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ILLINOIS STATE BAR ASSOCIATION

FAMILY LAW

The newsletter of the Illinois State Bar Association's Section on Family Law

Chair's column

By Kimberly J. Anderson

And so starts another year....We start with the brightest and most dedicated family law practitioners in our state. Although not given credit for everything they accomplish, this group is one of the hardest working I have been associated with at the ISBA. I cannot thank John O'Brien enough for considering me for this position and I will work hard to make him proud.

This committee examines bills making their way through the legislature, analyzes case law and puts highly intuitive CLE programs before our bar. As lawyers and judges, we seek to not only educate, but to keep our members abreast of what is transpiring in the family law arena. In addition, I invite your input and your knowledge to keep us informed with new developments.

We also start this year with the exciting new Civil Union law. It has been a long time coming and I know we will all be working hard to implement it in our practice. My hope is that we will not only hear from family law practitioners sharing their experiences with the new law, but we hope to hear from lawyers in tax, probate and guardianship, to inform us how the civil union is impacting their practices so we can better educate the domestic relations bar. I invite the family law bar to share with us any cases, whether they are presently being litigated, or those completed, to inform us about problems or concerns with the law. There will be adjustments along the way and the best way to deal with some of those concerns is to compile and discuss the problems we are experiencing. We will then formulate possible solutions that can be passed on and hopefully implemented.

Lastly, our CLE programs are some of the best attended in the ISBA. We take our commitment to provide quality CLE to you very seriously, and Pamela Kuzniar has another year ahead of her as our leader. Please forward any topics or suggestions for CLE to her. It is through the feedback that we receive, which enables us to gear the most timely and informative programs to you.

If you are in need of any information please do not hesitate to contact me at Anderson & Boback. I look forward to working and hearing from you in the coming year. ■

Wickham v. Byrne revisited—Its legacy

By Morris Lane Harvey

Illinois' grandparent visitation statute has a constitutionally troubled history. In the case of *Wickham v. Byrne*,[1] the Illinois Supreme Court declared the original grandparent visitation statute facially unconstitutional. A short time prior to that decision, the Court had declared the statute unconstitutional *as applied* in the case of *Lulay v. Lulay*.[2] Following the Court's decisions in *Lulay* and *Wickham,* effective January 1, 2005, the General Assembly amended the former statute.[3] Surprisingly, since that time, there have been relatively few reported cases involving the new grandparent visitation statute in any of its permutations.

The one occasion where the issue has been squarely presented to our Supreme Court was in the case of *Mulay v. Mulay*.[4] In *Mulay*, the Circuit Court of Peoria County determined that the current version of the grandparent visitation statute was unconstitutional for substantially the same

Continued on page 3

INSIDE

***(Notice to librarians:** The following issues were published in Volume 54 of this newsletter during the fiscal year ending June 30, 2011: August, No. 1; September, No. 2; December, No. 3; February, No. 4; March, No. 5; April, No. 6; May, No. 7; June, No. 8).*

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Wickham v. Byrne revisited—Its legacy

Continued from page 1

reasons as the *Wickham* court had determined the previous statute to be unconstitutional. The Supreme Court, however, refused to decide the constitutionality issue in *Mulay*; rather, the Court determined that the cause should be remanded to the circuit court to rule on a pleading motion filed pursuant to section 2-615 of the Illinois Code of Civil Procedure before it would address the constitutionality issue. There are no other reported cases in Illinois where the constitutionality of the new statute has been addressed by a court of review.

It is the purpose of this article to address three major issues which directly impact the issue of the constitutionality of the current statute.

A. Substantive Due Process

In the case of *Troxel v. Granville*,[5] the United States Supreme Court, in a plurality opinion authored by Justice O'Connor, determined that a statute such as our grandparent visitation statute, which allowed the court to interfere with a fit parent's decision regarding the care, custody and control of his or her children, implicated a fundamental liberty interest. As such, the statute had to further a compelling state interest to pass constitutional muster.

In the *Wickham* case, our Supreme Court began its analysis with the *Troxel* decision. It explained that one of the fundamental rights protected under the fourteenth amendment is the right of parents to make decisions concerning the care, custody and control of their children without unwarranted state intrusion.[6] The court then discussed in some detail the kind of state interference with fundamental parental child-rearing rights that are justified. The court categorized those situations in which such interference had been justified as instances which were necessary "to protect the health, safety and welfare of children."[7] The examples listed by the court as satisfying that test included such things as required testing for phenylketonuria at birth, certain required immunizations, required hearing and visual examinations, and the prohibition of child labor. All of the matters cited by the court dealt directly with the physical integrity and safety of the child. The *Wickham* court was satisfied that such matters met the compelling state interest test.

The *Wickham* court then turned to the assertion made by the grandparents in that case. The grandparents argued that under the grandparent visitation statute, the trial judge steps into the shoes of the deceased parent to protect and maintain the children's family heritage. Our Supreme Court weighed that argument against the kinds of things which it determined would meet the compelling state interest test. In its analysis, the Court concluded:

> This argument overlooks the clear constitutional directive that state interference should only occur when the health, safety or welfare of the child is at risk. *The issue we address* [grandparent visitation] *does not involve a threat to the health, safety or welfare of children*.[8]
>
> [Emphasis added].

