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# Conjugal Co-Habitation Not Established

The parties were married to each other for 29 years. A Judgment for Dissolution of Marriage was entered on January 26, 2015, which incorporated a Marital Settlement Agreement. The MSA required in part, that the husband pay the wife maintenance in the amount of \$4,200 per month, for a period of 29 years. The parties had one child, a daughter, now emancipated. On January 27, 2017, the husband filed a Petition to Terminate or Reduce Maintenance based on the wife's cohabitation with her boyfriend on a resident, continuing, and conjugal basis.

The wife was represented by her attorneys James M. Quigley and Shana L. Vitek of Beerman LLP. The husband was represented by his attorneys Brian J. Hurst of Hurst, Robin & Kay, LLC, Deanna J. Bowen and Lauren A. Wu of the Law Office of Deanna J. Bowen.

The husband made a series of allegations in his Petition as follows: that his wife moved to Marathon to be with her boyfriend; that she and the boyfriend resided together; that the boyfriend kept his belongings at the wife's condo; that the boyfriend walked to work every morning from her condo; that her parents were aware and have stated that she lived with the boyfriend; that the wife and the boyfriend signed cards together; that the boyfriend and the wife always used her car; and that the boyfriend gave her a boat.

The husband did establish that his wife and her boyfriend had been involved in a romantic, exclusive relationship; that the boyfriend had assisted the wife with grocery shopping and household improvements; that the boyfriend and the wife ate meals together; and that they had taken three trips together.

The wife argued that the facts in this case were closely aligned with, but even more compelling, than those in In Re Marriage of Miller, 2015 IL App. (22) 140530. The length of the relationship in Miller was 6 years, and in this case, 3 years. The nights spent together in Miller were 4 of 7 in a week, and in this case, 6 nights per month. In Miller, the alleged co-habitors presented themselves on social media as a couple, took 14 trips together and attended milestone events for each other, and each other's families. In this case, the wife and her boyfriend spent a significant amount of time together, much of it in group activities, and traveled three times together outside of Illinois. There was no evidence of comingling of assets or of estate planning established for the benefit of the other person.

The husband argued that Miller was distinguishable from this case in that the wife and her boyfriend's residences were merely 250 yards apart, as opposed to an hour's drive. The couple in Miller had discontinued their relationship, where this couple remained together. The husband argued that although they may not have spent as many nights together, they shared most of their days. He also argued that their failure to invest together, was based on the fact, that neither had any money to invest. The fact that they did not keep personal property at each other's houses was explained by the fact that their homes were so close to one another. The husband evidenced the wife and her boyfriend's state of mind through their text exchange using words like "forever and ever".

The husband challenged the wife's credibility based on discrepancies in her testimony. For example, that she had not given the boyfriend the access code to her apartment keypad. The boyfriend's testimony contradicted hers, and she had, on at least one occasion, given him the access



code. Her testimony varied on the number of overnights she spent with her boyfriend in a month.

The *Miller* ruling also found the wife in that case was not wholly credible, but the court did not find that fatal to her position. In this case, the court found the wife was not entirely credible; her testimony was at times conflicted and evasive, and it was certainly evident that she was motivated to preserve her maintenance.

Specifically concerning for the court was her creation of notes for her boyfriend, regarding his deposition testimony, and her attempts to falsely create an appearance that she was dating other people.

But, even given the wife's lapses in credibility, the husband still had the burden to establish his case by a preponderance of the evidence that cohabitation existed, or exists.

In finding that the parties in *Miller* were in an intimate dating relationship, rather than a de facto marriage, the court didn't rely on one fact, or series of specific check-list facts, but rather a totality of the circumstances. "The termination of maintenance was permanent and irrevocable; and therefore, a new relationship prompting the termination of maintenance must evidence a permanence based on mutual commitment, as manifested by a combination of the length of the relationship and an intertwining of significant assets that would be difficult to undo.

The evidence in this case did support a finding that the wife and her boyfriend were engaged in an intimate dating relationship, but a review of the totality of the facts and circumstances led this court to conclude that they were not cohabiting on a resident, continuing conjugal basis, and there did not exist a commitment or relationship that could not be easily disentangled.

The husband had failed to sustain his burden of proof in establishing that the wife was cohabiting with her boyfriend. Judge Elizabeth Rochford denied the husband's Petition to Terminate Maintenance.

