NORTH SUBURBAN
BAR ASSOCIATION

N S B A N E W S

Summer 2013

In this Issue:

PRESIDENT'S MESSAGE – JULY 2013

By Anna Krolikowska, President

Dear Friends:

As I sit down to write to you for the last time as President of the North Suburban Bar Association, I am struck by how much we have accomplished in the past year, and how quickly time passes. As I reflect on the last year, I am filled with tremendous gratitude and appreciation for the opportunity to serve as the 45th President of this wonderful organization. It has been both a pleasure and a privilege. Moreover, as I prepare to pass on the responsibilities and joys associated with the office of President of the North Suburban Bar Association into the capable hands of our President-Elect, Jan Weinstein, and her extremely qualified Officers and Board of Directors, I thank all of you who have contributed your time, expertise and dedication to this association during this year.

Every one of our officers, directors, members and friends of the North Suburban Bar Association contributed to our success and growth in the past year. Many thanks to Jan Weinstein, our President- Elect, for the quality continuing education programming you organized for us in the past year. From our general CLE presentations, through our highly successful Ethics CLE in April of this year, you revived our continuing education programming. Of course, we could not offer such interesting and relevant CLEs without our excellent speakers. We greatly appreciate the contributions of our talented and engaging CLE presenters: Honorable Justice Jesse Reyes (October 2012), Joan and Burt Grant, of Grant & Grant P.C. (November 2012), Jim Minchella (January 2013), Honorable Martin Moltz (February 2013), Michele Jochner, of Schiller, Ducanto & Fleck (Ethics CLE), Brian Clauss, Director of Veterans Legal Support Center & Clinic at John Marshall Law School. (Ethics CLE), David Pasulka, of Pasulka & Associates (Ethics CLE), Scott Renfroe, ARDC- Chief (Ethics CLE), Cliff Scott Rudnick, Assistant Professor and Director of CLE and Professionalism at John Marshall Law School (Ethics CLE), and Jerry Beatty of Chicago Title Insurance (June 2013).

Thank you to Anna Morrison-Ricordati, our incoming 1st Vice-President, for all her efforts devoted to the continuous improvement of our Newsletter. It has been a joy to read the informative, timely, and relevant articles, as well as to peruse the various photo galleries, which reflect the camaraderie and friendship, which define the NSBA. Also, many thanks to all of our contributing writers, especially Angela Peters. I encourage all of you to continue writing.

We greatly appreciate all the efforts of Ray Bartell, John Stimson, and Jim Minchella, and all our Directors in expanding our membership. During a time when all bar associations struggle with membership, your efforts were incredibly valuable and did not go un-noticed. I look forward to seeing how we will expand your initiatives next year.

As you may recall, one of my goals for this year was to bring the NSBA into the modern age, or maybe drag the NSBA into the modern age, when it comes to technology. Thank you to Ray Ricordati, our 2012-2013 Secretary, and technology guru, for making sure that my hopes became a reality! We now have a functioning website, which contains not only the listing of our current officers and the board, and our calendar, it also contains the listing of our current members.

Our members can now utilize our website to renew their membership (HINT, HINT... it is that time of the year again!), as well as to contact our officers. Next steps, include links to our members' websites, but I am sure you will hear more about that from Jan in the fall. You can see it for yourself at http://www.ilnsba.org. We can continue to thrive and grow as an organization with your support. I strongly encourage each and every one of you to take a more active role with the NSBA. You will not regret it!

Having said that, let's not forget our Treasurer, Rosanne Barrett. You handled your many responsibilities with dedication and devotion. Although, a treasurer's role might seem to some tedious and unglamorous, it is crucial to the success of any organization. Thank you.

Of course, let us not forget our Board of Directors: Honorable Steve Bernstein, Brian Clauss, William Ensing, Keith Goldberg, Burton Grant, Dick Mortell (Immediate Past- President), Paul Plotnick, Honorable Jesse Reyes, Robert Arthur Romanoff, John Stimson, Phil Witt. Thank you all for your initiative, commitment, and devotion to the North Suburban Bar Association. We are lucky to have you!

As a bar association we have been blessed with the friendship and support of our judges. Many thanks to all of you who contributed your time to our association in the past year. In particular, the North Suburban Bar Association is grateful for the continuing support of: the Honorable Timothy C. Evans, Chief Judge of the Cook County Circuit Court, the Honorable Jesse Reyes, the Honorable Grace Dickler, Presiding Judge Domestic Relations Division, the Honorable Shelley Sutker-Dermer, Presiding Judge, Second Municipal District, the Honorable William Maki, Presiding Judge, Third Municipal District, the Honorable Allen E. Goldberg, the Honorable Jeannie Cleveland Bernstein, the Honorable Steve Bernstein, the Honorable Thomas V. Lyons, the Honorable Martin Moltz, and the Honorable Jeannie Reynolds.

In addition, we greatly appreciate the support of Paula Holderman, ISBA President, Rick Felice, ISBA President-Elect, John O'Brien ISBA Past-President/ ATG, John Locallo, ISBA Past-President, Mark Hassakis, ISBA Past-President, John Thies, ISBA Immediate Past-President, and the ISBA Mutual Insurance Company.

Of course, I would be remiss if I did not thank, Steve Rakowski, my business partner. Thank you for making sure that everything ran smoothly at the office, so that I could devote a large portion of my time this year to the North Suburban Bar Association. I very much appreciate your friendship and support.

Last, but certainly not least, my family, my parents, Mira and Andrzej, and my brothers, Maciej and Peter. Thank you for your limitless love, and tireless support, and encouragement! Mom, and Dad, you raised me to believe that with hard work and dedication all things are possible. I would not be who I am today without you! Thank you all for your continued support. I look forward to an exciting 2013-2014 year!

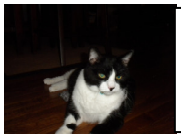
I hope to see all of you at our Installation Dinner on September 24, 2013, at the North Shore Country Club, 1340 Glenview Road, Glenview, Illinois 60025. We will present the Sanford Blustin Award to the Honorable Thomas Kilbride, the Chief Justice of the Illinois Supreme Court. Tickets to this event are available at $100.00 per person. Please mail checks to: the NSBA at, P.O. Box 731, Glenview, IL 60026. For additional information, to reserve a ticket, or to discuss available sponsorship options please contact Anna Krolikowska at president@ilnsba.org, or (847) 715-9328.

Anna P. Krolikowska
NSBA President 2012-2013

From the Editor's Desk:

Thanks to all members (and new members) who have submitted articles and information for the NSBA Newsletters! And especially to those able to attend the NSBA events this past year, thank you for willingly participating in the (many) photos used herein. It has been a pleasure serving as the NSBA Newsletter Editor and I look forward to seeing you at the September 24, 2013 Installation Dinner.

As the NSBA website is still being re-designed/reconstructed, please send any updated contact information to raymond.ricordati@huschblackwell.com.



There are many great animal companions in the North Suburban shelters. Please consider adopting one today!

Again, thanks --
Anna Morrison-Ricordati

CONGRATULATIONS TO ANGELA PETERS

NSBA Member, Angela Peters, was chosen to serve as Chair of the Illinois State Bar Association's Animal Law Section Council, 2013-2014!