The *Wickham* court further explained that, unlike the statutes concerning inoculation or immunization, which did involve those threats, the grandparent visitation statute involved a parent's decision to control who may interact with his or her children.

After the *Wickham* decision was handed down, the appellate court for the fifth district had occasion to discuss its import in the case of *In re the Marriage of Ross*.[9] In defining the scope of the Supreme Court's ruling in *Wickham*, the court said:

> The [Wickham] court stated that state interference with fundamental parental child-rearing rights is justified only in limited circumstances to protect the health, safety and welfare of children . . . The court held that grandparent visitation does not involve a threat to health, safety or welfare of children and that, therefore, the state's inference with fundamental parental child-rearing rights was not justified.[10]

The holding in *Wickham*, together with the appellate court's discussion in *Ross*, raises a serious question as to whether the legislature can *ever* enact a grandparent visitation statute which would pass muster under the substantive due process analysis. The most compelling question that must be answered when ruling on the constitutionality of our current grandparent visitation statute is whether it or any similar statute can ever be justified by a compelling state interest.

B. "Unreasonable Denial of Visitation."

The current statute requires, as a threshold for filing a petition, that the denial of grandparent visitation by a parent be "unreasonable."[11] It is apparent that the determination of what is "unreasonable" must be made by the trial court initially. That provision itself raises a significant constitutional question under both *Troxel* and *Wickham*.

In *Troxel*,[12] the court noted that there is a presumption that fit parents act in the best interests of their children. The *Wickham* court likewise endorsed such a presumption when it said:

> Parents have the constitutionally protected latitude to raise their children as they decide, *even if these decisions are perceived by some to be for arbitrary or wrong reasons*. The presumption that parents act in their children's best interest *prevents the court from second-guessing parents visitation decisions*. Moreover a fit parent's constitutionally protected liberty interest to direct the care, custody and control of his or her children *mandates that parents-not judges-should be the ones to decide with whom their children will and will not associate*.[13]
>
> [Emphasis added].

The current grandparent visitation statute imposes the obligation upon the trial court to pass judgment on the reasonableness of a fit parent's decision to refuse visitation as a prerequisite for allowing the petition to be considered. It is difficult to surmise how a court may determine the reasonableness of a parent's decision to allow or not allow visitation without, in the first instance, substituting its judgment for that of the parent. It would seem that is precisely what our Supreme Court in *Wickham* said the trial court lacked the constitutional authority to do. The *Wickham* court foreclosed any possibility of any such substitution being constitutional.

C. "Rebuttable Presumption"

The former statute required that the pe-

titioning party show that the visitation was in the "best interest" of the child. The current statute substitutes that provision with a requirement that the petitioning party show "harm" to the child resulting from the parent's denial of visitation.[14] Further, the current statute creates a "rebuttable presumption" that a fit parent's actions and decisions are not harmful.

It appears that the rebuttable presumption was added in response to the Supreme Court's comments in *Wickham* to show additional deference to the parent's decision regarding visitation. However, an analysis of the statutory language, and of the law related to rebuttable presumptions, reveals that, in fact, such a rebuttable presumption adds nothing to the statute.

An examination of the operation of rebuttable presumptions clearly illustrates the point. Typically such presumptions arise to assist the party having the *affirmative* of an issue. For example, in the case of *Bell v. Reid*,[15] one issue was whether the driver of the vehicle in the case was the agent of the owner. The law created a rebuttable presumption that such a relationship existed. The plaintiff, having the burden of proof on the issue of agency, introduced minimal evidence that such a relationship existed. Because the defendant did not rebut the presumption, the fact of the presumption sustained a finding for the plaintiff.

Another example of such a rebuttable presumption is the presumption that the addressee receives a letter upon proof that it was mailed to the proper address.[16] Such a presumption aides the party having the affirmative of the issue, that is, the burden of proof that s/he has notified the other party of some fact. In the absence of any rebuttal to the presumption, the party having the burden of proof prevails on the issue of notice just as the plaintiff prevailed on the issue of agency in *Bell v. Reid*.

The quirk of the rebuttable presumption created by the current grandparent visitation statute is that it assists the party who does *not* bear the burden of proof. Under the former statute, case law is clear that the burden of proof was on the grandparent seeking visitation.[17] Similarly, the current statute is clear by its plain language that the grandparent seeking visitation bears the burden of proof to show that the lack of visitation is harmful. The party denying visitation does not bear this burden. Because the rebuttable presumption included in this statute does not assist the grandparent seeking visitation, but rather assists the parent *who does not bear the burden of proof*, it is superfluous and has no meaningful effect.

