid v. Smith*, 212 Ill. 2d 389, 397 (2004). The presumptions are as follows:

(a) A man is presumed to be the natural father of a child if: (1) he and the child's natural mother are or have been married to each other, even though the marriage is or could be declared invalid, and the child is born or conceived during such marriage; (2) after the child's birth, he and the child's natural mother have married each other, even though the marriage is or could be declared invalid, and he is named, with his written consent, as the child's father on the child's birth certificate; (3) he and the child's natural mother have signed an acknowledgment of paternity in accordance with rules adopted by the Department of Healthcare and Family Services under Section 1017.7 of the Illinois Public Aid Code; or (4) he and the child's natural mother have signed an acknowledgment of parentage or, if the natural father is someone other than one presumed to be the father under this Section, an acknowledg-

ment of parentage and denial of paternity in accordance with Section 12 of the Vital Records Act.

2.) Bradley admitted section 5's marital presumptions did not apply. Bradley argued he should be considered to have signed an acknowledgment of parentage pursuant to § 5(a)(4) in that he signed an Agreed Order to be Bound by the Results of Genetic Testing, and then failed to appear for testing with the knowledge that his failure to appear would result in a default Administrative Paternity Order being entered.

3.) The Illinois Supreme Court, in *Smith*, held that section 7(b-5) should be narrowly construed, and a section 7(b-5) action may only be brought under the first two presumptions, the marital presumptions. Where the presumption of paternity arises out of a voluntary acknowledgment, section 7(b-5) does not apply. Instead, section 6(d) applies: "A signed acknowledgment of paternity entered under this Act may be challenged in court only on the basis of fraud, duress, or material mistake of fact." 750 ILCS 45/6(d) (West 2010).

4.) Even if section 7(b-5) applied, Bradley's nonpaternity claim violated the applicable statute of limitations. Section 8(a)(4) of the Parentage Act, which specifically refers to section 7(b-5), provides that actions to declare the nonexistence of paternity shall be barred if brought more than 2 years after the petitioner obtains actual knowledge of relevant facts.

Bradley argued that he obtained "actual knowledge" that he was not H.L.B.'s natural father only upon receipt of the DNA test results. Bradley dismissed his 2004 petition to declare nonexistence of paternity as "merely speculative," and pointed to the dictionary definition of "actual knowledge." However, section 8(a)(4) does not require knowledge of all facts, only "relevant" facts. The "actual knowledge of relevant facts" that triggers the two-year limitations period is not limited to the receipt of DNA test results.

5.) Under the doctrine of *res judicata*, a final judgment on the merits constitutes an absolute bar to any subsequent action involving the same claim, demand, or cause of action. The three requirements of the doctrine of *res judicata* are (1) a final judgment on the merits rendered by a court of competent jurisdiction, (2) an identity of cause of action, and (3) an identity of parties or their privies. Bradley did not dispute that the first and third requirements for the application of the doctrine of res judicata were satisfied.

6.) Bradley rejected the argument that the administrative order in 2001 and the dismissal of his 2004 petition in the trial court on the basis of *res judicata* are now *res judicata*. Bradley argued that the 2001 and 2004 petitions were petitions to determine parentage, while the present one was a petition to establish nonpaternity, and therefore *res judicata* did not apply

7.) Under the doctrine of collateral estoppel, findings of fact can be *res judicata* in a second action, even if there are separate causes of action. Accordingly, the doctrine's second requirement was satisfied and the action was barred.

Man did not have Standing to Seek Parentage and Custody of a Child Adopted by his former Fiancé.

In re PARENTAGE OF SCARLETT Z.-D., a Minor (JAMES R.D., Petitioner-Appellant, v. MARIA Z., Respondent-Appellee). August 30, 2012, Ill.App.Ct. 2nd District, No. 2-12-0266, 2012 IL App (2d) 120266, Timothy J. McJoynt, trial judge.

While James and Maria were engaged and living together, Maria went to Slovakia, where she was a citizen. Maria commenced the process for adopting an orphan, 3½ year-old Scarlett. During the year-long adoption process, Maria lived in Slovakia. James visited approximately five times. In 2004, Maria returned to the US with Scarlett, and the parties lived together with Scarlett as a family. The parties never married and James did not adopt Scarlett. James and Maria separated in 2008 and Maria moved out with Scarlett.

James sought custody, visitation and child support. After a trial, the trial court dismissed his claims. James appealed and the appellate court affirmed.

1.) Section 601(b) of the Dissolution Act provides that a custody proceeding may be commenced by a parent or by a person other than a parent but only if the child is not in the physical custody of one of his parents. The Illinois Supreme Court has interpreted section 601(b)(2) as a standing requirement. *In re R.L.S.*, 218 Ill. 2d 428, 434-35 (2006).

2.) Section 2 of the Parentage Act of 1984 provides that a parent and child relationship means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. In the context of a nonparent seeking custody under section 601(b)(2) of the Dissolution Act, standing is a threshold issue that the trial court must decide before proceeding to a best-interests determination.

3.) James failed to address the threshold issue of standing in the pleadings under either the Dissolution Act or the Parentage Act of 1984. Accordingly, James' waiver argument had no merit.

