NORTH SUBURBAN BAR ASSOCIATION

N S B A N E W S

SPRING 2015

In this Issue:

President's Message 1-2
NSBA Judge's Night 3
List of NSBA Officers & Directors 4
From the Editor's Desk 4
NSBA Ethics CLE Seminar 5-6
Sponsors 7
2015 Gary Wild Honoree Profile 8
Upcoming Events 9
Article, "Bankruptcy and Divorce: One party's fresh start, another party's nightmare" 10-13
On the Tip of Your Tongue 14-21
NSBA Contact Info. 22

PRESIDENT'S MESSAGE – April 2015

By: Anna Morrison-Ricordati, President

Dear NSBA Members:

Spring is finally here!

First, thanks to everyone who attended the Gary Wild Dinner on March 10, 2015 honoring the YWCA Evanston/North Shore. Gail Vierneisel did a great job coordinating this event. Your tickets, along with our generous sponsors, allowed the NSBA to contribute over $1400 towards the YWCA's great work in the community! Wendy Dickson accepted on behalf of the YWCA and discussed the Legal Advocacy Program, including combined efforts with the NSBA to present CLE training for attorneys providing pro bono assistance for victims of domestic violence. This program is tentatively scheduled for June 3, 2015 (more details coming soon).

Our next big event is slated for April 21, 2015 and is the annual Ethics CLE at the Skokie Courthouse. The morning session, entitled "A More Civil Practice," addresses ethical considerations in civil cases. The afternoon session, entitled "It's Criminal: When Losing Your License is the Least of Your Concerns" addresses the possible criminal ramifications of ethical violations. Please RSVP to attend the morning ($45), afternoon ($45) or both sessions ($90 & lunch included). We will also be presenting an appreciation of service award to the Hon. Earl B. Hoffenberg at 12:30 pm. I hope to see you there!

And you won't want to miss Judges Night on May 14, 2015 at the North Shore Country Club. This year's honoree is the Hon. Sebastian Patti, who was elected to the Circuit Court of Cook County in 1996. Judge Patti served in the Child Protection Division and was the Supervising Judge in the Housing Section of the First Municipal Division, Circuit Court of Cook County from 1999 – 2003. The Illinois Supreme Court assigned Judge Patti to serve as a Justice on the Illinois Appellate Court, First District in August 2009. After serving, he returned to the Circuit Court of Cook County in 2010 and was assigned to General Chancery. In 2011, Judge Patti became the Presiding Judge Domestic Violence Division. We are excited to be honoring Judge Patti and hope you will join us for an evening of hour d'oeuvres, cocktails and celebration!

As always, your membership and participation in NSBA events is greatly appreciated. We couldn't do this without you!

Very truly yours,

Anna

"Be the change you wish to see in the world." M. Gandhi

NSBA JUDGE'S NIGHT

NORTH SUBURBAN BAR ASSOCIATION'S ANNUAL

Judge's Night

Honoring

Hon. Sebastian Patti

6:00-8:30PM May 14, 2015
NORTH SHORE COUNTRY CLUB
1340 GLENVIEW ROAD, GLENVIEW, ILLINOIS 60025

2013-2014 NSBA Officers & Directors:

Officers:

Anna Morrison-Ricordati, *President*
Ray Ricordati, III, *1st Vice President*
Molly Caesar, *2nd Vice President*
Rick Pullano, *3rd Vice President*
John Stimpson, *4th Vice President*
Michael Craven, *Secretary*
Vince Pinelli, *Treasurer*
Jan Weinstein, *Immediate Past President*

Directors:

Hon. Steven J. Bernstein
Brian Clauss
William Ensing
Barb Lusky
Ana Pontoga
David Pasulka
Paul Plotnick
Hon. Jesse G. Reyes
Robert A. Romanoff
Phil Witt

From the Editor's Desk:

Thanks to all those who were able to attend the NSBA events over the last several months (CLE seminar on Illinois Mortgage Foreclosure presented by Justice Jesse Reyes and the Gary Wild Dinner honoring YWCA Evanston). If you need CLE credit hours in ethics and you also want to attend a great program, I encourage you to register for the NSBA Ethics Seminar on April 21, 2015 (see pages 5 and 6 for details).

We can always use more law articles to be included in our newsletter, so please volunteer. If you have any new stories or information that you would like to include in the newsletter, please contact me at rlp@pullanolaw.com.

Thanks,

Rick Pullano

North Suburban Bar Association's Annual Ethics CLE Seminar

Part I: A More "Civil" Practice
(8:30 am – 12:15 pm)

Part II: It's Criminal! When Losing Your License Is The Least Of Your Concerns
(1:15 pm – 4:30 pm)

April 21, 2015
8:30am-4:30pm

Please be sure to join us at 12:30 pm for Presentation of the NSBA's Appreciation of Service Award to the Honorable Earl B. Hoffenberg

Skokie Courthouse
5600 Old Orchard Road
Skokie, Illinois 60077

RSVP: president@ilnsba.org

NSBA Ethics CLE Seminar
April 21, 2015

8:30 am – 9:00 am Registration/Check-In and Introduction

Part I: A More "Civil" Practice

9:00 am – 10:00 am ***Speaker***: Marci Rolnik Walker
Legal Director, Lawyers for the Creative Arts

Topic: Doing Good Work, Ethical Considerations for Pro Bono Attorneys

10:00 am – 11:00 am ***Speaker***: Katherine Erwin
Special Projects Director, Illinois Supreme Court Commission on Professionalism

Topic: Talking 'Bout My Generation: Professionalism in the Multigenerational Workplace.…

11:00 am – 11:15 am BREAK

11:15 am – 12:15 pm ***Speaker***: Representative
Center for Conflict Resolution (CCR)

Topic: Ethics in Mediation: Before, During and After

12:15 pm – 1:15 pm LUNCH (will be provided by NSBA)

12:30 pm Presentation of NSBA Service Award to the Honorable Earl B. Hoffenberg

Part II: It's Criminal: When Losing Your license is the Least of Your Concerns

1:15 pm – 2:15 pm ***Speaker***: Sharon Opryszek
Senior Litigation Counsel, Attorney Registration & Disciplinary Commission

Topic: Tweeting Poison: What's Trending In #DisciplinaryLaw And #SocialMedia

2:15 pm – 3:15 pm ***Speaker***: Mia Jigante
Risk Management Director, Dykema Gossett PLLC

Topic: Greed And The Herd Mentality: Examining the Rise and Fall of John Gellene and Others

3:15 pm – 3:30 pm BREAK

3:30 pm – 4:30 pm ***Speaker***: Sari Montgomery
Of Counsel, Robinson Law Group LLC

Topic: You Got "The Letter," Now What??: Tips on What to Expect and How to Best Respond to an ARDC Inquiry

THANKS TO OUR SPONSERS!!!