An analysis of the interplay between burdens of proof and rebuttable presumptions is useful to illustrate this point. It has long been held that the usual test of burden of proof and its operation is to determine which party would win if no evidence were offered at all.[18] Under both the current and the former grandparent visitation statutes, the answer to that is obvious. The burden of proof, whether through caselaw or by the plain language of the statute, was on the grandparent seeking visitation. In the absence of any evidence offered by the grandparent, the party denying visitation prevails. The question, then, is what effect the addition of a rebuttable presumption has on this outcome.

Thirty five years ago, in the case of *Diederich v. Walters*,[19] the Supreme Court held that as soon as any evidence is produced which is contrary to a rebuttable presumption, the presumption vanishes entirely.[20] In the case of presumption of delivery of a letter, for example, the presumption is entirely rebutted and disappears by the simple fact that the person to whom the letter was addressed denies receiving it. At that point, the presumption ceases to operate and the issue becomes one of fact.

Applying this holding to the grandparent visitation statute, we see that all a grandparent must do to overcome the presumption is offer *any* evidence that the denial of visitation causes harm to the child. At that point, as a matter of law, the presumption ceases to operate, and the parties are left in the same position which they would have been had the presumption never existed, with the grandparent seeking visitation still bearing the burden of proof. Whether there is a presumption in place or not, the grandparent must offer some evidence to show that the denial of visitation harms the child. This is an intrinsic requirement of the burden of proof, and adding a presumption favoring the parent creates no heavier burden on the grandparent than simply assigning him or her the burden of proof. The rebuttable presumption is essentially no more than a redundancy.

This procedural quirk exists because the statutorily created presumption is *not* in favor of the party having the affirmative of the issue; rather, it assists the defending party. This assistance is unnecessary and offers no assistance at all, as the defending party is *already* favored by the statute's placing the burden of proof on the plaintiff. The same result is reached whether the presumption exists or not; in the absence of any evidence, the defending party, the parent, prevails solely by the grandparent's failure to meet the burden of proof, without regard to the presumption. As soon as the moving party produces *any* evidence of "harm," the presumption vanishes, and the burden then shifts to the defending party to refute that evidence of harm. Again, the presumption does not accomplish anything not already accomplished by assigning the burden of proof to the petitioning party.

For the presumption to grant any significant deference to a parent's decision regarding visitation, it is submitted that the legislature would have to amend the statute to require that the presumption be overcome by clear and convincing evidence. Until such an amendment, the operation of the current statute regarding any presumption in favor of a parent is no different from the operation of the former statute which the *Wickham* court declared to be facially unconstitutional.

Conclusion

There are significant issues that call into question the constitutionality of the current version of the grandparent visitation statute. The flaws found in the former statute by our Supreme Court in *Wickham* have not been meaningfully addressed in the current version. Indeed, the *Wickham* decision raises, in at least two regards, a serious question as to whether *any* grandparent visitation statute can ever pass substantive due process muster in the face of what appears to be the constitutionally conclusive presumption that a fit parent has a fundamental right to control, *inter alia*, access by others to his child. Further, the inclusion of a rebuttable presumption favoring the party not bearing the burden of proof is a redundancy that fails to show any further deference to that fundamental right. The language lends nothing to the statute that elevates the harm requirement to a level that invokes a compelling state interest.

Hopefully, sooner rather than later, the court will address what is clearly an abiding issue that will continue to create uncertainty in the practice of family law in this state until it is definitively addressed. ■

1. 199 Ill. 2d 309, 769 N.E. 2d 1 (2002).

2. 193 Ill. 2d 455, 739 N.E. 2d 521 (2000).
3. 750 ILCS 5/607(a-5).
4. 225 Ill. 2d 601, 870 N.E. 2d 328 (2007).
5. 530 U.S. 57, 120 S. Ct. 2054 (2000).
6. 199 Ill. 2d 309 at 316, citing *Troxel*, 530 U.S. 57 at 66.
7. 199 Ill. 2d 309 at 317.
8. *Id.*
9. 355 Ill. App. 3d 1162, 824 N.E. 2d 1108 (5th Dist. 2005).
10. *Id.* at 1168.
11. 750 ILCS 5/607(a-5)(1).
12. 530 U.S. 57 at 68.
13. 199 Ill. 2d at 318.
14. 750 ILCS 5/607(a-5)(3).
15. 118 Ill. App. 3d 310, 454 N.E. 2d 1117 (5th Dist. 1983).
16. See, *inter alia*, *City of Chicago v. Supreme Savings and Loan Association*, 27 Ill. App. 3d 589, 327 N.E. 2d 5 (1st Dist. 1975).
17. *In re Marriage of Mehring*, 324 Ill. App. 3d 262, 755 N.E. 2d 109 (5th Dist. 2001).
18. *Village of Park Forrest v. Angel*, 37 Ill. App. 746, 347 N.E. 2d 278 (1st Dist. 1976).
19. 65 Ill. 2d 95, 357 N.E. 2d 1128 (1976).
20. *Id.* at 100-102.