# Third Party Respondents Dismissed

The wife initiated a parentage petition in 1999 against the husband, now deceased. Prior to his death, throughout the course of these proceedings, it became clear that the husband's adult children, namely a son and a daughter, controlled the bulk of his assets. Given their control of the assets with which the husband would have used to satisfy his child support obligation to his children, they were added as Third Party Respondents via the wife's filing of an Amended Complaint. Nevertheless, Judge Abbey Fishman Romanek granted the wife's Motion to prohibit the husband's adult children from intervening.

The wife was represented by Thomas G. Olp of Thomas More Society. The Third Party Respondent (adult son) was represented by James B. Zaczek and Amy Pilarsky of Bert Zaczek Esq. The Third Party Respondent (adult daughter) was represented by Leonard S. Becker of Leonard Becker, Esq.

The wife of the deceased husband filed the Motion to Dismiss pursuant to 735 ILCS 5/2-615. Section 2 615 stood parallel to 735 ILCS 5/2-619. In brief, the Section 2-615 arguments challenge the legal sufficiency of a claim while the Section 2-619 arguments admit that the facts pled, if proved, were legally sufficient to support the claim, but challenged the pleading on the basis of an affirmative matter that allowed the defendant to avoid the legal effect to the claim or that defeated the claim itself entirely.



Since the wife challenged her husband's adult son's Petition for Relief from a Void Judgment pursuant to 735 ILCS 5/2-1401, the court had to look to the legal landscape of Section 2-1401 to. determine what the son must have pled to have sufficiently stated a claim for which relief could be granted most favorable to his position.

To successfully set aside an order via Section 2-1401 within two years of the entry thereof, a party is required to show by a preponderance of the evidence not only the existence of a. meritorious claim or defense in the original action, but also due diligence in pursuing the claim or defense in the circuit court as well as due diligence in presenting the petition for relief under Section 2-1401(a). The only time a meritorious claim or defense or due diligence need not be established in a proceeding under Section 2-1401(a) is when the order or judgment at issue was attacked as void. In re Haley D:, 2011 IL 110886 958. Conversely, where the judgment at issue is attacked as void as the son had alleged here, "it may be attacked and vacated at any time, either directly or collaterally." Stankowicz v. Gonzalez, 103 III. App. 3d 828, 831 (1st Disti; 1981

Ultimately, Section 2-1401 "invoked the equitable powers of the circuit court, which should prevent enforcement of a default judgment when it would be unfair, unjust, or unconscionable" such that "the power to set aside a default and permit a defendant to have his day in court is based upon substantial principles of right and wrong and is to be exercised for the prevention of injury and for the furtherance of justice." *Smith v. Airoom, Inc., 114 III. 2d 209, 225 (DISTRICT 1986)*, internal citations omitted. Nonetheless, "while a liberal construction must be given to the petition to prevent an unjust result...the ambit of Section 2 -- 1401 relief must not be over-broadened to such an

extent that principles of equity and an ordered concept of justice are diluted."

In this particular, the son had not challenged the court's jurisdiction over the subject matter or the court's inherent power to enter the order at issue; nor had he alleged that the order was procured by fraud. Instead, he had challenged the court's personal jurisdiction over him due to purported defects in personal service of summons on him approximately fifteen years ago. Thus, the court focused its assessment on its personal jurisdiction over him.

While it is true that "proper service of summons was commonly a prerequisite to obtaining jurisdiction over a party, and if [a] defendant has not been properly served; any order the court entered against him would be void, whether or not he had actual knowledge of the proceedings;" it was also true that "a party who wished to contest a court's jurisdiction over him at the commencement of a lawsuit must enter a special appearance, limited to the question of jurisdiction." Stankowicz v. Gonzalez, 103 II. App. 3d at 831. If a party contesting the court's jurisdiction via a special appearance "raised matters which go beyond the jurisdictional issue, he transformed his 'special' appearance into a general one;" and it was well settled that "a general appearance waived defects in service since the party was voluntarily submitting to the court's jurisdiction." See also Spencer v. Am. United Cab Ass'n., 59 III. App. 2d 165, 172, 208 N. E. 2d 118, 121 (1965) (similarly stating that "where a party enters a special appearance questioning the jurisdiction of the court over his person and thereafter makes a general appearance, jurisdictional questions raised in the special appearance were deemed waived" internal citations omitted); and see Pease v. Herb Julian Cab Co., 7 Ill. App. 3d 179, 182 (1st Dist. 1972).