AMR LAW GROUP, LLC

Robert Romanoff

DANIEL O'BRIEN

Hon. Allen Goldberg

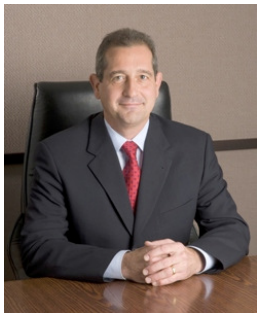
PAUL W. PLOTNICK

RP Law Offices of Richard L. Pullano P.C.

2015 Gary Wild Honoree:

The YWCA is the largest provider of abused women's shelters and domestic violence (DV) services in the country, serving over 500,000 women and children annually. In 1983, the YWCA Evanston / North Shore opened a shelter for battered women and their children, and created the DV Legal Advocacy Program (LAP) at the Skokie (District 2) Courthouse in 1996 to provide legal assistance to pro se victims of domestic violence seeking civil remedies through the Illinois Domestic Violence Act (IDVA).

September 9, 2014 **6:00-8:30 p.m.**	**2014-2015 Officers Installation Dinner, and presentation of Sanford Blustin Award to Terrence Hake** **Location: North Shore Country Club, 1340 Glenview Road, Glenview, Illinois 60025**
October 21, 2014 **6:00-8:30 p.m.**	**Dinner CLE - Hon. Martin Molz, "Discussion on Recent Developments in Illinois and Federal Law"** **Location: Happ Inn Bar and Grill, 305 Happ Road, Northfield, Illinois 60093**
November 18, 2014 **6:00-8:30 p.m.**	**Dinner CLE - William Ensing, "Shoestring Asset Protection: An Overview of Less Exotic Forms of Asset Protection"** **Location: Happ Inn Bar and Grill, 305 Happ Road, Northfield, Illinois 60093**
December 16, 2014 **6:00-9:00 p.m.**	**Holiday Party** **Location: Happ Inn Bar and Grill, 305 Happ Road, Northfield, Illinois 60093**
January 13, 2015 **6:00-8:30 p.m.**	**Dinner CLE - Eldon Ham, "Recent Issues in Sports Law"** **Location: Happ Inn Bar and Grill, 305 Happ Road, Northfield, Illinois 60093**
February 10, 2015 **6:00-8:30 p.m.**	**Dinner CLE - Justice Jesse Reyes, Topic to be determined** **Location: Happ Inn Bar and Grill, 305 Happ Road, Northfield, Illinois 60093**
March 10, 2015 **6:00-8:30 p.m.**	**Gary Wild Dinner - Honoree to be determined** **Location: to be determined**
April 21, 2015 **Time: TBD**	**Ethics CLE (6 hours) - Various Speakers, Topic to be determined** **Location: Skokie Courthouse, 5600 Old Orchard Road, Skokie, Illinois, 60077**
May 14, 2015 **6:00-8:30 p.m.**	**Judges Night** **Location: North Shore Country Club, 1340 Glenview Road, Glenview, Illinois 60025**
June 9, 2015 **6:00-8:30 p.m.**	**Annual Meeting/Elections** **Dinner CLE - Edward Moor, "Product Liability"** **Location: Happ Inn Bar and Grill, 305 Happ Road, Northfield, Illinois 60093**



Bankruptcy and Divorce:

One party's fresh start, another party's nightmare

By: David P. Pasulka, Molly E. Caesar, and Morgan A. Gay

Although the common convention is that bankruptcy provides a fresh start to debtors by allowing them to liquidate their assets to pay or reorganize their debts, it does have a multitude of consequences. Spouses, like creditors, can feel the weight of a debtor's financial decisions. The best way to protect your client is to ask yourself, what are the possible ramifications to a non-debtor spouse who wants to divorce a debtor spouse who is in the process of, or could eventually be, filing for bankruptcy? By understanding both the elements of bankruptcy law that affect family law and the elements of family law that affect bankruptcy law you can appreciate the affect they have on one another, which provides your client the tools to navigate the consequences of an ex-spouse filing for bankruptcy.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) made several changes to the Bankruptcy Code that protect non-debtor spouses.[i] Specifically, noteworthy changes were made to the treatment of domestic support obligations. Domestic support obligations are any debt incurred before or after a bankruptcy filing that is owed to or is recoverable by a spouse, former spouse, child or governmental unit; in the nature of alimony, maintenance or support; and established pursuant to the terms of a divorce decree, separation agreement, property settlement agreement, court order or administrative determination.[ii] Though domestic support obligations are generally characterized as maintenance or child support, the Bankruptcy Code analyzes the "nature" of the obligation "without regard to whether such debt is expressly so designated."[iii] Therefore, once a debtor files for bankruptcy, a bankruptcy court is not bound by a divorcing parties' marital settlement agreement.