2012-2013 NSBA Officers & Directors:

Officers

Anna Krolikowska, *President*
Jan S. Weinstein, *1st Vice President*
William Herst, *2nd Vice President*
Anna Morrison-Ricordati, *3rd Vice President*
Ray Bartel, *4th Vice President*
Ray Ricordati, *Secretary*
Rosanne Barrett, *Treasurer*
Richard J. Mortell, *Past President*

Directors (2 year term):

Brian Clauss
William Ensing
Keith Goldberg
Burton Grant
Hon. Jesse G. Reyes

Continuing Directors (1 yr term):

Hon. Steven J. Bernstein
Paul Plotnick
Robert Romanoff
John Stimson
Phil Witt

Cook County's One-of-a-Kind Program, a Veterans' Track within the Domestic Violence Court, Shows Enormous Promise but Lacks Essential Support

Over 2 million soldiers are returning from the War on Terror, and a surge of serious mental illnesses, like posttraumatic stress disorder, and traumatic brain injuries are coming home with them. Mental illnesses arising as a result of service or combat are correlated with increased criminal behavior, substance abuse, and domestic violence. Countless scholarly articles and studies have been published about how courts are addressing *criminality* and *substance abuse* among veterans, by way of veterans treatment courts. The first veterans treatment court began in Buffalo, New York in 2008. Since then, veterans treatment courts have sprung up across the nation. Generally, these courts not only adjudicate veterans' criminal behavior, but also treat veterans' substance abuse issues and mental illnesses, and provide them with an environment that fosters emotional support, with job training, with family services, with education and transportation assistance, and with many other services. The intent of these veterans treatment courts is to provide veterans with specialized focus to guide them to a smoother reentry into society. These courts have shown great success in doing so.

What is less understood in the literature is how courts can address *domestic violence* among veterans. The lack of information is, in large part, due to the fact that the applicable laws preclude veterans treatment courts from accepting "violent" offenders into their programs. In Illinois, for example, the Veterans and Servicemembers Court Act provides that veterans are eligible for the court's procedures provided that, among other things, the individual has not been convicted of a crime of violence within the past 10 years, including any offense where serious bodily injury occurred (730 ILCS § 167/20). The Act specifically excludes veterans who have been convicted of crimes of violence, including domestic violence.

That veterans treatment courts are precluding veterans involved in domestic violence means an enormous amount of veterans are missing out on the specialized support and treatment that they (and their victims) direly need. (Studies regularly show that male veterans diagnosed with PTSD are more likely than other veterans to commit aggression against their partners and children, and the severity of that aggression is positively correlated with the

severity of PTSD symptoms (Monson, et al., 2009). One study, for example, determined veterans with PTSD consistently commit more frequent and more severe intimate partner violence, at rates approaching two to three times the national average (Finley, et al., 2010)). Cook County has designed a unique program to address this dire need. The program would create a veterans' track within the county's domestic violence court, thereby sidestepping the veterans treatment court's preclusion of violent offenders. The program is modeled after the many veterans treatment courts across the country (*i.e.*, it is intended to provide veterans (and victims) with family counseling, transportation, education, and other assistance, and emotional support). The program is likely to produce the same positive results as has been observed in veterans treatment courts. The program has obtained essential funding and experienced staff and volunteers. Unfortunately, however, the program has not yet become operational as it lacks universal community support. Groups that advocate for women's rights tend to view these types of programs as "get out of jail free" cards – in other words, they argue that veterans convicted of domestic violence should follow the same course in the criminal court as all other offenders, otherwise their victims will not see justice served. Certainly, the designers of Cook County's program are sympathetic to those beliefs.

However, the veterans track within the domestic violence court is not intended to allow veterans convicted of domestic violence to "get away with it." Rather, it is intended to require veterans to undergo the same criminal process as would be experienced in the criminal court, while also addressing the specific needs of veterans dealing with symptoms of PTSD, traumatic brain injuries, or other mental illnesses that are likely a (or, in some cases, *the*) cause of the violence. So the program's goal is the same as victims' goal: to prevent violence. The program's designers' next major feat will be to solidify this message with its opponents, and to gain opponents' support. With support, the program promises to yield positive results for both veterans and their victims. For more information, please see *Cook County's Creative Solution to Prevent Ongoing Domestic Violence Among Veterans: A Veterans Track within the Domestic Violence Court for Chicago* by Carly Everett at http://www.jmls.edu/veterans/pdf/newsletter-archive/2013-spring-VLSC-newsletter.pdf. **Carly Everett, J.D., M.P.A., is an attorney practicing commercial/corporate litigation at Segal McCambridge Singer & Mahoney, Ltd. in Chicago, Illinois.**

ON THE TIP OF YOUR TONGUE,

By Angela Peters

FAMILY LAW

In re Marriage of Agers, 2013 IL App (5th) 120375, July 8, 2013, Pulaski Co., GOLDENHERSH, Affirmed. Uncorroborated hearsay statements of five-year-old minor alone were insufficient to support a finding of abuse. Sufficient corroboration of alleged abuse or neglect requires more than just witnesses testifying that minor told them of abuse. Minor's mother failed to present sufficient evidence to show that father's visitation would seriously endanger minor. Court properly admitted videotape of minor and her father during visitation at courthouse, as court found tape relevant only for limited purpose of showing that minor did not fear her father, and to observe their interaction. Court properly denied mother's motion for in camera interview with minor, as mother could have presented minor's testimony during hearing but chose not to do so, and trial court has great discretion as to whether to conduct in camera interviews with minors. (WELCH and CATES, concurring.)

In re Marriage of Vondra,2013 IL App (1st) 123025, June 28, 2013, Cook Co., 2d Div., HARRIS, Affirmed. Wife filed petition for adult children's college expenses in pending dissolution proceedings, not yet ruled upon by court and no settlement agreement yet reached. Court properly found that adult children lacked standing to bring their claim and denying their request to join or intervene in their parents' dissolution proceedings. Wife will adequately represent children's interests; petition does not seek contribution from children toward college and living expenses, and alleges that husband has financial resources to pay entire expenses. (CONNORS and SIMON, concurring.)

In re Marriage of Carlson-Urbanczyk, 2013 IL App (3d)120731, June 26, 2013,3rd Dist., Will Co., WRIGHT, Affirmed. Court granted mother sole custody of three minor children, and ordered father to pay child support in statutory amount of 32% of his net income. Court properly ordered father to pay 20% of children's daycare and extracurricular activities, rather than the 40% of those expenses originally ordered, as that would have reduced father's net income by 50% (total child support plus expenses). Any amount above agreed 32% of father's net income represents upward deviation from statutory amount and must be supported by record. Court properly found that father did not have ability to pay 40% of those expenses. (CARTER and McDADE, concurring.

In re Marriage of Dowd, 2013 IL App (3d) 120140, June 20, 2013, Will Co.,WRIGHT, Affirmed. Court properly awarded wife 20% of husband's bonuses between $50,001 and $100,000 per year, and zero of husband's bonuses exceeding $100,000 each year in maintenance award (with monthly maintenance to wife of $6,100). Court's decision to allow fixed maintenance plus graduated percentage of annual bonuses as incentive for husband to maintain his productivity was reasonable and fair. Court properly denied wife's petition for contribution to attorney fees, as wife

received property and accounts in excess of $200,000, and thus had sufficient income and assets to pay her own attorney fees. (McDADE and O'BRIEN, concurring.)

In re Marriage of Tiballi, 2013 IL App (2d) 120523, June 7, 2013, Kane Co., McLAREN, Affirmed. In post-decree custody dispute, husband voluntarily dismissed without prejudice his petition to modify custody. Court properly ordered husband to pay fees of Section 604(b) court-appointed custody evaluator (psychologist), as a taxable cost upon voluntary dismissal. The function of a Section 604(b) professional is to advise trial court, not to assist a party in preparing for trial. (HUTCHINSON, concurring; ZENOFF, dissenting.)

In re K.T., 2013 IL App (3d) 120969, June 7, 2013, Peoria Co., LYTTON, Reversed and remanded. State filed juvenile petition alleging mother's neglect of child who was an enrolled member of Seminole Indian tribe. Court improperly denied mother's motion for continuance so tribe could enter the case prior to combined adjudication and dispositional hearing. Court's orders finding child neglected and mother unfit constituted "foster care placement" under the Indian Child Welfare Act, and thus court was required to comply with notice provisions of Act prior to hearing. (O'BRIEN and SCHMIDT, concurring.)