"Once a court acquires jurisdiction, it is the duty of the litigants to follow the (progress of their own) case." Smith v. Airoom, Inc., 114 III. 2d at 225; see also Esczuk v. Chi. Transit Auth... 39 DI. 2d 464, 468 (1968) (affirmatively stating that "the practical administration of justice \*requires that the litigant undertake the burden of following his case if this be possible"). Applying the foregoing analysis to the case at bar, in consideration of the fact that the son himself and multiple attorneys acting on his behalf have raised substantive arguments in these proceedings on matters other than the court's personal jurisdiction over him, it is abundantly clear that he waived any objection to the court's jurisdiction more than a decade ago. It was also clear that the court did not lose jurisdiction over him simply because he decided he no longer needed to participate in this case.

Since the son only challenged personal jurisdiction, and since the court found he waived that argument, there was no way he could state a claim for which relief could be granted via 00 W section 2-1401. Accordingly, the ex-wife's Motion to Dismiss via Section 2-615 was granted.

The adult daughter had filed a Motion for Leave to Join her brother's Petition for Relief from a Void Judgment both individually and in her capacity as the representative of the Estate. In her motion, though she did not cite to any particular statute, she argued that the arguments and prayers for relief her brother had made were essentially the same as those she would make herself, both individually and in her capacity as the representative of her father's estate, since her arguments were essentially the same. If those arguments successfully vacated the judgment as to her brother's, she argued, they should successfully vacate the judgment against her and the Estate as well.

As both adult children had failed to plead sufficient facts in their petition which, if proved, would entitle them to relief via Section 2-1401, the court granted the ex-wife's Motion to Strike and Dismiss as to both adult children, both individually and in the daughter's capacity as representative of the estate.

# Jurisdiction Relinquished to Florida

The parties' marriage was dissolved on February 18, 2014. Thereafter, on March 21, 2016, the court had entered an amended order, granting the mother's Petition for Removal of the Minor Child to the State of Florida. Pursuant to 750 ILCS 36/207 Judge Mark J. Lopez subsequently found that Illinois was an inconvenient forum under the circumstances and relinguished jurisdiction to the state of Florida over all pending matters.

The father was represented by Douglas S. Ehrman of Levine, Ehrman and Horberg Ltd. The mother was represented by Stephanie E. Greenberg of Greenberg & Sinkovitz LLC.

Pursuant to 750 ILCS 36/207, Paragraph B, the court must consider certain statutory factors and determine whether it was appropriate for Florida to exercise jurisdiction over this proceeding. Considering the relevant statutory factors, the court found that no domestic violence had occurred between the parties and should such domestic violence occur, that both Illinois and Florida would protect the parties and the minor child. The mother and the minor child had resided in the State of Florida in excess of 2.5

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years and had been residents of the State of Florida since March of 2016 when the court entered its amended order allowing the mother to remove the minor child to Florida. Subsequent to the relocation, the child and the mother lived in Florida, which included but was not limited to the location of the child's school records, medical records, or any records of any contact, if any, with the father since the entry of the court's relocation order. The ability of a court of each state to decide the issues expeditiously and the procedures necessary to present the evidence, specifically the ease of access to the child's therapists was considered.

The court found the minor child's emotional well-being to be the most important issue addressed by the pending litigation. The court found that the minor child's best interest would be served by allowing a court to address these issues with the least amount of disruption to his daily life which would be in Florida.

Additionally, should the court feel inclined to appoint a representative for the minor child; it would be most practical to appoint an attorney who was also a resident of the State of Florida. For those reasons, the court found procedurally that Florida could decide the pending issues more expeditiously than Illinois.

The court found the father's Petition to Decline Jurisdiction and the mother's Motion to Suspend the father's Skype and Phone Calls with the Minor Child were pending in Illinois. The father sought to enroll the prior Judgment, in the State of Florida having filed a Petition to Enroll a Foreign Judgment in the State of Florida. The court initially found that the Illinois court had more familiarity with the pending facts and issues and was to be considered the current home state of the child. The father requested an evidentiary hearing on the issues of the home state of the child and

mother's Petition for Illinois to Retain Jurisdiction.

In considering the statutory factors as listed above, the court gave the greatest weight to the mother and the minor child's residency outside of the State of Illinois for over 2.5 years and that the child attended school and counseling services in Florida and had no contact with Illinois since the relocation was granted and the court's desire to address these pending issues with the least disruption to the minor child's daily life. The father argued that he was now a resident of Tennessee and no longer resided in Illinois. Although the court had previously found the father not to be credible, he was the only party to the pending litigation residing in Illinois when the court concluded its relocation hearing and entered its amended order on March 21, 2016.

Considering all the statutory factors, Judge Mark J. Lopez found that they weighed in favor of finding that Illinois was an inconvenient forum for future litigation and also found given this review of all the statutory considerations, that Illinois was now an inconvenient forum for litigation by these parties and would relinquish jurisdiction to the State of Florida to exercise jurisdiction over the pending visitation and modification of the father's visitation schedule and any other litigation between the parties arising out of their dissolution of marriage.