The fact that the liability underlying the payment is designated as a support obligation is not dispositive; a bankruptcy court must determine the nature of the liability as a support obligation. Bankruptcy courts have looked at the following factors to determine if a payment is in the nature of a domestic support obligation:

> (1) the substance and language of the document in question; (2) the financial condition of the parties at the time of the decree or agreement; ((3) the function served by the obligation and intent of the parties at the time of the agreement; and 4) whether there is evidence to question the intent of a spouse or evidence of overbearing by either party.[iv]

Once the bankruptcy court determines a debt is a domestic support obligation, the non-debt creditor is afforded many protections to insure payment of said debt, including the following protections:

1) Domestic support obligations are an exception to the automatic stay.[v] Therefore, even though a debtor spouse files for bankruptcy, the debtor spouse will still be responsible to pay any domestic obligation support.[vi]

2) Moreover, these obligations are non-dischargeable; therefore, will not be terminated through bankruptcy.[vii]
3) The BAPCPA advanced domestic support obligations to first priority.[viii] Therefore, the debtor spouse must pay domestic support obligations before he pays any other creditor.[ix]
4) Domestic support obligations are not subject to preference recovery.[x] Therefore, a trustee cannot avoid a domestic support payment, even if the payments were paid on an accelerated basis.
5) Domestic support obligation claims can also be enforced against exempt property.[xi]

Despite the BAPCPA's many protections for non-debtor spouses, non-debtor spouses should be aware of the possibility of being responsible for joint debts and the possible scrutiny the transfers made during their divorce may face in a bankruptcy proceeding. Though a debtor spouse can discharge many liabilities to creditors, the non-debtor spouse could still remain liable for joint debts to the creditor. For example, in In re McCollum, the parties filed for divorce and the court entered a judgment that assigned various marital debts. Specifically, the debtor spouse was responsible for paying the mortgage and car loan.[xii] Thereafter, the debtor spouse filed Chapter 13 bankruptcy.[xiii] The debtor spouse sought a determination regarding the discharagability of the assigned debt in the divorce decree, arguing that these debts were non-domestic support obligations. The McCullum court found that the debts were in the nature of property division under Section 523(a)(15) and therefore were dischargeable.[xiv] In a situation such as this where the debtor spouse was discharged from debts assigned to him through a divorce, the discharge only releases the debtor spouse from the creditor, not the non-debtor spouse. Therefore, the non-debtor spouse could now become primarily liable to those creditors.[xv]

Moreover, it is a generally recognized principle in the United States that "if one spouse makes a fraudulent conveyance to a third party as a means of evading the division of marital property, the divorce court may reach the property in the hands of the transferee and may divide it in accordance with the statute."[xvi] A trustee in a bankruptcy action has the power to avoid fraudulent transfers and fraudulent obligations. In general, a fraudulent transfer occurs if the debtor involuntarily or voluntarily made the transfer to hinder, delay, or defraud other creditors, or if the debtor received less than a reasonably equivalent value in exchange for the transfer and was insolvent at the time of or as a result of the transfer.[xvii]

Although parties may have obtained a reasonable and fair divorce from the state court's point of view, the bankruptcy court can still find that some or all of the transfers between the spouses and former spouses might be recoverable by a bankruptcy trustee for the estate. Although fraudulent transfers generally occur within business relationships, bankruptcy courts also look to transactions within a marriage to determine if a debtor is evading a creditor. The Fordu case summarizes this point best by stating:

> At least where state fraudulent transfer law does not exempt divorce court determinations, a trustee may rely on that state law to bring an avoidance action to challenge transfers made in the divorce action as being fraudulent as to other creditors. Even where the divorce court explicitly found that the division was fair and reasonable, its holding is not binding on the trustee who was not in privity with the debtor. The trustee is responsible to all creditors, while the divorce court was only looking at the issues between the husband and wife. This is particularly true if the divorce was finalized

before the bankruptcy took place, so that it would not be possible for the divorce court to take the other interests into consideration while making its decision.[xviii]

Where a trustee can show actual intent to hinder, delay, or defraud creditors in the context of an impending bankruptcy of one of the marital partners undergoing a divorce, the transfer of property made pursuant to a property settlement agreement incorporated into the divorce decree may be avoided as an actual fraudulent transfer.[xix] The trustee must prove, by clear and convincing evidence, that the challenged transfers were made with the actual intent to cheat the debtor's creditors.[xx]

Therefore, if a debtor spouse files for bankruptcy after a divorce, there is the concern that the non-debtor spouse may still be responsible for debts that were assigned to the debtor spouse if a bankruptcy trustee finds those transfers fraudulent. The debtor spouse may be discharged of responsibility for debts through bankruptcy, but creditors may come after the non-debtor spouse if their name is still on the debt.

Many of these issues can be avoided simply by the timing the debtor spouse files for bankruptcy. If a couple believes they will ultimately have to file bankruptcy, there are many benefits to filing for bankruptcy before they file for divorce. Not only could filing for bankruptcy before a divorce proceeding simplify the marital settlement agreement by clearing most debts, but it also prevents a non-debtor spouse being ordered to pay a joint debt assigned to a debtor spouse if that spouse discharges the debt. In contrast, if a debtor spouse files for bankruptcy during a divorce proceeding, the automatic stay still affects the division of property. Therefore, if a debtor spouse files for bankruptcy during a divorce proceeding, the non-debtor spouse can still seek a domestic support obligation but all property determinations are frozen until the bankruptcy is discharged. This can make a divorce proceeding remain stagnant for years. Most problems arise when a debtor spouse files for bankruptcy after a divorce proceeding. As previously discussed, the non-debtor spouse is at risk for being responsible for debts assigned to the debtor spouse.

There are protections available for a client whose spouse is in the process of filing for bankruptcy or could file for bankruptcy in the future. Due to the benefits and protections of support obligations and the risk of property distribution to a non-debtor spouse, a non-debtor spouse can reduce the chance that a bankruptcy court will discharge payments by labeling the debt as a support obligation. A marital settlement agreement should specifically label payments as support obligations to guide a bankruptcy court to that conclusion.

The most common protection many attorneys utilize is drafting "hold harmless" clauses when allocating debt in a marital settlement agreement. Hold harmless clauses provide that one party assumes the liability of a certain debt on behalf of another. If the party who is held harmless incurs debt on that claim, the party liable for that debt must either pay that debt or reimburse that party.[xxi] Hold harmless clauses make the debtor responsible to the person being held harmless, not the actual creditor. Therefore, if the debtor files for bankruptcy, though the debt is dischargeable as to the creditor, it is not dischargeable as to the spouse being held harmless.[xxii] However, for the debt to be non-dischargeable as to the spouse being held harmless, the underlying debt must be a debt that is in the nature of being non-dischargeable.[xxiii] For example, if a debtor spouse is responsible for paying the electric bills and the non-debtor spouse is held harmless from such debt, a bankruptcy court may find this payment is in the nature of a domestic support obligation and therefore the debt is non-dischargeable as to the non-debtor spouse.