IRMO v. Mayfield, 2013 IL 114655, May 23, 2013, 4th Dist., Woodford Co., THEIS, Appellate court affirmed. Ex-husband received lump-sum settlement for workers compensation claim. Court must justify any departure from child support guidelines when allocating a lump sum. A one-time payment such as lump-sum settlement is income, but its nonrecurring nature may factor into court's decision on allocation. Ex-husband presented insufficient evidence to warrant deviation under Section 505(a)(2), and never specifically asked court to depart from guidelines. Court properly set child support at 20% of lump-sum settlement, in absence of any evidence to support a different amount. (KILBRIDE, FREEMAN, THOMAS, GARMAN, KARMEIER, and BURKE, concurring.)

In re the Parentage of J.W., 2013 IL 114817, May 23, 2013, 4th Dist., Vermilion Co., THEIS, Circuit court affirmed; appellate court reversed. Biological father of 11-year-old girl, conceived in one-time sexual encounter but whose parentage had been presumed to be of mother's first husband, legally established his parentage. In proceeding to determine visitation privileges under Section 14(a)(1) of Parentage Act, initial burden is on the noncustodial parent to show visitation is in the best interests of the child, using best-interest standard of Section 602 of Marriage Act. Court's ruling that any presumption that it was in child's best interests to promote parent-child relationship was rebutted by evidence, considering child's actions and behavior and concern of expert and GAL for increased risk of harm to child at this stage in her concrete cognitive development if visitation with biological father were awarded. (KILBRIDE, FREEMAN, THOMAS, GARMAN, KARMEIER, and BURKE, concurring.)

In re Marriage of McBride, 2013 IL App (1st) 112255, May 14, 2013, Cook Co., 2d Div., SIMON, Affirmed in part and reversed in part; remanded with directions. In dissolution trial as to division of property, court properly found that wife rebutted presumption of marital property. Even though wife had signed quitclaim deed transferring title of property she had acquired prior to marriage into joint tenancy, husband had prepared quitclaim documents and did not explain them to wife. Manifest weight of evidence indicated that wife had no intent to gift property. Court erred in finding that husband's payoff of mortgage on that property was intended as a gift. Court properly allowed wife to testify as to her intent in parties' letter requesting closure of joint account and equal distribution of funds

into two separate accounts, as letter was not a clear and unambiguous statement relating to dissolution proceedings.

In re Marriage of Young, 2013 IL App (2d) 121196, May 7, 2013, McHenry Co., BURKE, Reversed. Court's finding that respondent husband was accessing numerous child pornography sites on an iPad while inside the family residence was not against manifest weight of evidence. However, such conduct is not "harassment" under the Domestic Violence Act and thus plenary order of protection based on that conduct was improper. Petitioner wife did not prove, by a preponderance of the evidence, that husband acted "knowingly" by being consciously aware that his viewing of pornography on iPage was practically certain to cause emotional distress. (JORGENSEN and HUDSON, concurring.)

In re the Marriage of Jensen, 2013 IL App (4th) 120355, May 6, 2013, Coles Co., HOLDER WHITE,Appeal dismissed. Trial court's order finding that wife was entitled to maintenance, but reserving issue of maintenance for future determination and not setting an amount of maintenance to be paid, is not a final order for purposes of appeal. Court reserved maintenance to be review in six months, along with status of husband's employment and financial circumstances. Thus, appellate court lacks jurisdiction to consider merits of husband's appeal of court's allocation of 55% of total marital estate to wife, and finding that husband dissipated $14,000 in marital assets.(STEIGMANN and POPE, concurring.)

In re Marriage of Levinson, 2013 IL App (1st) 121696, May 2, 2013, Cook Co., 4th Div., FITZGERALD SMITH, Affirmed in part and vacated in part. Court properly awarded wife $78,500 in interim attorney fees, and properly considered all statutory factors. Allowing a party to not pay reasonable interim fees solely because the other party previously paid more to her own attorneys is unjust and contrary to purpose of statute. Marriage and Dissolution of Marriage Act does not allow for parties to generally test validity of interim fees awards under guise of "friendly contempt" merely because party does not agree with the award. Contumacious behavior of party in openly refusing, in open court, to pay interim fees per order is direct civil contempt. (LAVIN and EPSTEIN, concurring.)

In re Marriage of Sobieski, 2013 IL App (2d) 111146, 984 N.E.2d 163, 368 Ill.Dec. 438, the appellate court affirmed the trial court's decision to order the husband to pay $43,180 towards wife's outstanding attorneys' fees. One of the main issues at trial was the proper calculation of husband's net income. The court agreed with the finding that his net monthly income was $12,000 given his lack of credible testimony. The husband admitted that he handled significant amounts of cash in his employment at a family-owned business. He had also filled out various financial applications that contradicted his own testimony about his income. On the other hand, the wife suffered from bipolar disorder and depression and had a significantly lower earning capacity than the husband. Although the husband argued that he and the wife were in similar financial situations after the divorce, the appellate court held that the trial court properly considered all of the statutory factors when ordering the contribution.

In re Marriage of Sobieski, 2013 IL App (2d) 111146, 984 N.E.2d 163, 368 Ill.Dec. 438, the father appealed a trial court's ruling that he pay guideline child support even though he spent portions of 216 days per year with the children. In the parenting agreement, the mother was designated the four children's primary residential parent. The trial court was not persuaded that she should not be entitled to guideline support. The court relied on the case of *In re Marriage of Demattia,* 302 Ill.App.3d 390, 706

N.E.2d 67, 235 Ill.Dec. 807 (1999), which held that there should not be an automatic reduction in child support because the father spends extended time with his children, who reside primarily with the mother.

In re the Marriage of Putzler, 2013 IL App (2d) 120551, ___ N.E.2d ___, ___ Ill.Dec. ___, the appellate court affirmed the trial court's ruling to increase a father's support order from $2,500 to $3,703 per month. The father argued at trial that the mother had failed to demonstrate that expenses for the children had specifically increased. The mother hired a certified public accountant to review the father's tax returns and opine at trial on the father's income. The father failed to offer any contradictory evidence to this opinion. The appellate court reaffirmed existing caselaw, which states regardless of whether the children's needs have increased support obligations may be increased based upon an increase in the supporting parent's ability to pay. Additionally, it is well settled that an increase in the children's needs may be presumed because they have grown older and the cost of living has risen. The appellate court also upheld a fee award to the mother for prevailing on two petitions for rule on parenting issues even though she was employed at a law firm and her boss had agreed to not charge her for her representation.

Banister v. Partridge, 2013 IL App (4th) 120916, 984 N.E.2d 598, 368 Ill.Dec. 652, a parentage action, the mother petitioned for leave to remove the minor child to Kentucky so that she could reside with her new husband who was in the military and residing at Fort Campbell. The trial court made numerous findings under the *Eckert*factors (*see In re Marriage of Eckert,* 119 Ill.2d 316, 518 N.E.2d 1041, 116 Ill.Dec. 220 (1988)) and ruled that it was in the child's best interests to reside in Kentucky. Later, the mother filed a petition to remove the child from Kentucky to Maine, where her husband had been assigned to a ROTC training position. The trial court denied her petition and she appealed. On appeal, the mother argued that the trial court lacked statutory authority to hear her petition on the grounds that once leave is given to a parent to remove a child from Illinois, neither the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq.,* or the Illinois Parentage Act, 750 ILCS 40/1, *et seq.,* require the parent seek further leave of court to remove the child again. The court disagreed and held that by its inherent authority to enforce its custody and visitation provisions of its judgment, it had the authority to hear the subsequent removal issue. However, the appellate court reversed the trial court on the removal issue and found that the child's life would be enhanced if the mother was allowed to remove him to Maine.

