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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 Kelli Gordon

You have read a lot about HB1452 in this column over the last couple of years. It is a complete re-write of the Illinois Marriage & Dissolution of Marriage Act. It makes many changes; some significant (like eliminating the terms "joint" and "sole" custody) and some insignificant (like eliminating "grounds" other than irreconcilable differences). The bill is still in the process of being amended and the Illinois State Bar Association is playing a role in trying to make additional amendments.

I get asked on a weekly basis, "What is the status of that 'Big Bill'?" So here it is: The bill passed the House of Representatives on April 10, 2014 with House Amendment 2 and it was sent to the Senate the same day. Senate Amendment 1 completely deleted and replaced the underlying bill on May 8, 2014. The bill ended up in the Committee on Assignments at the end of the spring session. During the fall veto session (November 19 to 21, 2014; December 2 to 4, 2014), the bill will most likely be referred to a substantive committee such as the Judiciary Committee. It can, and probably will, be amended again by the Judiciary Committee. If it passes the Judiciary

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Co-owner or creditor? That is the question when dividing a marital public pension

By Hon. Mark J. Lopez

Over the last several years, this writer has regularly encountered the ex-spouse member of a public pension who refuses to sign the required consent form to divide the pension portion which was awarded to the ex-spouse.[1] In most, if not all cases, the member cites the case of *In re: Marriage of Menken*, 334 Ill. App.3d 531 (2nd Dist., 2002) in support of their position.

Virtually all public pension handbooks distributed to membership includes language which states in essence:

> The Court does not have the authority to order the member to sign the consent form.[2]

This Court recently addressed this issue in a post decree enforcement proceeding. The parties' judgment awarded the ex-wife an interest in her ex-husband's marital public pension. Her ex-husband began his public employment prior to July 1, 1999 which requires a consent form to be signed. The ex-wife filed a motion to divide her ex-husband's public pension and included in her prayer for relief that the Court order him to execute the required consent form.

The ex-husband argued that the Court is prohibited from ordering Samuel to execute the consent form and cited the case of *In re: Marriage of Menken*, 334 Ill.App.3d 531 (2002) in support of his argument.

He also argued that the Illinois Constitu-

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Chair's column

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Committee, it will have to be voted up or down by the Senate and sent back to the House for concurrence with any Senate amendments. If and when the House concurs in any Senate amendments, it will be sent to the Governor. Within 60 days of being sent the bill, the Governor can sign it as is, make specific changes to it in an amendatory veto that both chambers must accept, veto the whole thing, or do nothing. If he does nothing, the bill becomes law as a "pocket signature." The full text of the bill can be found by going to the Illinois General Assembly Web page, www.ilga.gov and on the left-hand side of the homepage in the search engine insert HB1452. (Hint: download the PDF version; it's easier to read.) It is unknown what the bill's effective date will be, but the best guess is that if it is passed in veto session it will be June 1, 2015.

The Family Law Section Council has been working hard this summer to review the bill. As you will recall from Pam Kuzniar's previous columns, subcommittees have been set up to review specific parts of the bill. The subcommittees then made reports to the council regarding what they approved of, disapproved of, and potential changes to the bill. Another subcommittee, the "Collating Committee" (William Scott, Matt Kirsh, David Levy, Richard Zuckerman and Jennifer Shaw, as well as Jim Covington) has spent countless hours in reviewing these reports and "word smithing" the bill to present it to the council at our next meeting. From there, the council will vote and a recommendation will be made to the Board of the ISBA.

One of the biggest changes is the repeal of the "removal" statute. Instead, HB1452 uses the term "relocation," which is defined as "a change of residence of more than 25 miles for more than 90 days that significantly impairs a parent's ability to exercise the parental responsibilities that the parent has been exercising or is entitled to exercise under a parenting plan or allocation judgment." Therefore, you simply move across a state line and you are still within 25 miles, the statute is not triggered. However, if you are in Central Illinois and you move more than 25 miles (still within Illinois) the statute is triggered. Look for amendments to this section.

Some people have confused HB1452 with other bills that had been drafted last spring. HB1452 does not presume a 50/50 division of custody. An earlier version of HB1452 did have an aspirational section that stated that the non-custodial parent should have at least 35% of time with the minor children; however, that section has been eliminated from HB1452.

Stay tuned! ■

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Co-owner or creditor? That is the question when dividing a marital public pension

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tion, Article 13, Section 5, which is the Anti-Alienation provision, prohibits creditors from seizing any pension benefits of the litigant. The ex-husband found support for this Anti-Alienation argument in *Menken*, as well. The ex-husband argued that a trial court is prohibited from ordering a pension member's execution of the consent to the division of his public pension because the *Menken* Court found that such an order would violate the Anti-Alienation Provision of the Illinois Constitution.

40 ILCS 5/1-119(m)(1) of the Illinois Pension Code states as follows:

> In accordance with Article XIII, Section 5 of the Illinois Constitution which prohibits the impairment or diminishment of benefits granted under this Code 'a QILDRO' issued against a member of a retirement system established under an Article of this Code that exempts the payment of benefits or refunds from attachment, garnishment, judgment or other legal process shall not be effective without the written consent of the member if the member began participating in the retirement system on or before the effective date of this Section. That consent must specify the retirement system, the court case number, and the names and social security numbers of the member and the alternative payee.