Attorneys can also draft separate provisions regarding bankruptcy within the marital settlement agreement. These clauses require the debtor spouse to remain personally liable to the non-debtor spouse for any expenses that may occur in connection with the defense of any suit instituted by a creditor. The purpose of these clauses is to insure the assigned debt remains the responsibility of the spouse who was allocated said debt.

Regardless, the non-debtor spouse should always ensure that their name is taken off all debt allocated to the other spouse. Moreover, a spouse can go back to divorce court and ask that domestic support obligations be modified.[xxiv] Where a non-debtor spouse is held liable for the discharged debts of a debtor spouse, the non-debtor spouse can go back to a divorce court to ask for a modification in their domestic support obligation due to a substantial change in circumstances. Though the non-debtor spouse cannot request a change in the property division, the fact that the non-debtor spouse is responsible for debt she was not responsible for at the time of the marital settlement agreement, significantly changes her financial position.

In conclusion, though recent changes in bankruptcy law have provided more protections for non-debtor spouses, the non-debtor spouse may still be responsible for discharged debt. It is important to recognize that a bankruptcy court could find transfers made in a dissolution proceeding fraudulent, even though the marital settlement agreement or judgment for dissolution itself is reasonable and fair.

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i. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. § 101, et seq.
ii. 11 U.S.C. § 101(14)(a)
iii. Id.
iv. In re Poole, c/a 07-03093 (Bankr. D.S.C. 2007)
v. An automatic stay is an automatic injunction that essentially halts creditors from taking action on debts. 11 U.S.C. § 362 (2010)
vi. 11 U.S.C. § 362(b)(2)
vii. 11 U.S.C. § 523(a)(5) and (15)
viii. In a bankruptcy context, priorities determine the order in which creditors are paid.
ix. 11 U.S.C. § 507(a)(1)
x. A preference is an avoidance power given to the bankruptcy trustee, who administers the bankruptcy estate, to recover certain pre-petition transactions. A preference occurs when a debtor favors one creditor over another creditor. 11 U.S.C. § 547(c)(7)
xi. Federal and state law provide exemptions that permit a debtor to keep certain types of property out of the reach of a bankruptcy trustee; for example, social security income is exempt under 11 U.S.C. § 522(d)(10)(a).
xii. In re McCollum, 415 B.R. 625 (Bankr. M.D. Ga 2009)
xiii. Chapter 13 bankruptcy allows a debtor to adjust their debts to pay over three to five years.
xiv. Id.
xv. Properties can be discharged differently under Chapter 7 and Chapter 13 bankruptcy; therefore, non debtor spouses will be affected differently depending on how the debtor spouse files. For example, non domestic support obligations assigned within a marital settlement agreement or judgment for dissolution of marriage are generally not dischargeable under Chapter 7 bankruptcy. 11 U.S.C. § 523(a)(15). However, under Chapter 13 bankruptcy, these debts may be dischargeable.
xvi. Clark, The Law of Domestic Relations in the United States, Second Edition, Vol. II (1987).
xvii. 11 U.S.C. § 548(a)
xviii. In re Fordu, 201 F.3d 693 (6th Cir. 1999)
xix. In re Lange, 35 B.R. 579 (Bankr. E.D. Mo. 1983); In re Soclucco, 68 B.R. 748 (Bankr. D.N.H. 1986)
xx. In re Devito, 111 B.R. 529 (Bankr. W. D. Pa. 1990).
xxi. Jeremy Mosley v. Tiffiny Smith, 2013-CA-01205-COA
xxii. Id.
xxiii. Id.
xxiv. 750 ILCS 5/510

ON THE TIP OF YOUR TONGUE

By Angela Peters

FAMILY LAW

IRMO Little, 2014 IL App (2d) 140373, Dec. 22, 2014. Husband filed Section 2-1401 petition to vacate MSA, alleging that during dissolution proceedings, wife transferred assets belonging to marital business to her brother and his company, although she testified to the contrary. Husband's allegations in Section 2-1401 petition were sufficient to allege existence of a meritorious claim. Although husband filed petition 7 months after dissolution, he sufficiently showed diligence, as he alleged that he did not learn of wife's transfer of assets until he learned that wife had filed breach of contract action based on agreement to transfer assets, and husband filed petition to vacate six days later. (SCHOSTOK and HUTCHINSON, concurring.)

Blumenthal v. Brewer, 2014 IL App (1st) 132250, Dec. 19, 2014. Plaintiff sued to partition a home she owed with her former domestic partner of 26 years. Defendant had stayed home for a while, and worked in government sector, to devote more time to care for the couple's three children, and Plaintiff became primary breadwinner. The previous public policy in Illinois, treating unmarried partnerships as illicit, no longer exists. Court erred in dismissing as factually deficient Defendant's counterclaims, seeking sole title to equalize couple's overall assets. Counterclaims were not an attempt to retroactively create a marriage, and allowing her claims to proceed does not conflict with Illinois' abolishment of common law marriage. Enactment of statutes providing for no-fault divorce and enforcement of prenuptial agreements have resolved concern of prior case law (Hewitt v Hewitt) that recognizing property rights between unmarried cohabitants would contravene the public policy of strengthening and preserving the institution of marriage. (GORDON and REYES, concurring.)

IRMO Saracco, 2014 IL App (3d) 130741, Nov. 25, 2014. Judgment for dissolution of marriage reserved issue of college contribution, and later court entered order as to one of the parties' children that mother would be responsible for 60% of his college expenses and father would be responsible for 40% of college expenses. Court erred in terminating mother's required contribution toward son's college expenses; court did not specifically find a substantial change in circumstances, and evidence did not support substantial change. Son is an average student who has accepted all available types of financial assistance. Neither his strained relationship with his mother, nor his decision not to work during college (consistent throughout college career) alone supports finding of substantial change. (CARTER and O'BRIEN, concurring.)

Robinson v. Reif, 2014 IL App (4th) 140244, Nov. 24, 2014. Maternal grandparents filed petition for permanent and temporary grandparent visitation of their two minor grandchildren, who they had taken care of in their home for 18 months after car accident in which children's mother was killed and their father was severely injured. Children were age 3 and age 7 months at time of accident. Court's judgment, granting petition and setting visitation schedule, was not against manifest weight of the evidence. Plaintiffs presented expert testimony that young children develop attachments to primary caregivers, and opined that children formed attachment to Plaintiffs during this critical development stage and that children would

be damaged emotionally if deprived of all visitation with Plaintiffs. (APPLETON and TURNER, concurring.)