Ralda-Sanden v. Sanden, 2013 IL App (1st) 121117, April 30, 2013, Cook Co., 2d Div., Reversed and remanded. Daughter filed complaint to establish paternity against Defendant, at age 22, three months after first learning of her father's identity. Daughter and her mother filed uncontroverted affidavits that mother, who had been a live-in nanny for Defendant, was raped by him, she never told daughter of his identity, and told her that he died in car accident. Courts may apply equitable tolling doctrine to allow a child to file a parentage claim past the Section 8(a)(1) statute of limitations period of the Illinois Parentage Act. (SIMON, specially concurring; CONNORS, dissenting.)

In re the Marriage of Price, 2013 IL App (4th) 120422, April 10, 2013, Vermilion Co., KNECHT, Affirmed. Trial court had jurisdiction to enter order modifying terms of its supplemental order to judgment of dissolution. Although husband filed notice of appeal, trial court retained jurisdiction to determine matters arising independent of and collateral to its judgment, as court's assessment of interest was imposed as a penalty for husband's failure to pay judgment within 90 days as originally ordered by court. This is independent of and collateral to the issues raised in direct appeal: whether court erred in ordering him to pay the equalization payment within 90 days of judgment. (STEIGMAN and TURNER, concurring.)

CIVIL MISCELLANEOUS LAW

Sutton v. Ekong, 2013 IL App (1st) 121975, July 9, 2013, Cook Co., 2d Div., SIMON, vacated. Plaintiff was not diligent in attempting to personally serve Defendant with Complaint; although Plaintiff's process server attempted five times to serve him at his residence, no attempt was made to serve him at his business address. Thus, court erred in granting Plaintiff's motion for service by special order of court, and service by Secretary of State was improper. Court did not have personal jurisdiction over Defendant when entering default judgment against him.(QUINN and CONNORS, concurring.)

Kalkman v. Nedved, 2013 IL App (3d) 120800, June 14, 2013, Knox Co., McDADE, Reversed and remanded with directions. (Court opinion corrected 6/25/13.) Sellers of lakefront home stated, on their mandatory Disclosure Report, that they were not aware of any material defects with walls or floors. After purchase, buyers discovered numerous material defects in leaking windows, patio doors, and garage door. Obligation to disclose material defects in "walls" of home does not also require a seller to disclose material defects in windows or doors. Residential Real Property Disclosure Act is not intended to mandate disclosure of all potential material defects, but only those 23 items listed as conditions or material defects, and Act must be strictly construed. (WRIGHT, concurring; LYTTON, specially concurring.)

City of Highland Park v. Kane,2013 IL App (2d) 120788, April 12, 2013, Lake Co., JORGENSEN, Reversed and remanded. (Court opinion corrected 6/20/13.) An officer need not articulate that a certain traffic violation provided a reason for a traffic stop for the stop to be valid. Where undisputed that Defendant failed to signal her turn, even though officer did not include that violation as a basis to stop Defendant, that formed an objective basis for traffic stop. (BURKE and HUDSON, concurring.)

Cushing v. Greyhound Lines, Inc., 2013 IL App (1st) 103197, May 16, 2013, Cook Co., 4th Div., EPSTEIN, Vacated and remanded with directions. Bus passenger, travelling from Las Vegas to Chicago, was run over by bus and killed during stop at Colorado bus station. Her surviving daughter, age 7, witnessed the accident; husband (who was not the father of the daughter) also survived her. Settlements of estate with two defendants are invalid, as court improperly removed estate administrator's counsel without a hearing and improperly excluded estate administrator from wrongful death action proceedings, and thus interests of decedent's estate were not represented in settlement. Court erred in granting substitution of judge for cause, as judge's statements did not demonstrate bias against Defendants sufficient for showing of cause. Dismissing emotional distress claims of daughter (by then age 16) was too harsh a sanction for her refusal to give deposition. (McBRIDE and HOWSE, concurring.)

In re Estate of Deuth, 2013 IL App (3d) 120194, June 27, 2013, Putnam Co., HOLDRIDGE, Reversed and remanded. Department of Healthcare and Family Services (DHFS) filed claim against decedent's estate for reimbursement of Medicaid expenses. Five-year "catch-all" statute of limitations in Section 13-505 of Code of Civil Procedure does not bar claims by government to recover public money. State's claim asserts a public right, to recover public funds paid to a citizen in the form of public healthcare benefits. State may extend a perfected lien indefinitely simply by filing notice of its intent to do so every five years. (WRIGHT and CARTER, concurring.)

Zheng v. Holder, Federal 7th Circuit Court, Nos. 11-3081 & 12-2566 Cons., July 11, 2013, Petition for Review, Order of Bd. of Immigration Appeals, Petition granted. Ct. of Appeals remanded for further consideration alien's asylum and withholding of removal applications where alien (native of China) alleged that she would be subjected to forced sterilization if required to return to China, under circumstances where alien already had two U.S.-born children. While Bd.'s denial was based on 2007 Country Profile that suggested China was barring use of physical coercion to compel persons to submit to forced abortion or sterilization, other more recent documents suggested that Chinese Fujian authorities were more vigorously enforcing one-child policy and applied it even in circumstances where children were born outside of China.

In re Ryan, Federal 7th Circuit Court, No. 12-3398, July 8, 2013, N.D. Ill., E. Div., Affirmed. In adversary proceeding filed by debtor in his Chapter 13 bankruptcy petition, Bankruptcy Ct. did not err in rejecting debtor's contention that federal govt.'s lien of $136,898.93 was "void" for all but $1,625, which represented total of debtor's personal assets. In general, liens pass through bankruptcy unaffected, and under Dewsnup, 502 US 410, section 502(d) of Bankruptcy Code did not allow debtor to void lien. Rather, govt. had unsecured claim for remaining portion of its lien that was not satisfied after tender of debtor's personal assets. Ct. rejected debtor's claim that holding in Dewsnup did not apply because Dewsnup concerned Chapter 7 bankruptcy petition.

Rogers v. Imeri, No. 115860, 5th Dist., March 12, 2013, Affirmed; certified question answered. This case presents question as to whether trial court properly found in instant Dramshop Act action that $160,550 that plaintiff had previously received from his own insurer and from alleged intoxicated person's liability insurer should be set-off from any jury's verdict in favor of plaintiff, as opposed to being set-off from $130,338.51 maximum statutory damages cap for dramshop actions where defendant's insurance company had been declared insolvent and was being represented by Illinois Insurance Guaranty Fund. Appellate Court, in affirming trial court, found that any required reduction for "other insurance" recoveries set forth in section 546(a) of Illinois Insurance Guaranty Fund statute must be applied to jury's verdict, and, if said reduction produces damages award that is greater than statutory cap, said award must be further reduced to maximum statutory damages cap in Dramshop Act.

In the Matter of Rita P., No. 115798, 1st Dist., Feb 19, 2013, reversed. This case presents question as to whether trial court properly entered order authorizing involuntary administration of psychotropic medication to respondent for 90 days, where trial court failed to make specific findings of fact to support said order. Appellate Court, in reversing trial court, found that such findings were mandatory under section 3-816(a) of Mental Health and Developmental Disabilities Code and rejected state's contention that said findings were only discretionary, or that trial court's statement that testimony was "overwhelming in support of state's petition" satisfied said requirements.

People v. Burge, Nos. 115635 and 115645 Cons., 1st Dist., Nov. 30, 2013, Reversed and remanded with instructions. This case presents question as to whether trial court properly dismissed Attorney General's petition alleging that Pension Board's decision to allow Jon Burge to continue to receive his police officer pension violated section 5-227 of Pension Code due to fact that Burge had been found guilty on two federal felony obstruction of justice charges. While trial court found that section 1-115 of Pension Code did not vest it with subject-matter jurisdiction to rule on merits of Attorney General's complaint where section 5-189 of Pension Code vested Pension Bd. with exclusive original jurisdiction to determine issue, and where Attorney General's complaint could not be construed as timely appeal seeking review of Pension Bd.'s decision, Appellate Court, in reversing trial court,

found that there was no legislative intent to divest circuit courts of subject-matter jurisdiction to hear civil actions brought by Attorney General under section 1-115(b) of Pension Code. Appellate Court further found that Pension Bd. erred in finding that Bd.'s tie vote on issue regarding Burge's ability to receive pension benefits meant that Burge could continue to receive said benefits since section 5-182 of Pension Code permits receipt of pension only on majority vote of Pension Bd.