The Amended Order entered on March 21, 2016 included an order for supervised visitation for the father until the child's therapist opined that unsupervised visitation was appropriate. Since the entry of the March 21, 2016 order, the court had no evidence that the father had exercised any supervised visitation with the child in Florida since March 2016. The court had concerns that declining jurisdiction would result in an emotional disruption caused by the father to the relationship



between the child and his mother, as described in the court's March 21, 2016 order; these issues would merely be shifted from Illinois to Florida where the father would be in closer proximity to the son without having complied with this court's supervised visit requirements for the last 2.5 years.

Judge Mark J. Lopez granted the father's Motion requesting Illinois to Decline Jurisdiction as being an inconvenient forum and the cause was transferred to the Circuit Court of Pasco County, Florida to address all pending matters between the parties. All Illinois litigation was stayed until Florida had exercised jurisdiction over these parties as Florida was now the home State of the minor child. Pursuant to 750 ILCS 36/207(b), the State of Florida was to exercise Jurisdiction over all future issues brought between the parties.

The father was also ordered to pay any costs charged by the Circuit Court of Cook County Clerk's office to transfer the physical file to the Clerk of the Circuit Court of Pasco County, Florida.

# Comments of Attorney Douglas S. Ehrman:

"My take away from this case was the importance of the evidentiary hearing in getting the result sought. Judge Lopez had understandable reasons for initially declining the motion for Illinois to Decline Jurisdiction, but to his credit, and as is always the case in his courtroom, he was willing to be convinced that the facts supported an alternate outcome. This was a unique case in as much as the party that no longer lives in Illinois wanted the case to remain here, while the party that had remained in the state after the relocation had been granted, was the party who wished to have the case moved to Florida. Not surprisingly, the case law with such a circumstance is sparse. Ultimately, the evidence supported the underlying spirit of the inconvenient forum statute."

# Resident of Dubai Subject to Jurisdiction

The wife filed her Petition for Dissolution of Marriage on October 16, 2017. The husband moved to dismiss the Petition for Dissolution for lack of personal jurisdiction. The wife cited Section 2-209(a)(9) of the Illinois Code of Civil Procedure stating Illinois had personal jurisdiction over a defendant if the defendant failed "to support a child, spouse or former spouse who had continued to reside in this state since the person either formerly resided with them in this state or directed them to reside in this state." Judge Maritza Martinez denied the husband's Motion to Dismiss.

The wife was represented by Kourosh Arami of Kourosh Arami P.C. The husband was represented by Rouhy J. Shalabi of Shalabi & Associates.

The husband argued that the instant action should be dismissed because the court lacked jurisdiction over the his person under the Illinois Marriage and Dissolution Act. He was not now, nor had he ever been a resident of the State of Illinois. He was, and had been for the past 30 years, a resident of Dubai. He was not personally served with summons in Illinois, and no other basis existed for the court to exercise jurisdiction over his person.

The parties' had resided in Dubai as husband and wife since 1987. On July 19, 2016 both came to Illinois to attend the funeral of their eldest son. As of that date the wife had never resided in Illinois. Prior to travelling to Chicago for the funeral, the parties' went to the American Consulate to get visas to travel to the United States and were asked by the consulate how many days they intended to stay. They told the consulate



it would be 15 days or less and they booked round trip tickets from July 19, 2016 to August 2, 2016.

On the day they were scheduled to return, the wife said that she did not want to return at that time. The husband thought she would stay with their daughter for a few days, and then return home. He returned to Dubai alone.

The parties' were the parents of five children. All were emancipated. One child, a daughter, age 27, was not disabled, contrary to allegations set forth in the Petition for Dissolution. Prior to July 19, 2016, the daughter had lived her entire life in Dubai. She graduated high school and attended the university in Dubai for 2 semesters.

The husband argued that the wife had attempted to establish residency in Illinois solely for the purpose of having Illinois law apply, when the proper jurisdiction should have been Dubai. She had no job, property, or any other interests in Illinois. On information and belief, she was not a legal resident of the United States of America. She had never provided the husband an address of her residence, nor did he know where she was living.