Child support withholding—Payor beware

By Christine S.P. Kovach, Attorney at Law, Coffey & McCracken Law Firm, PC

With the number of cases under the Income Withholding for Support Act ("Withholding Act") [750 ILCS 28/1 et seq.] on the rise, payors must be especially mindful of their duties and responsibilities under the Withholding Act. Under 750 ILCS 28/50, the obligee, the public office or the obligor may file a complaint with the court to enforce the statutory penalties of the Withholding Act. Generally the cases involve one or both of the following issues: "Who is a payor?" and "How and when will a penalty under the Withholding Act be assessed for failure to withhold or to timely remit the child suport?"

"Illinois has a strong interest in preserving and promoting the welfare of children. Indeed, it is difficult to imagine a more compelling State interest than the support of children. Illinois also has a general interest in effective enforcement of judgments." *Sheppard v. Money*, 124 Ill.2d 265, 529 N.E.2d 542, 547 124 Ill.Dec. 561 (1988) [citations omitted]. Illinois recognizes the significant impact of the payment of child support on Illinois' families and strives to ensure that child support payments are collected and distributed in a timely and reliable fashion.

Who is a payor?

Under 750 ILCS 28/15(g), the Withholding Act defines payor as "any payor of income to an obligor." The courts have broadly defined "income" in determining who is a "payor." In *In re the Marriage of Vaughn*, 403 Ill.App.3d 830, 935 N.E.2d 123, 343 Ill.Dec. 483 (First Dist., 2010), the child support obligee served an income withholding notice (IWN) upon Blue Cross. The child support obligor was a chiropractor who received weekly payments from Blue Cross for the services he provided to his patients insured through Blue Cross. The child support obligor was a sole proprietor operating under the fictitious or assumed name of "Vaughn Center." Blue Cross issued checks to Vaughn Center.

The *Vaughn* court looked to the definition of income in 750 ILCS 28/15(d) to define a payor. 750 ILCS 28/15(d) is an inclusionary provision, that states:

> "Income" means any form of periodic payment to an individual, regardless of source, including, but not limited to: wages, salary, commission, compensation as an independent contractor, workers' compensation, disability, annuity, pension, and retirement benefits, lottery prize awards, insurance proceeds, vacation pay, bonuses, profit-sharing payments, severance pay, interest, and any other payments, made by a person, private entity, federal or state government, any unit of local government, school district or any entity created by Public Act; however, "income" excludes:
>
> (1) Any amounts required by law to be withheld, other than creditor claims, including, but not limited to, federal, State and local taxes, Social Security and other retirement and disability contributions;

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(2) Union dues;

(3) Any amounts exempted by the federal Consumer Credit Protection Act;

(4) Public assistance payments; and

(5) Unemployment insurance benefits except as provided by law.

Any other State or local laws which limit or exempt income or the amount or percentage of income that can be withheld shall not apply.

The *Vaughn* court found that Blue Cross paid income to the child support obligor, was a payor within the definition of the Withholding Act and was subject to provisions of the Withholding Act. The court added that "Blue Cross cannot avoid the Withholding Act by merely stating that it is not allowed to offer a 'convenience' to a provider when it is required by statute to do so and has received proper notice." *Vaughn*, 935 N.E.2d at 130. Further, the court stated in dicta that "even if a payor does not realize that its payee is in fact the obligor named in the notice, that fact would not provide a valid defense that would exempt it from the Withholding Act's penalty provision." *Vaughn*, 935 N.E.2d at 129.

This language requires the recipient of an IWN to take proactive steps to determine whether it pays income to the named child support obligor. After receipt of the IWN, a business entity should determine if the obligor listed in the notice receives any form of income from the business entity. The business entity will likely be required to withhold and timely remit the appropriate child support deduction from the income payment to the obligor.

However, it is significant that the *Vaughn* case involved a child support obligor who was a sole proprietor. The court may have reached a different opinion if the payments from Blue Cross had been issued to a partnership or corporation.

In a case from the State of Minnesota, the court found that "[a] religious institution providing in-kind benefits to a church member is a 'payor of funds' under Minn.Stat. Section 518.6111 (2002)." *In re the Marriage of Rooney*, 669 N.W.2d 362, 365 (Court of Appeals, 2003) In the *Rooney* case, the child support obligor joined a church which required its members to give all their property and material possessions to the church and in exchange, the church supported its members. The church provided the child support obligor with room, board, in-kind benefits and a small stipend of $39.80 bi-weekly.

The *Rooney* court quotes from the Minnesota statute, which states, "A 'payor of funds' is 'any person or entity that provides funds to an obligor, including an employer as defined under chapter 24 of the Internal Revenue Code, section 3401(d), an independent contractor, payor of worker's compensation benefits or unemployment benefits, or a financial institution as defined in section 13B.06.'" *Rooney*, 669 N.W.2d at 372. After examining the definition of employer within the Internal Revenue Code (26 USCA Section 3401(d)), the Minnesota court concluded, "for purposes of Minn.Stat. Section 518.6111, a 'payor of funds' includes an entity for which a support obligor performs services and which provides the obligor with remuneration, cash-based or otherwise." *Rooney*, 669 N.W.2d at 372.