The Venture-Newberg Perini Stone & Webster v. Ill. Worker's Compensation Commission, No. 115728, 4th Dist., Dec. 6, 2012, Circuit court judgment reversed; Commission decision reinstated. This case presents question as to whether trial court properly set aside Commission's determination that claimant was entitled to Workers' Compensation benefits arising out of his accident, which occurred while claimant was riding in vehicle from his motel to jobsite. Appellate Court, in reversing trial court and reinstating Commission's award, found that claimant's injuries were compensable under Workers' Compensation Act since claimant met requirements of traveling-employee exception where claimant was assigned to jobsite that was not employer's premises, but rather was premises of client of employer. Dissent, as well as employer in its petition for leave to appeal, argued that claimant's assigned location became employer's premises (so as to preclude claimant from qualifying for traveling-employee exception) under circumstances where, as here, claimant was hired only on temporary basis and was assigned only to work at one specific jobsite for duration of his employment.

CRIMINAL LAW

People v. Vasquez, 2013 IL App (2d) 120344, July 15, 2013, Du Page Co., SPENCE, Affirmed as modified. Defendant filed pro se petition for relief seeking $1,595 credit against a $3,000 drug assessment, for time spent in custody before he was sentenced, under Section 110-14 of Code of Criminal Procedure. Defendant lacked standing to seek relief under Post-Conviction Hearing Act, as he was not imprisoned on this case serving MSR term when he filed his petition. However, lack of standing under the Act does not equate to lack of subject matter jurisdiction, and does not preclude appellate court from granting request for monetary credit.(BURKE and JORGENSEN, concurring.

People v. Thomas, 2013 IL App (2d) 120646, June 20, 2013, Kane Co., ZENOFF, Affirmed. Defendant was convicted of aggravated criminal sexual assault. Defendant claimed ineffective assistance of counsel based on court-appointed attorney's failure to comply with Supreme Court Rule 651(c). Attorney appointed to represent Defendant in post-conviction proceeding withdrew on grounds that Defendant's petition was incurably meritless. Defendant then had no further statutory right to counsel, absent unusual circumstances, and had no right to a reasonable level of assistance from subsequently appointed attorney. (McLAREN and BIRKETT, concurring.)

People v. Jordan, 2013 IL App (2d) 120106, June 28, 2013, Du Page Co., ZENOFF, Vacated and remanded with directions. Defendant was convicted, after jury trial, of aggravated DUI and aggravated driving while license revoked. Where a defendant moves only to reconsider his sentence, counsel cannot satisfy Rule 604(d) by certifying that he has ascertained the defendant's contentions only as to his plea. It cannot be assumed that a defendant's decision not to move withdraw his plea, where he has moved only to reconsider his sentence, was defendant's decision based on proper advice and consultation with counsel unless counsel's Rule 604(d) certificate contains language referring to consultation about the plea. (HUTCHINSON and JORGENSEN, concurring.)

People v. Lard, 2013 IL App (1st) 110836,June 28, 2013, Cook Co., 2d Div., HARRIS, Affirmed. Defendant was convicted, after bench trial, of residential burglary. Preliminary hearing testimony of officer was admitted, although officer died prior to trial. Mere speculation that discovery might have produced evidence beneficial to Defendant cannot support Defendant's argument that his counsel's cross-examination of officer at preliminary hearing was not adequate and effective. (QUINN and CONNORS, concurring.)

People v. Olson,2013 IL App (2d) 121308,June 28, 2013,Du Page Co., SCHOSTOK, Vacated and remanded. Defendant was charged with DUI and ticketed for improper lane usage. Court was not required to grant Defendant's motion in limine to bar admission of results of breath test where testing machine was not certified for 63 days, although Administrative Code requires that breath-testing machines be certified every 62 days. As State argued that it had substantially complied with the Code, court should hold evidentiary hearing on whether State substantially complied with Code regulations, to render test results admissible. (HUTCHINSON and HUDSON, concurring.)

People v. Dismuke, 2013 IL App (2d) 120925, June 19, 2013, Kane Co., ZENOFF, Affirmed. Defendant was indicted for being armed habitual criminal and for unlawful possession of a weapon by a felon. Court properly dismissed charges, as Defendant's possession of cannabis and of handgun was the same act. Handguns that formed bases of later-filed charges were found during same searches at same times and places as cannabis that resulted in original charges. Defendant committed a single act within meaning of compulsory-joinder statute, and State was required to charge him with all offenses arising therefrom in single prosecution. (HUTCHINSON and JORGENSEN concurring.)

People v. Stahl, No. 115804, 5th Dist., Feb. 19, 2013, Affirmed. This case presents question as to whether trial court in fitness restoration proceeding properly found that defendant was unfit to stand trial (and that it was not reasonably probable that defendant would be fit to stand trial within one year), where defendant was unable to recall events surrounding incidents leading to charges of home invasion and aggravated unlawful restraint in view of fact that defendant had incurred brain damage resulting from self-inflicted gunshot wound. Appellate Court, in affirming trial court, held that defendant's inability to recall anything that occurred within 48 hours leading up to events at issue in case supported trial court's conclusion that defendant was not fit to stand trial given emphasis in applicable statute that defendant be able to recall and relate to counsel events at issue in charged offense. In its petition for leave to appeal, state argued that defendant's inability to recollect events on day of charged offenses due to amnesia or brain injury did not, by itself, support finding that defendant was unfit to stand trial.

People v. Hommerson, No. 115638, 2nd Dist., Jan 18, 2013, Affirmed. This case presents question as to whether trial court properly dismissed defendant's pro se post-conviction petition that challenged his first-degree murder conviction, where dismissal was based on defendant's failure to include notarized affidavit attesting to veracity of petition's contents. Appellate Court held that instant first-stage dismissal was proper under Carr, 407 Ill.App.3d 513, due to defendant's non-compliance with affidavit requirement under section 122-1(b) of Post-Conviction Hearing Act. Appellate Court further observed that defendant should not be able to allege anything that guarantees that his petition proceed to second-stage consideration under Act without verifying that said allegations are true. (Dissent filed.)

People v. Stoeckler, No. 115756, 3rd Dist. Rule 23 Order. This case presents question as to whether, after defendant had been convicted of murder and aggravated criminal sexual assault, trial court properly denied defendant's post-conviction motion under section 116-3 seeking Y-STR DNA test

of semen stain found on victim's pants, where said denial was based on trial court's determination that no experts had indicated that new DNA test would yield different result, and that defendant's guilt was overwhelming. Appellate Court, in reversing trial court, found that requested Y-STR DNA test had scientific potential to produce new non-cumulative evidence that was materially relevant to defendant's assertion of actual innocence. Dissent, as well as govt. in its petition for leave to appeal, argued that denial was appropriate because defendant had failed to indicate how Y-STR DNA test would produce more probative result than prior DNA test that did not exclude defendant as possible contributor to semen sample, especially where defendant had not claimed any error on part of forensic scientists who had conducted prior DNA test.

People v. Fernandez, No. 115527, 1st Dist. Rule 23 Order. This case presents question as to whether govt. failed to prove beyond reasonable doubt defendant's guilt on charge of aggravated discharge of weapon in direction of police officer, where said conviction was based on accountability theory. Appellate Court, in affirming defendant's conviction, found that rational trier-of-fact could have found defendant accountable for shooting of officer where defendant acknowledged in written statement that he agreed to drive shooter around neighborhood so that shooter could burglarize parked cars, and that under common design rule, defendant was responsible for shooter's acts in furtherance of said plan to burglarize that included instant shooting of officer. Appellate Court further noted that defendant had assisted shooter by driving him away from crime scene after shooting, and by pretending that neither he nor shooter was present in apartment when police knocked on apartment door. In his petition for leave to appeal, defendant argued that record contained insufficient evidence of his guilt where he did not know that shooter possessed firearm prior to shooting, and that court could not infer intent to discharge firearm based on defendant's actions taken after said shooting.