The *Menken* court reversed the trial court's order requiring the pension holder to sign the required consent form to divide his pension finding that to allow the trial court's order to stand would render the protections of Section 1-119(m)(1) meaningless.

In *Menken*, the ex-wife was awarded 60% of her ex-husband's public pension as an award of marital property in the parties' judgment. A review of the *Menken* decision also shows there was no analysis either by the trial court or the court of review to distinguish the ex-wife's status as a co-owner from that of a creditor.

Prior to and contrary to the Second District's *Menken* decision, the First District Appellate Court ruled in the matter of *In re: Marriage of Papeck*, 95 Ill.App.3d 624 (1st Dist., 1981). In *Papeck,* the court distinguished the interest of a former spouse who is awarded a portion of their ex-spouse's public pension from that of a creditor. The *Papeck* court found that as an alternate payee, the ex-spouse who was awarded an interest in the member ex-spouse's public pension becomes a co-owner of the pension with the member spouse.

The court in *Papeck,* however, rejected the ex-wife's argument that merely because she is an ex-wife the anti-alienation clause of the Illinois Constitution does not apply to her unlike other judgment creditors. The *Papeck*, court did state that an ex-spouse may be a judgment creditor, and if found to be a judgment creditor, the Anti-Alienation Clause of the Illinois Constitution would prohibit a court from ordering the execution of a consent.

The court in *Papeck* went on to find that an award of a marital interest in a pension is a property interest and if awarded to an ex-spouse in a judgment for dissolution of marriage, the ex-spouse obtains property rights in the pension and is a co-owner of the pension, and it is the status as a co-owner which exempts the co-owner from the protection of the Anti-Alienation Clause. The *Papeck* court confirmed an ex-spouse can be a co-owner of a pension if awarded an interest in a marital pension. In the case of *In re: Marriage of Winter*, 387 Ill.App.3d 21 (2008) the court found,

> where pension benefits are marital property, former spouses are not considered creditors," 750 ILCS 5-503(b)(1) (2006). It is well settled that the spouse of a member of a pension fund obtains ownership interest in the benefits as marital property which in the course of a dissolution of marriage may be allocated between spouses without regard to membership in the pension fund.

In re: *The Marriage of Hackett* 113 Ill. 2d 286 (1986), also In re: *The Marriage of Carlson* 269 Ill.App.3d 464 (1995), and *Papeck*. The court continued,

> It is the former spouse's status as a co-owner of the pension benefits that precludes the former spouse from being labeled as a creditor. The anti-alienation provision of the pension code presents no bar to the former spouse being awarded a marital share of the pension upon dissolution of marriage even though he or she is not a member of the pension fund involved.

The *Winter* case further cited *In re: Marriage of Roehn*, 216 Ill.App.3d 891 (2nd Dist., 1991) finding that the *Roehn* court failed to recognize *Papeck's* "crucial distinction" between a creditor and a co-owner and failed to include in its analysis the anti-alienation provision or its meaning as explained by *Hackett*.

Additionally, 750 ILCS 5/503(b)(2) at paragraph 3 states as follows:

> The recognition of pension benefits as marital property and the division of those benefits pursuant to a Qualified Illinois Domestic Relations Order shall not be a diminishment, alienation, or impairment of those benefits. The division of pension benefits is an allocation of property in which each spouse has a species of common ownership.

This Court believes that the plain language of 750 ILCS 5/503(b)(2) supports the finding that contrary to the *Menken* decision, our legislators have already confirmed that a division of a public pension as a marital asset by way of a QILDRO form is not a violation of the Anti-Alienation Clause. It is no coincidence that 750 ILCS 5/503(b)(2) was enacted on July 1, 1999 the same effective date as the QILDRO statute and the consent requirement became effective. To rule as the court did in *Menken* suggests that the court cannot enforce its own award of a marital asset, which is absurd.

Given the Court's rulings in *Papeck*, *Smithberg*, and *Winter*, it is clear that if an ex-spouse, alternate payee is awarded a marital portion of a property interest in his or her former spouse's public pension, then the Court is authorized to directly enforce its own orders to ensure that the alternate payee, former spouse receives the property interest they were awarded in their Judgment for Dissolution of their marriage. This enforcement authority includes, but is certainly not limited to, a direct order to the member ex-spouse to execute a consent to QILDRO.

If *Papeck's* "crucial distinction" between a creditor and a co-owner has any legal significance, then a Domestic Relations Court

that has awarded an ex-spouse an interest in their ex-spouse's public pension, must be authorized to order a pension holder of a public pension to sign the consent form to the division of his or her public pension to ensure that the co-owner, alternate payee, ex-spouse, receives his or her Court awarded property interest in their ex-spouse's public pension. Such authorization not only satisfies the Court's historic authority to directly enforce its own orders by the use of its contempt powers, but such authority would do no violence to the intent and purpose of the anti-alienation provision of the Illinois Constitution, as the public pension holder is still afforded its full protection against all creditors.