IRMO Harnack, 2014 IL App (1st) 121424, Nov. 21, 2014. Court entered default judgment dissolving marriage and apportioning parties' assets, and held that all shares of stock held by husband or his enterprises were marital property, and awarded wife half of shares of stock as her marital portion. Eight months later, husband moved to set aside judgment per Sections 2-1301(e) and 2-1401(a) OF Code of Civil Procedure. No exceptional circumstances exist to warrant relaxing due diligence requirements of Section 2-1401 for husband, and court properly denied Section 2-1401 petition and denied Section 2-1301(e) motion to vacate judgment. Cause remanded for court to amend judgment to clarify provisions for transfer of shares of stock to escrow. (McBRIDE and GORDON, concurring.)

In IRMO Dhillon, 2014 IL App (3d) 130653, the appellate court reversed a trial court's ruling that an account in the husband's name was his nonmarital property because the trial court incorrectly assumed the burden was on the wife to show that the funds were marital when the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/101, et seq., states that all property acquired by either spouse during the marriage and before a judgment for dissolution is presumed to be marital property, and that the presumption can be overcome only with a showing by clear and convincing evidence that the property falls into an exception under §503(a). The husband argued that the funds belonged to his father, but the only evidence the trial court had before it that this was true was the husband's testimony, which the court had found to be lacking in credibility in its opinion. The documentary evidence showed only that the funds made a "brief stop in other accounts" before being transferred into the account at issue. Thus, the husband did not meet his burden and the funds in the account should have been held to be marital property.

IRMO Dhillon, *supra*, the husband transferred approximately $300,000 to his father during a short period in 2007, prior to the wife filing a petition for dissolution. At trial, the appellate court noted that the husband offered only uncorroborated testimony that he was just returning his father's own money to him via the $300,000 transfers. The evidence showed that during the transfer period, the marriage was undergoing an irretrievable breakdown. The trial court heard from the wife that by the beginning of 2007 she was very upset and depressed about her marriage and that as the year went on the situation deteriorated. Although the wife testified that she did not make the final decision to leave her husband until the end of May 2007, the appellate court noted that the law on dissipation does not require that the marriage had to reach its final breaking point before dissipation could occur, but rather that it had to have only begun to undergo an irreconcilable breakdown. Because the time period during which the husband transferred the $300,000 to his father coincided with the dates when the wife testified the marriage was undergoing an irretrievable breakdown, the transfers should have been considered dissipation. Therefore, the court held that the wife was entitled to one half of the funds transferred

In IRMO Heasley, 2014 IL App (2d) 130937, the appellate court reversed a trial court's post-judgment ruling that terminated a maintenance award because the hearing should have been governed only by the language of the court's prior order. The trial court entered the termination order at the second review of maintenance following the entry of the judgment for dissolution of marriage. Prior thereto, the first review of maintenance, which came before the court by way of the husband's motion to terminate/reduce maintenance at the first review period, resulted in an order that denied his motion and continued the matter for approximately 18 months for a subsequent review. The trial court directed the wife to remain fully employed and to seek out promotions and better job opportunities. In 18 months, the wife filed a motion to increase and the husband filed a motion to decrease. The trial court entered an order terminating maintenance and found that the wife failed to pursue further educational opportunities. Because the prior court order did not require the wife to seek further education, the trial court should not have found fault that she did not do so. The wife had remained employed at her current employer, and the evidence showed

she took advantage of in-house training and opportunities within the company. The appellate court found the trial court failed to recognize the limited scope of the review under the prior court order and reversed the termination and remanded for further proceedings.

Thank you to IICLE Family Law January, 2015 Flashpoints, Donald C. Schiller & Michelle A. Lawless, Schiller DuCanto & Fleck LLP. For this month's contributions.

IRMO Solomon, 2015 IL App (1st) 133048, 3rd Div., No. 1-13-3048, March 11, 2015. Husband's employer failed to timely process two child support payments from his wages, although deduction and withholding order was entered as part of dissolution judgment. Court properly denied wife's petition against employer, a county hospital, seeking statutory penalty of $100 per day for "knowing" violation, and properly found that hospital rebutted statutory presumption with sufficient evidence that it did not knowingly fail to withhold two missing support payments. Penalty in Section 35 of Withholding Act is not punitive. Hospital is not entitled to immunity for its actions in processing support order, as such actions are ministerial rather than discretionary. (LAVIN and MASON, specially concurring.)

IRMO Krol, 2015 IL App. (1st) 140976, 1st Div., No. 1-14-0976, March 2, 2015. Parties, both Polish citizens, were married and living in Poland. Prior to marriage, wife had obtained lawful permanent residency in U.S. One child was born in Poland. Husband then filed petition for dissolution in a Polish court, which did not include request for custody of child. Wife then filed for dissolution and for custody in Cook County Circuit Court, which entered order finding that Poland is habitual residence of child and that child is to be returned to Poland. Wife then voluntarily dismissed her petition. Husband's Hague Convention petition should be treated as an independent action that survives dismissal of petition for dissolution. Voluntary dismissal should not be used to avoid unfavorable determination on child's habitual residence. Wife's noncompliance with court orders created delay that brought about any "change in circumstances" which wife cannot now use to her benefit. (DELORT and HARRIS, concurring.)

IRMO Ostrander, 2015 IL App (3d) 130755, February 25, 2015. In dissolution proceeding, husband filed motion for finding of no paternity, asserting that one of the two children born during marriage was not his child, and presenting confirming DNA test result. Court erred in granting husband's motion and in finding that as husband was not child's biological father he had no support obligation as to that child. Statute of Limitations in Parentage Act barred husband's motion, as Act requires filing of request for nonpaternity be within 2 years after petitioner obtains knowledge of relevant facts. Husband failed to meet his burden to show that motion (filed 8 years after child's birth) was timely, as he failed to present any evidence that he had only recently discovered he was not child's biological father; and his testimony indicated he did have such knowledge at time of child's birth. (HOLDRIDGE and LYTTON, concurring.)