After receipt of the IWN and determination of payor status, the recipient of the IWN must initiate income withholding from the obligor within 14 days. Failure to properly initiate income withholding may result in the imposition of a penalty for failure to withhold. The penalty for failure to withhold or to timely remit is discussed in more detail in the next section.

How and when will a penalty under the Withholding Act be assessed for failure to withhold or to timely remit the child support?

Once a business entity determines it pays income to the obligor and is a payor under the Withholding Act, the payor has certain mandatory duties under the Withholding Act. 750 ILCS 28/35,[1] requires the recipient of an IWN to comply with the following duties: a) initiate income withholding within 14 days after receipt of the IWN and b) remit child support payments within seven business days after the date the payment would have been paid to the obligor.

Upon receipt of the IWN, the payor must initiate child support deductions within 14 calendar days from the date the IWN was mailed to the payor. Further, the Withholding Act states that a payor must "pay the amount withheld to the State Disbursement Unit (SDU) within seven business days after the date the amount would have been paid or credited to the obligor." The statutory penalty under the Withholding Act requires a payor to "pay a penalty of $100 for each day that the amount designated in the income withholding notice (whether or not withheld by the payor) is not paid to the State Disbursement Unit." Many of the cases under the Withholding Act address the failure of the payor to timely withhold and remit child support.

The Illinois courts have consistently found that when a payor knowingly fails to remit the child support payment on a timely basis, the payor will be subject to the statutory penalty for failure to remit. In the first Illinois case to examine the statutory and legislative history of the mandatory requirements for income withholding for child support, the Appellate Court in the Fourth District stated, "the employer penalty provision seeks not only to ensure a child support obligee receives the owed child support payments, but also that the obligee receives the support payments *in a timely manner*." *Dunahee v. Chenoa Welding & Fabrication, Inc.*, 273 Ill. App.3d 201, 652 N.E.2d 438, 209 Ill.Dec. 898, (Fourth Dist, 1995) [Emphasis in original text]

Although *Dunahee* was decided under the former withholding provisions of the Illinois Marriage and Dissolution Act [750 ILCS 5/706.1], the analysis remains the same. The legislature consolidated the various income withholding provisions under the Illinois Public Aid Code, the Illinois Marriage and Dissolution of Marriage Act, the Non-Support of Spouse and Children Act and the Illinois Parentage Act into the Withholding Act. (750 ILCS 28/5) The most significant change in the statute is the Withholding Act includes a penalty for failure to withhold the child support, in addition to failure to timely remit after withholding the child support payment.

In *Vrombaut v. Norcross Safety Products, L.L.C.*, 298 Ill.App.3d 560, 699 N.E.2d 155, 232 Ill.Dec. 708, (Third Dist., 1998), also decided under the prior withholding provisions, the court declined to impose a statutory penalty upon a payor who failed to withhold child support payments from the obligor's paycheck. The Income Withholding for Support Act, which was effective January 1, 1999, imposes a penalty on the payor for failure to withhold child support payments. The previous withholding provisions contained under the various Acts did not mandate a penalty for failure to withhold.

In the first case to be decided under the consolidated and revised Withholding Act, *Grams v. Autozone, Inc.*, 319 Ill.App.3d 567, 745 N.E.2d 687, 253 Ill.Dec. 564, (Third Dist., 2001), the payor failed to remit several dif-

ferent child support payments on a timely basis and the court found that "[a] separate violation occurs each time an employer knowingly fails to remit an amount that it has withheld from an employer's paycheck." The $100 per day penalty was assessed on each individually unremitted child support payment. While Autozone argued that the penalty could be devasting to the payor, the court stated, "the penalty is justified on the basis that noncompliance with a child support withholding order by an employer may place a substantial burden on a child support obligee, who could be forced to miss mortgage payments or postpone purchasing necessities for a child until the overdue payment arrives." *Grams* at 691. "[T]he purpose of the Act [which] is to promote self-enforcement and to deter future noncompliance by the employer." *Grams* at 691.

The Second and Fourth District Appellate Courts both addressed issues arising under the Withholding Act in 2004. Both cases addressed whether the payor knowingly violated the duties of the Withholding Act. In *Thomas v. Diener*, 351 Ill.App.3d 645, 814 N.E.2d 187, 286 Ill.Dec. 537 (Fourth Dist, 2004), the issues were whether the payor had complied with the mailing requirement and whether the payor had knowingly failed to remit child support payments. The payor testified that the child support checks were mailed every two weeks to the SDU. The SDU did not receive the child support checks within a reasonable time after the obligor was paid, nor after which the employer testified it mailed the payments. The trial court attributed the delay to the employer based on the date the payment was received by the SDU. It is significant that the case involved penalties arising from two late child support remittances: one from January 2000 remitted in October 2001 and a second one from November 2000 remitted in December 2000. Based on the uncontradicted testimony of the payor, the court found that the payor's conduct "was an oversight and not a knowing violation of the Support [Withholding] Act." *Thomas*, 814 at 196. Further, the court found the payor's conduct "was, at worst, negligent." *Thomas*, 814 at 196. It is significant that the payor avoided the imposition of the penalty by making every effort to timely and substantially comply with the Withholding Act when notified of the withholding and remittance discrepancies.