The husband also argued that both judicial efficiency and the orderly administration of justice were best served by dismissing this instant (Illinois) action instanter due to lack of personal jurisdiction so as to permit a court of proper jurisdiction in Dubai to resolve this matter. Neither party had voted from an address registered in the State of Illinois. Neither party had a driver's license issued by the State of Illinois. Neither party had motor vehicles titled or registered in the State of Illinois. Neither party owned real estate within the State of Illinois. Since the parties were married, neither party had ever filed an income tax return in the State of Illinois. Since the parties were married, neither

party had been employed within the State of Illinois.

The wife alleged that the court had jurisdiction because the husband had committed some acts enumerated in the Illinois Long-Arm statute pursuant to Section 735 ILCS 5/2-209 that would submit the husband to the jurisdiction of Illinois, insofar as he had visited the City of Chicago from July 19, 2016 to August 2, 2016, when he attended the burial of one of the parties' sons.

The wife alleged that the husband directed her and all four of the living children of the parties to reside in Chicago. She further alleged the above "minimum contacts" satisfied the federal due process requirement, so as to make it fair to require the husband to defend this action in Illinois, where the parties continued to reside since July 19, 2016. The husband disagreed and further stated that the requirements enumerated in the Illinois Long-Arm statute pursuant to section 735 ILCS 5/2-209 had not been met.

The wife's allegation that the husband directed her and their four children to reside in Chicago was untrue. One of their sons graduated from Penn State University and was residing and working in Dubai. Another son was 22 years old, and attended lowa State University. Another son, age 20, lived in Chicago and attended a university in Chicago.

The husband argued that "the burden of proving a valid basis for the assertion of jurisdiction over a non resident defendant rested with the party seeking to impose jurisdiction." *R.W. Sawant & Co. v. Allied Programs Corp., 111 11.2d 304, 310 (1986).* He also asserted that the wife failed to meet her burden of proving a valid basis existed for the court to exercise personal jurisdiction over the husband. Additionally, the First District Appellate Court had further examined the issue

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and held, to wit: "[i]n determining whether an Illinois court may assert personal jurisdiction over a nonresident defendant, Illinois courts employ a two-prong analysis to evaluate whether the facts of the case met the requirements for (1) personal jurisdiction under the Illinois long arm statute and (2) due process under both the United States and Illinois Constitution." *Hanson v. Ahmed, 382 II. App. 3d 941, 943 (1st Dist. 2008).* 

The husband argued that he never transacted any business, committed any torturous act, or owned, used or possessed real estate in the State of Illinois, (735 İLCS 5/2-209(a)(1) (3). The husband never failed to support a child, spouse, or former spouse who had continued to reside in this State since the person either formally resided with them in this state or directed them to reside in this state. (735 ILCS 5/2 209(a)(9). The husband never committed any act under 735 LCS 5/2-209(a)(1) through (14). The wife made no allegations that personal service over Mohamed applies under 735 ILCS 5/2-209(b).

As admitted by the wife in her Petition for Dissolution of Marriage, Dubai had been the husband's domicile, residence, and home for the entirety of his life. Further, the husband had clearly demonstrated that he always intended Dubai to remain his permanent home. The wife did not offer proof that this action for dissolution of marriage arose from the husband doing any of the acts enumerated in Section 2-209(a) of the Illinois long-arm statute, which would submit the husband to the jurisdiction of an Illinois court. The wife did not allege in her Petition for Dissolution of Marriage that any other constitutionally permissible basis for jurisdiction existed that would subject the husband to the jurisdiction of an Illinois court, nor did any such basis exist. Clearly, and in regard to the instant action, the State of Illinois lacked jurisdiction over his person.

Judge Martinez found that the wife had credibly testified relating to the matters surrounding her coming to reside in the State of Illinois, with the parties disabled child, said disability having been occasioned at the child's birth, and due to a lack of oxygen, resulting in the parties' child having neurological problems, autism and subsequent death. The husband directed the wife to reside in this State (of Illinois) on July 19, 2016 and then she continued to reside in this State, despite that he then requested her to return with him to Dubai at the end of August, 2016. She refused to return to Dubai, because she was aware of the husband's paramour, whom he subsequently married the following month. The husband had failed to support his spouse, and their disabled daughter, since the date that he requested her to return to Dubai when she refused said request.

Judge Maritza Martinez denied the husband's Motion to Dismiss Action for Dissolution of Marriage Due for Lack of Personal Jurisdiction. This matter was final and appealable, pursuant to Illinois Supreme Court Rule 301 and was currently being appealed.

# **Maintenance Denied**

The parties were married on June 28, 2013. They had no children. There was a disparity in the parties' income and the husband was currently unemployed. This was a short marriage of only 47 months. During the marriage the parties lived an affluent lifestyle, purchasing luxury autos, five-figure diamonds and timeshares. When the court applied these factors, the husband was an appropriate candidate for maintenance. However, since the husband's imputed salary exceeded 40% of the statutory limit, Judge Robert E. Douglas found that maintenance was not appropriate.