IRMO Hill, 2015 IL App (2d) 140345, No. 2-14-0345, February 23, 2015. Court entered order requiring husband to pay retroactive child support and attorney's fees for wife. Husband defied court's attempts to enforce order. Several rules to show cause were entered but not served on husband as he could not be located. Where a party seeks review of a judicial order while at same time defying trial court's attempts to enforce that order, appeal is dismissed. (HUTCHINSON and JORGENSEN, concurring.)

Thank you to ISBA Family Law case digests for its contributions this month.

CIVIL MISCELLANEOUS LAW

People v. Reed, 2014 IL App (1st) 122610 (December 31, 2014) Defendant was convicted, after jury trial, of first degree murder. Court properly summarily dismissed Defendant's pro se petition claiming various trial errors and ineffective assistance of counsel. Illinois Supreme Court's 2013 Bailey decision, which allocates decision-making authority between jury and judge by permitting a defendant to request

that jury determine whether State proved mental state necessary for death penalty eligibility, is a procedural rule rather than a substantive rule. Thus, Bailey decision does not apply retroactively to post conviction proceedings. Defense counsel was not ineffective for failing to anticipate Bailey decision, which was decided after Defendant's direct appeal had concluded. (PALMER and GORDON, concurring.)

Bob Red Remodeling, Inc. v. The Illinois Workers' Compensation Commission, 2014 IL App (1st) 130974WC (December 31, 2014)(Court opinion corrected 1/12/15.) Employee, who speaks Polish but not English, suffered work-related accident when he fell 11 feet from rooftop, and sustained injuries including traumatic brain injury and post-concussion syndrome. Commission found employee permanently and totally disabled, which was supported by rehab counselor's testimony that stable labor market did not exist for employee. Commission properly denied employer's motion to suspend benefits; employee reasonably chose to follow advice of his treating physician rather than that of IME physician. (HOLDRIDGE, HOFFMAN, HARRIS, and STEWART, concurring.)

RG Construction Services v. The Illinois Workers' Compensation Commission, 2014 IL App (1st) 132137WC (December 31, 2014) Employee filed workers compensation claim for work-related injuries to both knees. Record supports Commission's decision that employee's left knee condition was causally connected to his work accident, finding that he fell while working on stilts, and landed on both knees. Conflicts in testimony of physicians were for Commission to resolve, and its decision was not against manifest weight of evidence. Award of 107-4/7 weeks of TTD benefits was supported by record and not against manifest weight of evidence. (HOLDRIDGE, HOFFMAN, HUDSON, and STEWART, concurring.)

Illinois Tool Works Inc. v. Travelers Casualty and Surety Company, 2015 IL App (1st) 132350, January 13, 2015, Cook Co., 2d Div., SIMON, Affirmed. Defendants, the former insurers of Plaintiffs, which issued 10 policies to Plaintiffs, have a duty to defend Plaintiffs in multiple toxic tort cases brought by persons claiming injury from exposure to harmful materials while doing welding and other activities, and should bear entire cost. Duty to defend, known as litigation insurance, insures against being wrongly sued. Insurers must provide a defense for all cases where bare underlying allegations, if proved, would render insured individually liable. Duty to defend is joint and several. If insured is alleged to be liable solely as a successor, there is no duty to defend. (NEVILLE and PIERCE, concurring.)

Osler Institute, Inc. v. Miller, 2015 IL App (1st) 133899, January 9, 2015, Cook Co., 5th Div., McBRIDE, Affirmed. (Court opinion corrected 1/13/15.) Court properly granted Defendant's Section 2-619(a)(9) motion to dismiss on basis of laches. Court had entered consent decree barring Defendant, formerly employed by Plaintiff, and others from competing with Plaintiff, a company providing review courses for medical board exams. Plaintiff filed suit against Defendant and others after consent decree had expired, although it had discovered the alleged violations two years prior. Court properly found that Plaintiff lacked required diligence in pursuing present action, and Defendant suffered prejudice as a result of Plaintiff's delay in filing suit. (GORDON and REYES, concurring.)

In re Estate of Rodden, 2015 IL App (1st) 140798, January 12, 2015, Cook Co., 1st Div., DELORT, Affirmed. Office of Public Guardian filed petition for guardianship over 93-year-old man whose friend and caretaker had been his POA for health care and property. After POA resigned, Public Guardian discovered that she had written $17,000 in checks to herself from ward's account. Public Guardian then filed Petition for Accounting under POA for Property. Power of Attorney Act allows guardian to proceed by petition, in the nature of third-party counterclaim brought under existing guardianship case, rather than in a new, independent proceeding. Petition is functional equivalent of a summons, commanding POA to appear and account before the court on a specified date, time, and place. (CUNNINGHAM and CONNORS, concurring.)

Wise v. The Department of Employment Security, 2015 IL App (5th) 130306, January 12, 2015, Madison Co., CHAPMAN, Reversed. Casino discharged Plaintiff, a cook and buffet station attendant, for insubordination, and IDES denied her claim for unemployment benefits. Board of Review found that Plaintiff told her supervisor she would not comply with her request to get water and more ice to keep food cool on buffet table, then left her station and told another employee to perform the task. There was realistic potential for serious harm to employer, as two food items were at temperatures warmer than safe range to prevent bacteria, and customers could have become ill as a result. It was fortuitous that another employee was willing to perform the task requested, and insubordination took place in front of other employees. Plaintiff's conduct was "misconduct" as defined in Unemployment Insurance Act. (WELCH and SCHWARM, concurring.)

L.F. v. The Department of Children and Family Services, 2015 IL App (2d) 131037, March 11, 2015, Lake Co., BURKE, Reversed with directions. DCFS failed to meet its burden of proof to show that a preponderance of evidence supported its indicated report of child neglect due to inadequate supervision. Director of DCFS erred in denying Plaintiff mother's request to expunge indicated finding. There was no evidence that Plaintiff's use of K3 (synthetic marijuana) rendered her unable to adequately supervise her 6-year-old son. DCFS failed to refute Plaintiff's testimony that she could still function after using K3, and failed to present evidence that her use of K3 produced substantial state of stupor, unconsciousness, or irrationality so that she was unable to adequately supervise her son. (HUTCHINSON and BIRKETT, concurring.)