In *Chen v. Ulner*, 354 Ill.App.3d 1004, 820 N.E.2d 1136, 290 Ill.Dec.69 (Second Dist., 2004), the court found that the payor had knowingly violated the Withholding Act and increased the statutory penalty imposed by the trial court from $38,100 to $90,600. Based on representations from the obligor, the payor commenced the income withholding for child support before the IWN was received, but failed to remit any payments to the SDU. The payor received an official IWN from the obligee and realized that the child support payments had not been remitted to the SDU. The payor was placed on actual notice of the duties to withhold and timely remit under the Withholding Act.

The payor "offered no compelling excuse for consistently failing to comply with the statute." *Chen*, 820 N.E.2d at 1148. The payor was further notified of the discrepancies when the child support obligee filed a complaint to enforce the penalty provisions

of the Withholding Act in October 2000. Despite receiving actual notice of the failure to remit, the payor failed to timely remit the missing child support payments despite having adequate time to mitigate the damages. By remitting the child support payments upon notification of the discrepancies, the payor could have reduced the penalty. The final child support payments from the payor were remitted in October 2001, nearly a year after the obligee's complaint.

The Illinois Supreme Court heard its first case involving the Withholding Act in 2007. The Illinois Supreme Court stated, "Our lawmakers are under no obligation to make unlawful conduct affordable, particularly where multiple statutory violations are at issue." *In re the Marriage of Miller*, 227 Ill.2d 185, 202-203, 879 N.E.2d 292, 303, 316 Ill.Dec.225, 236 (2007

In the *Miller* case, the payor knowingly failed to timely remit a large number of child support payments for a minimum of 11,721 days and amassed a large statutory penalty of $1,172,100. The penalty imposed by the court did not include penalties which may have occurred prior to April 15, 2002 or after October 4, 2004. The parties stipulated to review the withholding period from April 15, 2002 through October 4, 2004, or approximately 128 weeks.

The *Miller* case, like the *Chen* case, involved a payor who failed to fully comply with the provisions of the Withholding Act to timely remit child support even after actual knowledge of the potential penalty for failure to timely remit. The court pointed out that the payor "mailed the withheld child support in a timely fashion on only three occasions" during the 128 weeks. *Miller*, 879 N.E.2d at 297. The payor in *Miller* also blatantly failed to timely remit the child support payments despite efforts by the obligee to enforce the order for timely remittance of the child support payments and compliance with the Withholding Act.

The court stated, "Miller, however, could have avoided the imposition of any penalties simply by complying with his statutory obligation upon service of the withholding notice or at least after suit was filed. Miller chose to do otherwise. Because Miller controlled the extent of the penalty, he cannot now complain that the penalty is harsh when compared to the amount of child support at issue." *Miller*, 879 N.E.2d at 302.

The second case under the Withholding Act to be reviewed by the Illinois Supreme Court was *Gulla v. Kanaval*, 234 Ill.2d 414, 917 N.E.2d 392, 334 Ill.Dec. 566 (2009). Both the Supreme Court and Appellate Court upheld the trial court's finding that the payor knowingly violated the Withholding Act. The payor in *Gulla* was a Mississippi corporation. After review of both the Withholding Act and the Uniform Interstate Family Support Act (UIFSA) [750 ILCS 22/100 et seq.], the Supreme Court remanded the case to the trial court to recalculate the penalty pursuant to the law of the State of Mississippi. "UIFSA establishes a uniform procedure for enforcing an out-of-state child support order. However, it uniformly directs the employer-violator to the law of its State for the appropriate sanction." *Gulla*, 917 N.E.2d at 400.

The most recent case under the Withholding Act was heard by the Second District Appellate Court in 2010. In the case of *In re the Marriage of Stockton*, 401 Ill.App.3d 1064, 937 N.E.2d 657, 344 Ill.Dec. 634 (Second Dist., 2010), the parties' dispute involved one child support payment. The court found that the payment had been made and that any claim to the "statutory penalty" in the Act "must commence within two years after the action accrues." *Stockton*, 937 N.E.2d at 666. However, the *Stockton* court expressly stated, "we leave for another court to determine the effect on the statute of limitations of an outstanding payment that continues to accrue penalties." *Stockton*, 937 N.E.2d at 667.

From the line of cases examined under the Withholding Act, the courts have broadly defined income for determining who are payors and have consistently applied the statutory penalty to payors who knowingly fail to withhold or timely remit the child support payments. The courts will not hesitate to impose a statutory penalty upon a payor's knowing and egregious disregard for its duties under the Withholding Act. Payors must be mindful of their responsibilities and duties under the Withholding Act and fully comply to avoid the imposition of a penalty.