4.) James lacked both statutory standing on the facts and common-law standing because the equitable parent doctrine is not recognized in Illinois. The doctrine of *parens patriae* also failed to give James standing because this emergency power is considered extraordinary and is not intended as the basis of jurisdiction for general custody disputes between parents and others.

5.) The factors necessary to prove *equitable estoppel* are (1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other person intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof.

6.) *Equitable estoppel* is available only if a party has relied upon another party's misrepresentation or conceal-

ment of a material fact. James was aware at all times that he was not Scarlett's biological father, that the Slovakian adoption did not pertain to him, and that formal adoption in Illinois would be necessary. By his own testimony, Jim was clearly aware that he had no legal parent-child relationship with Scarlett. Maria made no misrepresentations of fact as to James' legal status in relation to Scarlett.

7.) James provided no apposite Illinois case law recognizing common-law standing to petition for same. Thus, assuming *arguendo* that the relevant statutes did not supplant the common law, there simply was no Illinois common law to support James' position.

► PROPERTY

Aggregation of Shares of Stock into a Single Certificate Did not Transmute Non-Marital Shares into Marital Property.

IN RE MARRIAGE OF PHILLIP C. SEEGER, Petitioner and Counterrespondent-Appellee, and COLLEEN A. SEEGER, Respondent and Counterpetitioner-Appellant. September 13, 2012, Ill.App.Ct. 2nd District, No. 2-11-0325, 2012 IL App (2d) 110325-U, David P. Brodsky, trial judge. Rule 23.

Colleen appealed claiming that the aggregation of the 211,650 of Medcor shares onto a single stock certificate, I-336, obliterated any distinction among them and, hence, transmuted any nonmarital shares into marital property. The appellate court disagreed and affirmed.

1.) Section 503(a) establishes a rebuttable presumption that "all property acquired by either spouse subsequent to the marriage" is marital property. A party can overcome this presumption only by a showing of clear and convincing evidence that the property falls within one of eight exceptions listed in section 503(a). Property acquired before marriage constitutes one of those exceptions.

2.) The 155,400 shares of Medcor stock at issue here were acquired by Phillip before the marriage. However, even what would otherwise be nonmarital property may lose that classification if commingled with marital property. (Sections 503(c)(1) and (c)(2).)

3.) Colleen asserted that, by virtue of Certificate I-336, the 155,400 shares of Medcor stock claimed by Phillip to be nonmarital were "commingled" with the remaining, marital shares. Section 503(c) identifies two ways by which property from one estate may "los[e] [its] identity" by being commingled with property from another estate. The first clause of section (c)(1) speaks of commingling that occurs when one estate is "contribut[ed] *** into another resulting in loss of identity of the contributed property." 750 ILCS 5/503(c)(1). The second clause of section (c)(1) addresses "loss of identity" that occurs when "marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates."

4.) Colleen had not established that the 155,400 shares of Medcor lost their identity under either section 503(c)(1) or (c)(2). Colleen stated that she "takes no quarrel" with the observation in *Bombal,* cited by the trial court, that a "stock certificate is not the stock itself but is the evidence of the aliquot part of the holder's ownership in the stock" (*Bombal*, 367 Ill. at 117).

5.) On the notion that modifications to a stock certificate can impact ownership in the stock, and thus its classification under the Act, Colleen likened a stock certificate to a title deed: "[C]hanges made to the title of real estate can and do impact its characterization of the underlying asset as marital or non-marital property; e.g., non-marital real estate which was originally held in one spouse's name is transmuted to marital property when it is transferred into joint ownership."

6.) Colleen was correct that there was an analogy, but she misconceived its nature. A redesignation of ownership on a stock certificate, like a redesignation on a title deed, is (if valid) a self-executing measure that can shift the asset between estates of property; such a simple transfer circumvents any "commingling" analysis under section 503(c)(1) and (c)(2).

7.) No change to a stock certificate, aside from a redesignation of ownership, would evidence a transfer of shares to another. Any other modification would simply leave the aliquot portion(s) of company ownership with the present owner(s). Here there was aggregation, on a single stock certificate, of shares already owned by the same individual. Such an action did not, quite obviously, signify a change in ownership. If anything, it confirmed that all of those shares were owned by that individual. If the aggregation signified some underlying action, it would, of course, be relevant to property classification, yet at bottom it evinced nothing but perhaps a desire for documentary simplicity on the part of Phillip, Medcor, or both.

8.) Since Certificate I-336 represented a simple arithmetical operation, and no underlying action, there could be no "commingling" under either clause of section 503(c)(1).

9.) Where marital and nonmarital shares are simply combined (again, whatever that might look like absent a redesignation of ownership), as Colleen claimed occurred here, section 503(c)(1) provides no guidance as to which estate has contributed to which. Colleen's claim that the marital estate would have received the contribution was without any support in the text of section 503(c)(1). As for the second clause of section 503(c)(1), one cannot see how the combination of shares would constitute "newly acquired property" as there would be no "property" distinct from the shares themselves.

10.) Even if there was commingling that either constituted "contribution" under the first clause of section 503(c)(1), or resulted in "newly acquired property" under the second clause of 503(c)(1), there was no loss of identity. After Certificate I-336 was issued, it remained possible to "determine the origin" of the shares by tracing them from the original certificates from which they derived."

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