First Merit Bank, N.A. v. Soltys, 2015 IL App (1st) 140100, March 11, 2015, Cook Co., 3d Div., PUCINSKI, Affirmed. Plaintiff creditor received notice of debtor's bankruptcy proceedings but did not timely file an adversary claim to challenge dischargeability of its deficiency judgment claim. Plaintiff creditor cannot satisfy debt discharged in bankruptcy from property transferred by debtor to land trusts under exception for fraudulent transfers to third parties. Illinois land trusts are a vehicle for property ownership where the beneficiary retains control and are not "third party" entities for purposes of "fraudulent transfer to third parties" exceptions to bankruptcy discharge. (LAVIN and HYMAN, concurring.)

A.G. Cullen Construction, Inc. v. Burnham Partners, LLC, 2015 IL App (1st) 122538, March 11, 2015, Cook Co., 3d Div., HYMAN, Reversed and remanded with directions. LLC hired Plaintiff construction company to build warehouse and distribution facility in Pennsylvania. LLC stopped paying Plaintiff upon dispute near project completion, and arbitrator entered award for Plaintiff. Prior to entry of award, co-Defendant LLC began to wind down LLC, liquidating all its assets. Sufficient and significant number of "badges" of fraud were present to give rise to presumption of fraud under Uniform Fraudulent Transfer Act (UFTA), as co-Defendant LLC's owner knew of threat of suit and judgment at time he made transfers of assets. Defendants presented no unbiased evidence that transfers was in exchange for reasonably equivalent value. Court erred in entering judgment in favor of co-Defendants on claims to pierce corporate veil. (LAVIN and MASON, concurring.)

Work Zone Safety, Inc. v. Crest Hill Land Development LLC, 2015 IL App (1st) 140088, March 10, 2015, Cook Co., 2d Div., LIU, Affirmed in part and reversed in part. Court granted equitable relief on judgment confirming arbitration award, in dispute over Defendant's sale of wetlands property to Plaintiff. Arbitrator concluded that Defendant was obligated to repurchase property at a certain price and awarded Plaintiff damages in the amount of said price, noting that award "stands" if Defendant failed to repurchase property. Defendant failed to repurchase or appeal, and moved to dismiss supplementary proceedings. Defendant's motion to dismiss was collateral attack on final judgment without satisfying any requirements under Sections 2-1301 or 2-1401, and circuit court's order granting equitable relief to Defendant impermissibly modified judgment and underlying arbitration award. Court properly interpreted arbitration

agreement's fee-shifting provision as inapplicable because dispute did not involve escrow funds. (SIMON and NEVILLE, concurring.)

Indian Harbor Insurance Company v. The City of Waukegan, 2015 IL App (2d) 140293, March 6, 2015, Lake Co., BURKE, Affirmed. Plaintiff was wrongfully convicted of rape and murder and imprisoned for 20 years, and was released after exonerated by DNA evidence. Plaintiff filed malicious prosecution claim against City and police officers. Plaintiff's malicious prosecution claim did not trigger coverage under insurance policies issued to City, because prosecution was commenced before inception of policies. Coverage for Plaintiff's other allegations also was not triggered under policies, and policies do not provide illusory coverage, as malicious prosecution did not occur during policy periods. (ZENOFF and SPENCE, concurring.)

Bradley v. The City of Marion Illinois, 2015 IL App (5th) 140267, March 10, 2015, Williamson Co., STEWART, Affirmed and remanded. Plaintiff employee was injured in work-related vehicle accident in which a third party was at fault. Circuit court correctly ruled, sua sponte, that it lacked subject matter jurisdiction to decide controversy n declaratory judgment action filed asking court to decide whether Plaintiff could seek additional benefits under Workers' Compensation Act, following Plaintiff's settlement of a third party tort claim that arose from workplace accident. Issues of Plaintiff's entitlement to workers' compensation benefits and Defendants' (City and its workers' compensation insurer) defenses to claim fall within exclusive jurisdiction of Workers' Compensation Commission. Circuit court's jurisdiction in this controversy is "appellate only", not concurrent. (SCHWARM and MOORE, concurring.)

CRIMINAL LAW

People v. DiCosola, 2015 IL App (2d) 140523, January 9, 2015, Du Page Co., SCHOSTOK. Affirmed. Court properly entered summary judgment in favor of Attorney General's complaint against Defendant for his failure to comply with investigative subpoena issued by AG per Sections 3 and 4 of Consumer Fraud Act. Defendant, who is not licensed to practice law in any state, sold instructional DVDs, held seminars, and provided consultations on bankruptcy and foreclosure laws. Defendant was required to appear in response to subpoena, and could at that time invoke his Fifth Amendment right against self-incrimination. Given no evidence that AG is aiding or participating in any criminal prosecution of Defendant, Fifth Amendment does not provide any basis for noncompliance with subpoena. (JORGENSEN and BIRKETT, concurring.)

People v. Haynes, 2015 IL App (3d) 130091, January 13, 2015, Kankakee Co., McDADE, Reversed and remanded. Defendant filed pro se post-conviction petition claiming that prosecution suborned perjury of a proffered 11-year-old witness, who was cousin of Assistant State's Attorney who was co-counsel during his criminal trial. Affidavit of witness offered by witness stated that shooting victim did have a gun, but that he was told to say that he did not have a gun. Affidavit, if true, renders witness' entire testimony reliable. A witness's testimony is entirely unreliable if he is under instructions from a prosecutor to lie or to omit certain facts while testifying. (HOLDRIDGE, concurring; LYTTON, specially concurring.)

People v. Axelson, 2015 IL App (2d) 140173, January 9, 2015, Winnebago Co., McLAREN, Vacated and remanded with directions. Defendant entered open plea of guilty to burglary and unlawful possession of a stolen motor vehicle and was sentenced to concurrent 10-year prison terms. Subsequently, new defense counsel filed motion to withdraw guilty plea, but counsel's certificate did not strictly comply with Rule 604(d), as he did not mention contentions of error as to Defendant's sentences. Proceedings on remand must follow Rule 605(c), which applies here because at plea hearing prosecution did make

concession in agreeing to forgo any recommendation of consecutive sentences. (BIRKETT and SPENCE, concurring.)