People v. Cummings, No. 115769, 3rd Dist., Feb. 11, 2013, Affirmed. This case presents question as to whether, in instant prosecution on driving vehicle while driver's license was suspended, trial court properly suppressed evidence of male defendant's driver's license status, under circumstances where officer's sole purpose for stopping vehicle in which defendant was driver was to determine whether driver was female owner of said vehicle who was subject of arrest warrant, and where officer, after determining that defendant was not said owner, asked for defendant's driver's license. Although defendant conceded that officer made valid stop of vehicle to determine identity of driver, Appellate Court, in affirming instant suppression order, found that defendant had been subjected to unreasonable seizure when officer requested him to produce driver's license since officer's reasonable suspicion of any criminal activity had dissipated at time of said request. Appellate Court further noted, though, that it would have been reasonable for officer to explain reason for stop, advise defendant that he was free to go, and then request defendant's license in context of consensual encounter. (Dissent filed.)

People v. McChriston, No. 115310, 4th Dist. Rule 23 Order. This case presents question as to whether trial court properly dismissed defendant's pro se section 2-1401 petition alleging that his 25-year sentence for unlawful delivery of controlled substance should be reduced by three years, where defendant claimed that Dept. of Corrections impermissibly added three-year mandatory supervised release term to his sentence under circumstances where sentencing court made no mention that defendant would be required to serve term of mandatory supervised release and did not mention any mandatory supervised release term in court's written sentencing order. Appellate Court, in affirming trial court, found that defendant's three-year mandatory supervised release term attached by operation of law and not by any action taken by Dept. of Corrections.

People v. Fields, No. 115542, 1st Dist., Nov. 14, 2012, Affirmed in part and vacated in part; cause remanded. This case presents question as to whether trial court properly proceeded to dispositional hearing immediately following trial in which respondent was found to be sexually violent person, where respondent requested that said hearing be continued to later date following his submission to new supplemental mental examination. While trial court, in denying respondent's continuance request and entering instant commitment order, determined that record already contained sufficient evidence to find that respondent was in need of treatment, Appellate Court, in vacating trial court's commitment order, found that section 40(b)(1) of Sexually Violent Persons Commitment Act required that trial court continue dispositional hearing where respondent had indicated that he wished to present witness at later date.

U.S. v. Collins, Federal 7th Circuit Court, No. 11-3098, May 15, 2013, N.D. Ill., E. Div., Affirmed. In prosecution on drug conspiracy charge, Dist Ct. did not err in admitting taped telephone conversations in which defendant and police informant discussed prices, quantities and quality of drugs. While defendant argued that govt. failed to lay proper foundation where phone calls took place outside presence of govt. agents, govt. satisfied its burden where agents described their communications to informant as to when and how to record said conversations, and where agents testified as to chain of custody once they received tapes from informant. Fact that defendant raised possibility that tapes were tampered with outside presence of govt. agents was insufficient to render said tapes inadmissible. Moreover, agents could properly testify from their own observations of defendant's voice that defendant was one of speakers in tapes. Also, expert could properly testify as to meaning of certain code words contained in tapes based on his experience and training in drug-dealing community.

U.S. v. Roux, Federal 7th Circuit Court, No. 10-2192, May 10, 2013, C.D. Ill., Affirmed. In prosecution on charge of inducing minor to create sexually explicit images, Dist. Ct. did not err in admitting evidence that defendant had sexually abused two of victim's sisters. Said evidence was admissible under Rule 404(b) to establish defendant's motive to commit charged offense and to rebut defendant's claim that he had never taken subject photographs or engaged in sexual abuse of victim. Fact that proffered evidence did not involve creation of sexually explicit photographs did not require different result since said evidence was relevant to establish defendant's sexual interest in under-aged girls. Dist. Ct. also did not err in admitting defendant's booking photographs to establish similarity of defendant's appearance at time of arrest to male figure depicted in photographs, where said pictures could explain defendant's recent weight loss, and where photographs failed to contain any formal indicia demonstrating that pictures were jailhouse booking photographs.

People v. Brown, 2013 IL App (2d) 111228, May 6, 2013, Winnebago Co., McLAREN, Vacated and remanded. (Court opinion corrected 5/8/13.) Defendant was convicted of three counts of felony disorderly conduct, from making a false report to public employees. Structural error occurred when court allowed State to exercise peremptory challenge to excuse a juror in middle of trial, in denial of due process. Court improperly allowed State to invade an impartial jury, as sanction for Defendant violating order in limine barring reference to police shooting which had occurred in the church where Defendant's parents were pastors. (BURKE and HUDSON, concurring.)

People v. Wright, 2013 IL App (1st) 111803, May 7, 2013, Cook Co., 2d Div., HARRIS, Reversed. State failed to prove Defendant guilty, beyond a reasonable doubt, of offense of aggravated unlawful use of a weapon, because it did not prove that Defendant knowingly or constructively possessed the weapon attributed to him. Defendant and another man fell down a flight of stairs, and he

was found lying on top of or near a gun. State did not prove that Defendant exercised exclusive or immediate control over area where weapon was found, as Defendant did not reside there, and three other people were in basement area where weapon found. (QUINN and CONNORS, concurring.)

People v. Jackson, 2013 IL App (3d) 110685, May 10, 2013, Tazewell Co., McDADE, Affirmed. Court was within its discretion in disqualifying counsel despite Defendant's waiver of any potential conflict of interest, as court applied Ortega factors to find that presumption in favor of preferred counsel was outweighed by risk of potential conflict.(WRIGHT and LYTTON, concurring.)

*Thank you to ISBA e-clips for these contributions.

Water Law

Our final CLE for the 2012 - 2013 year was presented on June 11, 2013, by attorney Gerald Beatty, an underwriter for Chicago Title Insurance Company.
Jerry informed us about Illinois water law. He explained navigable and non-navigable waterways, riparian rights and title issues arising with respect thereto. Most engaging was his presentation on the history of the Chicago lakefront. Clearly, a history buff, replete with dates, Jerry regaled us with stories of greed, law and politics which led to the successful development of our lakefront as a recreational gem (as opposed to a commercial wasteland).

Chicago Title recently joined NSBA as an affiliate and sponsor. Vince Hearn, local marketing representative, was also present for the CLE. We heartily welcome CT and look forward to a long and fruitful relationship.

Submitted by Jan S. Weinstein, Incoming NSBA President

Supremacy of the Unit Rule in Illinois Condemnation Cases[1]

By Paul E. Peldyak and Robert P. Groszek

Introduction.

With the passage of the American Recovery and Reinvestment Act of 2009, approximately $896 million in funding of various "shovel ready" projects are scheduled for Illinois. The leading categories for funding include transportation and infrastructure investments.[2] Illinois attorneys including general practitioners may find their clients confronted with an eminent domain proceeding seeking condemnation of a client's property. The overriding consideration in a condemnation case is to comply with the constitutional mandate to pay just compensation when private property is taken for public use.[3] The "Unit Rule" is the fundamental rule for valuation in condemnation cases from which a jury may determine "just compensation." The importance of this article is, therefore, to acquaint lawyers with the "Unit Rule" and to examine a challenge to that basic rule in a recent case where an owner sought a more favorable valuation for her property.

The *Kelley* Case.