The wife was represented by Robin Zandri of Goosetree Law Group P.C. The husband was represented by Christopher Edmonds of The Law Offices of Christopher Edmonds, Ltd.

The wife was retired and on a fixed income but earned a significant salary as a retired school teacher drawing a pension from the Teacher's Retirement System. Her yearly pension benefit at the time of trial was \$118,000.00. This yielded a yearly benefit of \$111,392.001.

The husband was currently unemployed. His unemployment was due, according to his testimony, to his inability to meet sales goals. For the last three years, the average of his earnings was \$88,034.00. It was reasonable to assume that in the future, the husband would be able to earn at least \$75,000.00 per year, given his experience and education. He claimed that his earning ability was compromised as a result of a nervous breakdown that he suffered. The court found that this testimony lacked credibility. He presented no medical testimony or evidence to substantiate the diagnosis or the opinion that his ability to earn was impaired as a result.

The court imputed income to the husband of \$81,608. When his imputed income of \$81,608.00 was added to the wife's salary of \$111,392.00, the sum was \$193,000.00. When this sum was multiplied by 40% the result was \$77,200.00. Since the husband's imputed salary exceeded the 40% statutory limit, a no maintenance award was appropriate.

The wife testified that a ring was a birthday/retirement gift and the husband testified that the ring was not a gift but purchased as investment property. No evidence was produced, beyond the parties' testimony to establish the credibility of either side's story, Because of this, the court found the ring to be marital property.

The court directed that the parties either sell the ring or return it to the pawnbroker for a refund and then equally divide the proceeds. The testimony was that the couple purchased another ring, during the marriage, as a replacement for the wife's lost engagement ring. No testimony was given as to how the original ring was lost, but both parties agreed that this was a replacement for the ring given to her by the husband as a token of their engagement. There was a presumption that an engagement ring was a gift and there was no testimony that the replacement engagement ring was anything but a gift. Since it was a gift to the wife from the husband, the replacement ring was awarded to the wife.

The husband provided uncontradicted testimony that a home safe existed in the home at the time he was arrested for domestic battery. He also testified to certain items contained in that safe. which included jewelry, watches and other sundry valuables totaling approximately \$132,970.00. He testified that the next time he was allowed in the house to retrieve his belongings, the safe was gone. The wife testified that she was out of the house when the husband was released and came to get his car and when she returned home the safe was missing. The husband argued that there could be no other perpetrator other than the wife or one of her family. The court volunteered that it did not moonlight as a detective, and left matters such as these to the professionals. The missing safe was reported to the local police who have it under investigation. Until the safe or the items contained therein turn up, the court had no way of apportioning the items contained in the safe.

The parties marital home in Wayne Illinois, sold in mid-November 2018. Proceeds of \$34,906.06 resulted from that sale and were held in escrow. The parties had presented testimony about various contributions to the down payment of the home from non marital assets and argue that they were



entitled to certain amounts from the sales proceeds. The court found that the property was purchased in the names of both parties. There was a presumption that the property was marital. Inasmuch as this was marital property, the proceeds were to be split equally between the parties.

At the time of the marriage, May 31, 2013, the wife had an account at the Leyden Credit Union, which had a balance of \$39,960.42. On June 6, 2014, she made a payment of \$9,109.78 to TRS to buy-back pension time she lost during a maternity leave. Prior to this payment, the wife had deposited paychecks in this account but no monies had been put into the account by the husband. There was no evidence to indicate that the original \$39,960.42 lost its non-marital character. The payment made by the wife was deemed to have been made from non-marital money and therefore, the husband was not entitled to any portion of that account.

The remaining escrowed funds equaled \$10,432.37. The court heard credible testimony from the wife that the balance on the parties Floor and Décor credit card represented flooring for the marital residence necessary to prepare it for sale. As such, the balance of this card was to be paid from the escrow after which the remainder shall be divided equally between the parties.

The wife's AXA Variable Annuity had both a marital and non marital component. The parties ascertained the balance as of the date of the marriage and this was to be subtracted from the balance at the time of trial, \$29,989.77. The marital portion of the annuity was to be divided between the parties equally. The husband's NeoGrid 401(k) was also marital and was to be divided equally between the parties. The wife was currently in pay status on her TRS pension. The testimony received by the court was that her

current yearly benefit was \$118,000. This amount was based on 35 years in the system. The court applied the Hunt Formula and determined that the marital portion of the wife's annual pension amount was \$13,216.00. The husband was entitled 50% of this amount or \$6,608.00 per year and he was awarded this amount.