People v. Thomas, 2014 IL App (3d) 120676, October 27, 2014, Henry Co., SCHMIDT, Affirmed in part and modified in part; remanded. (Modified upon denial of rehearing 1/8/15.) Defendant was convicted, after stipulated bench trial, of possession of controlled substance and resisting a peace officer. Defendant was lawfully seized when vehicle in which he was a passenger was stopped for a traffic violation. Setup procedure of officer ordering Defendant to roll windows up and turn on the heat before officer conducted dog sniff of exterior of vehicle was not an unreasonable search, under 2011 case precedent from Illinois Supreme Court (People v. Bartelt). No evidence presented that officer was injured, and thus resisting arrest conviction reduced from felony to misdemeanor. (HOLDRIDGE and O'BRIEN, concurring.)

In re Shermaine S., 2015 IL App (1st) 142421 (January 9, 2015) (Court opinion corrected 1/13/15. Respondent minor, age 16 at time of offense, was convicted, after jury trial, of one count of robbery, and was sentenced as a habitual juvenile offender (based on two dispositions for burglary in two prior years) and sentenced to mandatory term of commitment to Department of Juvenile Justice until age 21. Based on Illinois Supreme Court precedent, mandatory sentencing provision of Juvenile Court Act does not violate eighth amendment or Illinois proportionate penalties clause. (PUCINSKI and LAVIN, concurring.)

People v. Willis, 2015 IL App (5th) 130147, March 6, 2015, 1st Dist., Marion Co., GOLDENHERSH, Reversed and remanded with directions. Court erred in denying Defendant's motion to withdraw his guilty plea, as his attorney filed a Supreme Court Rule 604(d) certificate that was defective on its face. Certificate incorrectly refers to Defendant with pronoun "her", and states that he made amendments to pleadings, yet he later admitted that he had not done so. Certificate does not specify that counsel examined report of proceedings of guilty plea. (STEWART and SCHWARM, concurring.)

People v. Brown, 2015 IL App (1st) 122940, March 11, 2015, Cook Co., 3d Div., HYMAN, Affirmed. Court properly dismissed Defendant's second-stage post conviction petition, after his conviction for unlawful use of a weapon by a felon. Allegations in petition, with supporting documentation, fail to make substantial showing of any constitutional deprivation to warrant third-stage proceeding. No ineffective assistance of counsel claim, as Defendant cannot show prejudice from his claims that his counsel failed to relay State's plea offer, and that counsel failed to inform him of sentence he faced if convicted. Defendant cannot show reasonable probability that he would have accept plea offer and that if he had, court would have accepted it. (PUCINSKI and LAVIN, concurring.)

People v. Kirklin, 2015 IL App (1st) 131420, March 6, 2015, Cook Co., 5th Div., GORDON, Affirmed. Defendant was convicted, after bench trial, of aggravated battery. No ineffective assistance of counsel. Claim of ineffective assistance must be evaluated based on entire record. Defense counsel thoroughly exposed weaknesses and contradictions in State's case through cross-examination. Counsel's failure to introduce evidence of victim's recent cocaine use likely did not change outcome of trial. (McBRIDE and REYES, concurring.)

People v. Payne, 2015 IL App (2d) 120856, March 9, 2015, Winnebago Co., HUDSON, Affirmed. Defendant was convicted, after jury trial, of aggravated vehicular hijacking and aggravated battery. State's use of peremptory challenges did not evince a discriminatory purpose, as potential jurors who were stricken all made comments which indicated they might not be impartial. As hearing on post-trial motion occurred more than three months after jury selection, prosecutor's lack of recall as to specific reason for striking potential juror does not establish that her stated reason was pretextual. Court's finding that State established a valid and race-neutral reason to exclude potential juror is not clearly erroneous. (SCHOSTOK and ZENOFF, concurring.)

People v. Simpson, 2015 IL App (1st) 130303, March 11, 2015, Cook Co., 3d Div., HYMAN, Affirmed. Defendant and his codefendant were convicted after bench trial of four counts of home invasion with guns, while residents were in the house. Court properly denied pretrial motion to quash arrest and suppress evidence. Police stopped codefendants in early morning hours, immediately after receiving dispatch that suspects from a home invasion were fleeing in a car which matched their description, on the road and in the direction where they were travelling; no other vehicles were on the road. Reasonable suspicion for Terry stop can be derived, in part, when police observe persons similar to those believed fleeing from recent crime scene when found in general area where suspects would be expected. Pat down search was justified given that home invasion by two armed perpetrators is inherently dangerous crime. (LAVIN and MASON, concurring.)

People v. Lawson, 2015 IL App (1st) 120751, March 6, 2015, Cook Co., 6th Div., LAMPKIN, Affirmed in part and vacated in part. Defendant was convicted, after jury trial, of four counts of home invasion and aggravated kidnapping, and sentenced to natural life in prison. Three of Defendant's four convictions for home invasion are vacated, pursuant to one-act, one crime rule. Defendant's 2003 armed robbery sentence, which did not include firearm sentencing enhancement, is not void as he was properly sentenced without enhancement four years before legislature cured proportionate penalties clause violation. Defendant's first Class X felony conviction (armed robbery) occurred when he was 17, but his second Class X (armed robbery) conviction occurred five years later. Natural life sentence was properly imposed, and is not unconstitutional. Defendant's adjudication as armed habitual offender, of which he had fair and ample warning, punished him for new and separate crime he committed as an adult after two prior Class X felonies. (HALL and ROCHFORD, concurring.)

Foxxxy Ladyz Adult World, Inc. v. Village of Dix, Illinois, Federal 7th Circuit Court, No. 14-1642, March 10, 2015, S.D. Ill., Affirmed and reversed in part and remanded. Dist. Ct. erred in dismissing plaintiff-adult night club's First Amendment challenge to defendant's ordinance that banned public nudity/nude dancing that occurred at plaintiff's night club, even though defendant argued that said ban was aimed at preserving "social order, health, welfare and safety of citizens." Defendant failed to allege existence of tangible evidence that would establish link between prohibited nude dancing and cited harmful secondary effects. However, Dist. Ct. did not err in dismissing plaintiffs' challenge to two ordinances that essentially banned plaintiff's customers from bringing liquor into plaintiff's night club, since said ban did not violate either Illinois Liquor Control Act or Municipal Code and otherwise had rational basis. Moreover, First Amendment does not entitle bar, its dancers or patrons to have alcohol available during presentation of nude or semi-nude dancing.

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