On June 1, 2007, the Third District Appellate Court issued its order in *Department of Transportation, State of Illinois v. Mary A. Kelley, et al.*, No. 3-06-0348, which affirmed the supremacy of the "Unit Rule" in Illinois condemnation cases (referred to as *"Kelley II"*).[4] The decision affirmed a

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[1] Robert W. Fioretti is Alderman of Chicago's Second Ward and is a Special Assistant Attorney General. Paul E. Peldyak, is Of Counsel to Groszek Law Firm and is a Special Assistant Attorney General.
Robert P. Groszek is the principal of Groszek Law Firm

[2] http://news.onvia.com/illinois-stimulus-money-already-at-work-in-illinois-according-to-recoveryorg/; H.R. 1, the "American Recovery and Reinvestment Act of 2009" ("Recovery Act") (Pub. Law 111-5)(February 17, 2009).

[3] Ill. Const. art. I, §15 and 735 ILCS 30/10-5-5 (2009) (formerly 735 ILCS 5/7-101).

[4] The appellate court previously ruled on two certified questions appealed prior to trial in which defendant raised a challenge to the "Unit Rule" by introducing a theory of valuation termed the "Larger Parcel Theory" which is discussed herein. That case, *Department of Transportation v. Kelley*, 352 Ill. App. 3d 278 (3rd Dist. 2004), leave to appeal denied, *Department of Transportation v. Kelley*, 212 Ill. 2d 530 (2004) (*"Kelley I"*). In *Kelley II,* the Illinois Supreme Court denied defendant's petition for leave to appeal on September 26, 2007 in *Department of Transportation, State of Illinois v. Kelley*, 225 Ill. 2d 630, 875 N.E.2d 1110; 2007 Ill. LEXIS 1463; 314 Ill. Dec. 823 (2007), and the U.S. Supreme Court denied defendant's

rule of valuation which traced its lineage from the 1873 case of *Page v. Chicago, Milwaukee & St. Paul Railroad Co.*, 70 Ill. 324 (1873). The "Unit Rule" requires that the part taken from a whole parcel be valued as a proportionate part of the value of the whole considering all of its capabilities and best uses.[5] In doing so, the court must determine what comprises the whole parcel based on the unity of title, contiguity and unity of use. This determination becomes the basis for resolving the question of "just compensation" determined by a jury. The rule developed in response to the railroad companies' argument that the narrow strip of land needed for a railway right-of-way was too small for development and had no value or little value as land when it was separated from the parcel from which it was taken. This approach would often yield minimal compensation far below the value of the real estate unless the price was set proportionate to that which a sale of the entire parcel would bring on the open market.

Facts of the Case

Mary A. Kelley under the Kelley Trust owned a contiguous parcel of approximately 289 acres in Plainfield Township used for residential and farming purposes and also contained a small part of woodland along a river. The Illinois Department of Transportation (referred to as "IDOT" in this article) filed suit to condemn 1.047 acres to widen the intersection of Route 59 and 127th to better accommodate increased traffic. The 1.047 acres comprised an irregularly shaped portion of land and too small for any usable residential or commercial purpose by itself.[6]

The land condemned was only a partial taking of the whole parcel. Prior to trial, the Court determined from the evidence what constituted the whole of the parcel from which the part condemned was taken consistent with the "Unit Rule."[7] In making this determination, a Court considered the following: (1) unity of title, (2) contiguity, and (3) unity of use.[8] In this case, the Kelley trust held title to the entire 289 acre parcel satisfying the "unity of title" requirement and the property was contiguous. Defendant, however, disagreed with the court's finding that the parcel from which the condemned part was taken was the entire 289 acre tract. Defendant's appraisers did not disagree that the highest and best use of the parcel would be used mixed residential and commercial use, but sought to introduce a new theory of the "Larger Parcel Theory" to argue the entire tract could be divided into separate "zones of use" rather than being considered as one parcel with all different highest and best uses considered as contributing to the value of the land as a whole.

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petition for certiorari on February 19, 2008, in *Kelley v. Ill. Dep't of Transp.,* 128 S. Ct. 1256, 170 L. Ed. 2d 67, 2008 U.S. LEXIS 1364 (2008).

[5] *Department of Transportation v. Kelley*, 352 Ill.App.3d 278, 281, 815 N.E.2d 1214, 287 Ill.Dec. 411 (2003).

[6] The platted map of the property reveals that this irregular L-shaped parcel is oddly shaped, being primarily long and narrow. Facing 127th Street the parcel runs east to west for about 560 feet, but is only about ten feet in width, widening as it reaches the northwestern corner of the property towards the intersection. Similarly, that part facing Route 59 stretches about 760 feet from north to south and is only about thirty feet wide, gradually widening at it reaches the intersection of 127th Street and Route 59.

[7] *Department of Transportation v. Kelley*, 352 Ill.App.3d 278, 815 N.E.2d 1214, 287 Ill.Dec. 411 (2003).

[8] *Department of Transp. v. Chicago Title*, 303 Ill.App.3d 484, 495, 707 N.E.2d 637 (1st Dist. 1999).

The "Larger Parcel" Theory.

What set the stage for this battleground was the case of *Dept. of Transp. v. HP/Meacham Land Ltd. P'ship* and the specially concurring opinion of Justice Holdridge in *Kelley I*.[9] *HP/Meacham* involved a *narrow* exception to the strict application of the "Unit Rule" because a strict application there would materially misrepresent the true value of the land taken as opposed to a much less value for the remainder. In that case, the entire tract of property from which the condemned portion was taken, consisted of clearly physically defined buildable land and non-buildable wetland. After the taking, the owner retained only non-buildable wetland. The specifically distinct wetland would be worth considerably less than the part taken. To avoid the inequity and for a jury to award "just compensation" to the owner, the court determined there was no "unity of use" to define a single parcel of wetland and non-wetland and permitted the property to be considered two separate parcels and the part taken valued accordingly.[10] The purpose of such finding is to give the jury the opportunity to determine just compensation from potentially conflicting expert testimony of valuation is to place the owner in the same economic position as if no condemnation occurred; it is not to enhance or improve the owner's financial status.[11]

In *Kelly I*, although all parties agreed that the highest and best use of the property was mixed commercial and residential use and that the court previously determined the parcel to be the whole 289 acres, defendant's appraiser insisted on introducing the "Larger Parcel Theory" to define separate "zones of use." Defendant's appraiser proposed to *define a new "parcel" from which the condemned part was taken* rather than relying on the court's prior determination that the "parcel" was the entire 289 acres of contiguous property.

According to the "Larger Parcel Theory," one appraiser divided the 289 acres into three "zones of use": (1) an eighty acre zone of solely commercial use, (2) a two hundred one acre zone of residential sub-division use, and (3) a ten acre zone of residential estate use, each of which he assigned it own unique value never considering each "zone" as contributing to the value of the whole 289 acre parcel. The appraiser claimed modern appraisal and development trends supported this type of division.[12] IDOT filed a motion to bar this testimony which was denied and resulted in two certified questions taken as an interlocutory appeal to the appellate court in *Kelley I*.[13] The court summarized the issue succinctly: ". . . in a partial taking eminent domain action, does the unit rule of valuation prohibit appraisers from valuing portions of the whole differently and separately from the whole?"[14] The court then held "that

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[9] *Dept. of Transp. v. HP/Meacham Land Ltd. P'ship*, 245 Ill.App.3d 252, 614 N.E.2d 485 (2nd Dist. 1993); *see also, City of Springfield v. W. Koke Mill Dev.*, 312 Ill.App.3d 900, 902, 728 N.E.2d 781, 783 (4th Dist. 2000) (allowing separate valuations of property including both a drainage area and dry, level land); and see *Kelley I*, 352 Ill.App.3d at 282-84, 815 N.E.2d at 1218-19 (specially concurring opinion of J. Holdridge).

[10] *Id.* at 256-7

[11] *People ex rel. Dir. of Finance v. YWCA*, 74 Ill.2d 561, 572, 378 N.E.2d 305, 311 (1979), *overruled on other grounds by People v. Ortiz*, 196 Ill.2d 236, 752 N.E.2d 410 (2001).