The parties testified to items of personal property that they wished to have awarded to them. Although it was the duty of the court to divide personal property, the court was not Monty Hall and this was not "Let's Make A Deal". The parties were to attempt to divide the remaining personal property. If they were unable to do so, said property was to sold at a garage sale and the proceeds divided equally between the parties.

Each party received enough funds in the award of property to pay attorney's fees. The court ordered that each party be responsible for his or her own attorney's fees.

# Wife's Interest in Business Proceeds Allowed

The parties were married on January 5, 1985. A Judgment of Dissolution was entered on December 16, 2013 which incorporated the parties' Marital Settlement Agreement. The MSA addressed the parties' interests in Advertising Resources, Inc. ("ARI"), a marital business. The MSA incorporated a Share Agreement that delineated the parties' rights in ARI stock. Following the sale of ARI, the wife sought a declaratory judgment to determine whether or not the proceeds derived from a Restrictive Covenant Agreement and a Consulting Agreement the husband entered into in connection with the sale were part of the Net Proceeds to be divided pursuant to the parties' Share Agreement. Judge Mary S.



Trew granted the wife's Petition with respect to the Restrictive Convenant Agreement but set the request with respect to the Consulting Agreement for further hearing. To read the entire opinion, please visit www.illinoisdivorcedigest.com.

The wife was represented by Benton H. Page, Pamela J. Hutul, and Joshua T. Friedman of Davis Friedman LLPC. The husband was represented by Cynthia M. Baruck and Jay D. Stein of Stein & Stein Ltd.

On or about September 6, 2017, the parties executed a Stockholder Agreement pursuant to their ARI interests which were sold to a subsidiary of Menasha Packaging, LLC. In addition to the terms regarding acquisition of ARI's shareholder stock, Menasha's letter of intent included terms for the husband and another shareholder to receive consulting agreements with fees payable to each and restrictive covenant agreements with fees payable to each. The husband simultaneously entered into what the court termed as "supplemental agreements", at the same time that the parties had executed the Stockholder Agreement for sale.

The wife's Petition argued that pursuant to the Share Agreement, she was entitled to 33% of any proceeds and other considerations otherwise payable to the equity owners of the corporation, generally, as a result of such ownership which was paid to the husband by such persons pursuant to any understanding or arrangement." (Section 6 of Share Agreement).

Pursuant to the "Consulting Agreement", the

husband would receive payments totaling \$2,520,000.00 payable in sixty monthly installments of \$42,000 per month commencing September 30, 2017. The only way payment under the agreement could be terminated was if a court determined that the husband had materially breached the Restrictive Covenant Agreement.

Judge Mary S. Trew granted and denied in part the wife's Petition for Declaratory Judgment. It was granted in that the proceeds from the Restrictive Covenant Agreement were Net Proceeds as defined by the parties' Share Agreement and the wife was therefore entitled to thirty-three percent of the proceeds amounting to \$105,000 in monthly gross income. The court denied the Petition in that the proceeds from the Consulting Agreement were not clearly determined to either be Net Proceeds or excluded from being Net Proceeds. Judge Trew set the matter for further hearing with respect to the latter issue.

#### Comments of Attorney Benton H. Page:

"This was an interesting issue and both counsel strongly advocated for their client's position. Judge Trew thoughtfully considered both parties' arguments and analysis of the agreements that were the subject of the declaratory judgment action."

# Transfers Held Fradulent

The parties were married on June 7, 2008. They had no children of the marriage. The wife was 42 years of age and the husband was 65 years of age. The husband had two daughters of a majority age from a prior relationship, one of whom was joined as a Third Party Respondent. Judge D. Christopher Lombardo found that all property at issue in this case, real and personal, was marital. This included the "Investment"



Properties" transferred to the husband's daughter. This article is limited to the issues relating to those transfers of property to the husband's daughter.

The wife was represented by Sean M. Hamann of Lake, Toback & DiDomenico. The husband was represented by Arnold D. Goldstein of Goldstein Law Offices. The Third Party Respondent was represented by Kenneth M. Devaney of the Law Offices of Kenneth Devaney.