Further, should a payor become aware of a non-compliance issue, they should take proactive steps to avoid or minimize the statutory penalty. Once the payor becomes aware of a potential non-compliance issue, the payor should review its records and promptly remit any unremitted child support withholdings. The payor can reduce or avoid the potential statutory penalty by remitting the child support to stop the accrual of the penalty. While the statutory penalties are mandatory, the obligee or public office may forego the filing of a complaint to collect the statutory penalty under the Withholding Act if the payor takes proactive measures to comply with timely remittance of child support payments.

Finally, many of these types of income withholding issues could be resolved through effective communication between the payors, obligors, obligees, public offices and their respective attorneys. Obtaining compliance with an IWN may be as simple as a polite phone conversation between the interested parties. Justice O'Brien, in a concurring opinion in the Vaughn case, states, "A phone call and agreed order could have solved this problem. Instead, countless hours and dollars were spent on this case." *Vaughn*, 935 N.E.2d at 130. ■

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1. 750 ILCS 28/35 states:
   a. It shall be the duty of any payor who has been served with an income withholding notice to deduct and pay over income as provided in this Section. The payor shall deduct the amount designated in the income withholding notice, as supplemented by any notice provided pursuant to subsection (f) of Section 45, beginning no later than the next payment of income which is payable or creditable to the obligor that occurs 14 days following the date the income withholding notice was mailed, sent by facsimile or other electronic means, or placed for personal delivery to or service on the payor. The payor may combine all amounts withheld for the benefit of an obligee or public office into a single payment and transmit the payment with a listing of obligors from whom withholding has been effected. The payor shall pay the amount withheld to the State Disbursement Unit within 7 business days after the date the amount would (but for the duty to withhold income) have been paid or credited to the obligor. If the payor knowingly fails to withhold the amount designated in the income withholding notice or to pay any amount withheld to the State Disbursement Unit within 7 business days after the date the amount would have been paid or credited to the obligor, then the payor shall pay a penalty of $100 for each day that the amount designated in the income withholding notice (whether or not withheld by the payor) is not paid to the State Disbursement Unit after the period

of 7 business days has expired. The failure of a payor, on more than one occasion, to pay amounts withheld to the State Disbursement Unit within 7 business days after the date the amount would have been paid or credited to the obligor creates a presumption that the payor knowingly failed to pay over the amounts. This penalty may be collected in a civil action which may be brought against the payor in favor of the obligee or public office. A finding of a payor's nonperformance within the time required under this Act must be documented by a certified mail return receipt or a sheriff's or private process server's proof of service showing the date the income withholding notice was served on the payor. For purposes of this Act, a withheld amount shall be considered paid by a payor on the date it is mailed by the payor, or on the date an electronic funds transfer of the amount has been initiated by the payor, or on the date delivery of the amount has been initiated by the payor. For each deduction, the payor shall provide the State Disbursement Unit, at the time of transmittal, with the date the amount would (but for the duty to withhold income) have been paid or credited to the obligor.

After June 30, 2000, every payor that has 250 or more employees shall use electronic funds transfer to pay all amounts withheld under this Section. During the year 2001 and during each year thereafter, every payor that has fewer than 250 employees and that withheld income under this Section pursuant to 10 or more income withholding notices during December of the preceding year shall use electronic funds transfer to pay all amounts withheld under this Section.

Upon receipt of an income withholding notice requiring that a minor child be named as a beneficiary of a health insurance plan available through an employer or labor union or trade union, the employer or labor union or trade union shall immediately enroll the minor child as a beneficiary in the health insurance plan designated by the income withholding notice. The employer shall withhold any required premiums and pay over any amounts so withheld and any additional amounts the employer pays to the insurance carrier in a timely manner. The employer or labor union or trade union shall mail to the obligee, within 15 days of enrollment or upon request, notice of the date of coverage, information on the dependent coverage plan, and all forms necessary to obtain reimbursement for covered health expenses, such as would be made available to a new employee. When an order for dependent coverage is in effect and the insurance coverage is terminated or changed for any reason, the employer or labor union or trade union shall notify the obligee within 10 days of the termination or change date along with notice of conversion privileges.

For withholding of income, the payor shall be entitled to receive a fee not to exceed $5 per month to be taken from the income to be paid to the obligor.

(b) Whenever the obligor is no longer receiving income from the payor, the payor shall return a copy of the income withholding notice to the obligee or public office and shall provide information for the purpose of enforcing this Act.

(c) Withholding of income under this Act shall be made without regard to any prior or subsequent garnishments, attachments, wage assignments, or any other claims or creditors. Withholding of income under this Act shall not be in excess of the maximum amounts permitted under the federal Consumer Credit Protection Act. Income available for withholding shall be applied first to the current support obligation, then to any premium required for employer, labor union, or trade union-related health insurance coverage ordered under the order for support, and then to payments required on past-due support obligations. If there is insufficient available income remaining to pay the full amount of the required health insurance premium after withholding of income for the current support obligation, then the remaining available income shall be applied to payments required on past-due support obligations. If the payor has been served with more than one income withholding notice pertaining to the same obligor, the payor shall allocate income available for withholding on a proportionate share basis, giving priority to current support payments. A payor who complies with an income withholding notice that is regular on its face shall not be subject to civil liability with respect to any individual, any agency, or any creditor of the obligor for conduct in compliance with the notice.