[12] *Kelley I* , 352 Ill.App.3d at 279, 815 N.E.2d at 1216.

[13] *Kelley I* , 352 Ill.App.3d 278, 280, 815 N.E.2d at 1216; Ill. S. Ct. R. 308(a).

[14] The court relied on past precedent as expressed in such cases as *Forest Preserve Dist. v. Wing*, 305 Ill. 194, 196, 137 N.E. 139, 141 (1922); *Dept. of Transportation v. Quincy Coach House, Inc.*, 64 Ill.2d 350, 362-3, 356 N.E.2d 13, 19 (1976); *Department of Transp. v. First Bank*, 260 Ill. App. 3d 490, 496, 631 N.E.2d 1145, 1149 (1st Dist. 1992); IPI Civil 3d 300.44 (2000).

defendant's experts may not testify to appraisals that value portions of the subject property separately from the whole."[15]

Justification for Applying the "Larger Parcel" Theory.

Defendant claimed she was denied just compensation guaranteed by the U.S. and Illinois constitutions for the partial taking because the part taken was far more valuable as commercial property, not mixed use property, and should have been found to be such. To achieve this result, Defendant's appraiser argued he should be allowed to define a "larger parcel" from which the part condemned was taken based on his knowledge and experience. In defendant appraiser's opinion, this "larger parcel" consisted of an arbitrary eighty acres, one of the "zones" of use, delineated from the 289 acres which he termed suitable for solely commercial purposes. The entire partial taking was part of this hypothetical "larger parcel."

The "Larger Parcel" Is Not an Extension of the "Unit Rule."

Unlike the difference in the property's use as distinctly buildable or non-buildable wetland in *HP/Meacham*, this parcel was *not physically divisible* into clearly "commercial" and non-commercial or "residential" tracts. Nor was there a means of clearly differentiating where commercial use would end and where residential use would begin. Creation of the eighty acre parcel was solely the theoretical construct of the appraiser, one of an infinite number of "possibilities" where Kelley's commercial property ends and residential begins. Different appraisers could have different views as to the size of this hypothetical "commercial" parcel. The parcel could have been hypothetically larger or smaller and termed "commercial." All appraisers, however, agreed that the entire 289 acre parcel was suitable for "mixed commercial and residential" development.[16] The effect of creating the "Larger Parcel" was to create a parcel capable of commercial development throughout thereby increasing the value of the part taken to the owner since pure commercial property was worth more than mixed use commercial and residential property.

The problem with introducing the "Larger Parcel Theory," however, is the fact that the appraisers can introduce conflicting notions of what constitutes the "parcel" from which the take is made thereby forcing the jury to choose between conflicting ideas of the size of the hypothetical parcels before determining just compensation based on speculative "potentials" of use. Instead of determining "just compensation" from often conflicting evidence, the jury is now forced to deal with another issue – one which is resolved by the court prior to trial. The jury must determine, from conflicting evidence, the size and use of the parcel from which the part taken is made *and* determine from conflicting evidence "just compensation" for that taking.

Defendant's appraiser stated the "Larger Parcel Theory" opposes "size regression" which holds that as the number of square feet or acres in a tract of land increases, the price or value per unit tends to decrease. Accordingly, taking the entire 289 acres as the parcel from which the condemned portion is

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[15] *Kelley I,* 352 Ill.App.3d at 282, 815 N.E.2d at 1218.

[16] Had the court allowed defendant's appraiser to testify, a jury would be confronted with two questions, not one. The jury would have to determine the "Larger Parcel" from conflicting testimony and would have to determined "just compensation" for the part severed from the "Larger Parcel." By having the Court determine the parcel from which the take is made based on the unity of title, contiguity and unity of use, the jury concentrates on the issue of awarding "just compensation" without confusion.

taken theoretically decreases the value of that part which would be more valuable if considered only commercial property as opposed to mixed use property. But the opposite is also true. If the size of the parcel becomes too small, it may lose all value and have only nominal value on the open market, regardless of its prior highest and best use. The irregular, oddly shaped parcel taken for widening Route 59 at 127th is of no value for either commercial or residential development *by itself* and represents only nominal value at best.

Where strict application of the "Unit Rule" creates an injustice, the "unity of use" factor is a "safety value" for equitable application. Like the *HP/Meacham* case, where use of the property clearly falls into two categories where the tract of land is physically divisible into two categories of property such as buildable and non-buildable land, the court can separate an otherwise contiguous parcel under single ownership into two tracts and award compensation accordingly.

The "Unit Rule" is judge made and thus could be modified by a court. It grew out of equitable considerations to fulfill the constitutional mandate to pay "just compensation" for land taken for public use. It curbed the power of railroad companies to force a low price for property taken for a railroad right-of-way considering the nominal value of the strip of land taken and gave the landowner appropriate compensation for his or her property neither providing a windfall nor unfairly low compensation. If a change of the rule is warranted, it is better left to the legislature to accomplish that result.

Conclusion.

The "Unit Rule" has proven to be a workable, fair and equitable rule in fulfilling the constitutional mandate to provide "just compensation" to owner of private property taken for for public use. It also requires that property be valued at hits "highest and best use" not simply at market value.

The "Unit Rule" was part of our common law since the mid-nineteenth century. The holdings in *Kelley I* and *Kelley II* defeated a serious challenge to the "Unit Rule" of valuation. Practitioners should be wary, however, because language in those cases suggests the battle for supremacy of the "Unit Rule" may not be over.[17]

[17] See Justice Holdridge specially concurring opinion in *Kelley I* , 352 Ill.App.3d 282-84 and Justice McDade's dissenting opinion in *Kelley II* (unpublished order in Docket 03-06-0348), slip op. pp. 1-15).

CALENDAR OF EVENTS

September 24, 2013 **5:30-8:30 p.m.**	**2013-2014 Officers Installation Dinner, and presentation of Sanford Blustin Award to Honorable Thomas Kilbride, Chief Justice of the Illinois Supreme Court** **North Shore Country Club, 1340 Glenview Road, Illinois 60025**
October 8, 2013 **6:00 – 8:00 p.m.**	**Dinner CLE – Speaker TBA** ***Happ Inn Bar and Grill, 305 Happ Road, Northfield, Illinois 60093**
November 12, 2013 **6:00 – 8:00 p.m.**	**Dinner CLE – Speaker TBA** ***Happ Inn Bar and Grill**
December 10, 2013 **6:00 – 8:30 p.m.**	**Holiday Party – Location TBA**
January 7, 2014 **6:00 – 8:00 p.m.**	**Dinner CLE – Speaker TBA** ***Happ Inn Bar and Grill**
February 11, 2014 **6:00 – 8:00 p.m.**	**Dinner CLE – Speaker TBA** ***Happ Inn Bar and Grill**
March 11, 2014 **6:00 – 8:00 p.m.**	**Dinner CLE – Speaker TBA** ***Happ Inn Bar and Grill**
April 8, 2014	**Ethics CLE (6 hours) at the Skokie Courthouse** **5600 Old Orchard Road, Skokie, Illinois 60077**
May 13, 2014 **6:00 – 8:30 p.m.**	**Judge's Night!** **North Shore Country Club, 1340 Glenview Road, Illinois 60025**
June 10, 2014 **6:00 – 8:00 p.m.**	**Dinner CLE – Speaker TBA** ***Happ Inn Bar and Grill**

***NSBA CLEs** are held at the Happ Inn, 305 Happ Road, Northfield, Illinois 60093. Cost: $31.00 for dinner and 1 hour CLE credit. Food choices include (1) Vegan/Vegetarian, (2) Fish or (3) Chicken/Beef. RSVP to Anna Krolikowska @ president@ilnsba.org

PLEASE NOTE!!! $25.00 cancellation fee will be charged for no-shows, unless you substitute someone else in your place.

NORTH SUBURBAN BAR ASSOCIATION

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