The court first noted that, with the [one] exception, which the court addressed separately, all property owned by the parties was purchased or incorporated during the marriage, such that all was presumptively marital. 750 ILCS 5/503; *In re Marriage of Gattone, 317 Ill.App.3d 346, 352 (2000) (citing In re Marriage of Hegge, 285 Ill.App.3d 138, 141 (1996)).* 

The court noted that the husband had asserted a non-marital claim to virtually all property at issue in this case. The court considered his claims and rejected them, finding that he had not carried his burden of clear and convincing evidence to overcome the presumption that properties incorporated or acquired during the marriage were marital nor had he proved an interest in premarital property that was not transmuted or otherwise transferred to the marital estate. See In re Marriage of Schmitt, 391 111, App. 3d 1010. 1017 (2009) (citing In re Marriage of Didier, 318 111.App.3d 253, 258 (2000)). The court indicated that the husband made significant efforts to divert marital assets from the jurisdiction of the court by forming new holding entities, one of which was not disclosed until the eve of trial.

Addressing the business entities, Atom Group and Atom Financial Services, Inc. ("Atom Financial"), both were formed during the marriage, but prior to the husband filing for bankruptcy. The court noted

that entities of the same name existed prior to the marriage, both of which were voluntarily dissolved. No tracing of any kind was provided to the court to show any evidence of the link between the closed entities and the entities now in existence to support the husband's theory that the entities now in existence would be non-marital property, pursuant to Section 503 of the Illinois Marriage and Dissolution of Marriage Act. The husband also admittedly failed to assert any non marital claim to any business entity in his response to an interrogatory identifying only household furnishings purchased prior to marriage as non-marital property. Indeed, at trial, he judicially admitted that he voluntarily shut down his pre-marital business entities. See *Dremco*. *Inc*. v. Hartz Const. Co., 261 Ill. App. 3d 531, 535-36 (1994). This admission contributed to the court finding his assertion of non-marital property to be incredible and finding that the husband failed to carry his burden in the assertion of non-marital property. Further contributing to the court's findings of marital property, the court noted that the husband was judicially estopped from asserting an interest contrary to his prior bankruptcy averments.

Turning next to the court's consideration of the transfer of the "Investment Properties". Pursuant to 740 ILCS 160/8(a)(1), the court was authorized to enter a judgment avoiding the transfer or obligation to the extent necessary to satisfy the movant's claim. Support for the conclusion of the avoidance of transfer and return of property was found in Federal bankruptcy cases. In re Zeigler, 320 B.R. 362 (N.D. III. 2006). Relatedly, Illinois statute, 740 ILCS 160/5, sets forth considerations, or "badges of fraud," for the court to review as to whether a transfer was fraudulent. such that relief was warranted. In cases such as this, when the "badges of fraud" were present in sufficient number, they may give rise to a presumption of fraud. Steel Co. v. Morgan

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Marshall Indus., Inc., 278 I11.App.3d 241, 251 (1996). In the case of "fraud in law," where the purchase price is so unreasonable compared to the value of the property transferred, the transfers may be set aside, even absent a showing of fraudulent intent. Gen. Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1079 (7th Cir. 1997).

Applying those precepts to the instant case, the transfer of "Investment Properties" to the daughter constituted a fraudulent transfer. The husband testified that the wife consented to the transfers of the "Investment Properties" in an oral conversation, with only the two present, sometime shortly before filing her Petition for an Dissolution of Marriage, at which point the parties ceased cohabitating as husband and wife. He testified that it was a quid pro quo in exchange for gifts of the parties to the wife's son and in consideration of his tuition. The wife disputed that she ever consented and the court noted inconsistencies in the husband's accounts.

Finding no consent from wife, the court considered the actual intent" and "badges of fraud" in the instant case. See 740 ILCS 160/5. Initially, the court noted that an explicit statement of intent to defraud was rare, such that often the best indicator of intent were actions and common sense knowledge of people in these circumstances. See Majewski v. Gallina, 17 ON CI 111.2d 92, 99-100 (1959) (conspiracy to commit fraud often proven without direct proof); See also Alan Drey Co., Inc. v. Generation, Inc., 22 Ill. App. 3d 611, 618 (1974). In the absence of an express statement, the court considered the statutory factors, finding the most compelling to be that the husband transferred the "Investment Properties" for no consideration, while making contrary representations outside of the litigation. The court also noted that the husband had an apparent interest in an entity bearing the

daughter's name which he testified was used to receive rental proceeds from the "Investment Properties". In consideration of these factors, the court found the "Investment Properties" to be marital and the property of the estate, not the daughter.

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Publisher: Maol Murray Sloan
Staff Assistants: Colleen C. Wilson & Brendan Heintz
P.O. Box 64876
Chicago, Illinois 60664-0876
Phone: (312) 332-3773
Illinoisdivorcedigest@gmail.com