(d) No payor shall discharge, discipline, refuse to hire or otherwise penalize any obligor because of the duty to withhold income.

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

September

Tuesday, 9/6/11- Teleseminar—Social Media Issues and Employer Liability in the Workplace. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 9/7/11- Webinar—Conducting Legal Research on FastCase. Presented by the Illinois State Bar Association. 12-1.

Monday, 9/12/11- Chicago, Frankie's Scaloppine—Five Star Service: Ethically Satisfying your Client's Appetite for Great Customer Service. Presented by the Illinois State Bar Association. 5:30-7:30.

Tuesday, 9/13/11- Teleseminar—Joint Venture Agreements in Business, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 9/14/11- Teleseminar—Joint Venture Agreements in Business, Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, 9/16/11- Webcast—IP 101: An Intellectual Property Primer for In-House Attorneys. Presented by the ISBA Corporate Law Section. 12-2.

Friday, 9/16/11- Galena, Eagle Ridge Resort and Spa—Hot Topics in Consumer Collection. Presented by the ISBA Commercial Banking, Collections and Bankruptcy Section; co-sponsored by the ISBA Young Lawyers Division. 8:45-4:30.

Friday, 9/16/11- Carbondale, SIU School of Law—A Roadmap to the New Illinois Religious Freedoms and Civil Union Act. Presented by the Standing Committee on Sexual Orientation and Gender Identity. 2-4.

Tuesday, 9/20/11- Teleseminar—Franchise Law: What You Need to Know Before Your Client Buys. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 9/21/11- Webinar—Advanced Legal Research on FastCase. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/22/11- Teleseminar—Generation Skipping Transfer Tax Planning. Presented by the Illinois State Bar Association. 12-1.

Friday, 9/23/11- Fairview Heights, Four Points Sheraton—Current DUI, Traffic and Secretary of State Related Issues- Fall 2011. Presented by the ISBA Traffic Laws/Courts Section. 9-4.

Tuesday, 9/27/11- Teleseminar—Metadata: The Hidden Digital World of Client Files in Litigation. Presented by the Illinois State Bar Association. 12-1.

October

Tuesday, 10/4/11- Teleseminar—Fixing Broken Trusts. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/5/11- Webinar—Conducting Legal Research on FastCase. Presented by the Illinois State Bar Association. 12-1.

Thursday, 10/6/11- Teleseminar—Environmental Liability in Real Estate Transactions. Presented by the Illinois State Bar Association. 12-1.

Monday, 10/10/11- Chicago, UBS Towers—Advanced Workers' Compensation- Fall 2011. Presented by the ISBA Workers' Compensation Law Section. 9-5.

Monday, 10/10/11- Fairview Heights, Four Points Sheraton—Advanced Workers' Compensation- Fall 2011. Presented by the ISBA Workers' Compensation Law Section. 9-5.

Tuesday, 10/11/11- Teleseminar—Drafting LLC Operating Agreements, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/12/11- Teleseminar—Drafting LLC Operating Agreements, Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/12/11- Teleseminar—Drafting LLC Operating Agreements, Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, 10/14/11- Springfield, INB Conference Center—Divorce Basics for Pro Bono Attorneys- 2011. Presented by the ISBA Delivery of Legal Services Council. 1:00-4:45.

Thursday, 10/13/11- Chicago, USB Towers—Collaborative Law: The Nuts and Bolts. Presented by the ISBA General Practice, Solo and Small Firm Section; co-sponsored by the ISBA Alternative Dispute Resolution and the ISBA Young Lawyers Division. 8-12.

Friday, 10/14/11- Chicago, ISBA Chicago Regional Office—Family Law Nuts and Bolts Chicago 2011. Presented by the ISBA Family Law Section. 8-5

Monday, 10/17/11- Chicago, ISBA Chicago Regional Office—Hot Topics in Consumer Collection. Presented by the ISBA Commercial Banking, Collections and Bankruptcy Section; co-sponsored by the ISBA Young Lawyers Division. 8:45-4:30.

Tuesday, 10/18/11- Teleseminar—2011 Americans With Disabilities Act Update. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 10/18/11- Chicago, ISBA Chicago Regional Office—What You Need to Know About LLCs. Presented by the ISBA Corporation Securities and Business Law Section. 12:30-4:45.

Wednesday, 10/19/11- Webinar—Advanced Legal Research on FastCase. Presented by the Illinois State Bar Association. 12-1.

Thursday, 10/20/11- Chicago, ISBA Chicago Regional Office—The IMDMA and the Welfare of Pets. Presented by the ISBA Animal Law Section; co-sponsored by the ISBA Family Law Section and the ISBA Human Rights Section. 1:00-4:30 pm.

Thursday, 10/20/11- Live Webcast—The IMDMA and the Welfare of Pets. Presented by the ISBA Animal Law Section; co-sponsored by the ISBA Family Law Section and the ISBA Human Rights Section. 1:00-4:30 pm. ■

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