The recognition by the Illinois Legislature in 750 ILCS 5/503(b)(2) that a division of pension benefits as marital property by QILDRO is not an alienation of those benefits as contemplated by Section 1-119(m)(1) of the Pension Code clearly controls resolution of the issue. Also the rulings in *Papeck* and *Winter* that a former spouse alternate payee is a co-owner and not a creditor, of the ex-spouse member support the conclusion that contrary to the holding in *Menken*, Section 1-119(m)(1) of the Pension Code would not be rendered meaningless because pension holders still retain the full protection of Article 13, Section 5 of the Illinois Constitution against all other creditors.

In conclusion, this Court believes that ordering a member spouse to execute a consent to QILDRO is an appropriate, and statutorily authorized enforcement power of the Court in dealing with the division of public pension interests between spouses. ■

1. Consent form is required if public employee began prior to July 1, 1999. (40 ILCS 5/1-119)

2. Cited from the Illinois Municipal Retirement Fund QILDRO handbook.

Bankruptcy, divorce and judicial estoppel

By James Hanauer

With the recent recession, most family law attorneys have experienced the situation where a spouse files for bankruptcy during the divorce proceeding. In that situation, the family law attorney must consider the doctrine of judicial estoppel.

According to Section 541 of the Bankruptcy Code, the bankruptcy estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. 541 (1994). In divorce proceedings, Illinois courts have recognized that the filing of a bankruptcy petition creates an estate which includes all the property in which the debtor spouse has a legal or equitable interest. *In Re: Marriage of Pullen*, 409 Ill. App.3d 1161, 2 N.E.3d 667 (Ill. App. 1st Dist. 2011) (Rule 23 Opinion). As such, the debtor spouse's bankruptcy estate should include any property in which that spouse not only has a legal interest, but also an equitable interest.

Section 503(b)(1) of the Dissolution Act states that all property acquired by either spouse after the marriage and before a judgment for dissolution of marriage or declaration of invalidity of marriage is presumed to be marital property, regardless of whether title is held individually or in some form of co-ownership. The presumption of marital property can be overcome by a showing that the property was acquired by a method listed in Section 503(a).

The Second District Appellate Court has held that, under Illinois divorce laws, a non-titled spouse has a potential equitable interest in the marital home upon a divorce. *GMAC Mortgage, LLC v. Arrigo*, et al, 2014 IL App (2d) 130938, 8 N.E.3d 621, 2014 Ill. App. Lexis 230 (Ill. App. 2nd Dist. 2014). Although the case is not directly on point, it does adhere to the mandates of Section 503(b)(1) of the Dissolution Act. Specifically, the spouse that is not on title to property acquired after the marriage still has an equitable interest in the property when there is a divorce proceeding.

Section 541 of the Bankruptcy Code requires a debtor to list all legal or equitable interests in property as of the commencement of the case. If a divorce proceeding is pending at the time the spouse files a petition for bankruptcy, then that spouse would have an equitable interest in any marital property, even though his/her name is not on title. That spouse must disclose any marital property in which they may have an equitable interest.

The question then becomes what happens if the spouse that files for bankruptcy does not disclose the equitable interest they may have in marital property that is just titled in the other spouse's name? Can the spouse that did not file bankruptcy use the failure to disclose the marital assets to their advantage? Under the doctrine of judicial estoppel, the answer appears to be yes.

In two recent Illinois Appellate decisions, the Courts have applied judicial estoppel to Illinois civil proceedings from Federal bankruptcy proceedings. *Shoup v. Gore, et al*., 2014 IL App (4th) 130911; 2014 Ill. App. LEXIS 458 (2014). *Berge v. Mader and DMG America, Inc*., 957 N.E.2d 968; 2011 Ill. App. LEXIS 1054; 2011 IL App (1st) 103778; 354 Ill. Dec. 374 Although each of the cases involved a personal injury cause of action, the same logic and legal principal would apply to divorce proceedings.

According to both *Shoup* and *Berge*, the doctrine of judicial estoppel bars a party from making a representation in a civil case after he has successfully taken a contrary position in another case. The goal of the application of judicial estoppel is to protect the integrity of the system of justice and prevent a party from manipulating and making a mockery of the system of dispensing justice in all its forms. At its heart, this doctrine prevents chameleonic litigants from shifting positions to suit the exigencies of the moment, engaging in cynical gamesmanship, or hoodwinking a court.

Judicial estoppel applies if the following five separate elements are present. Those are as follows: (1) the two positions must be taken by the same party; (2) the positions must be taken in judicial proceedings; (3) the positions must be given under oath; (4) the party must have successfully maintained the first position, and received some benefit thereby; and (5) the two positions must be totally inconsistent.

In both *Shoup* and *Berge* the Illinois Appellate Courts applied judicial estoppel to Illi-

nois state civil proceedings after the plaintiffs filed a petition for bankruptcy. In both cases, the plaintiffs had a civil cause of action that accrued prior to receiving a discharge in the bankruptcy proceeding and the civil cause of action was not disclosed in the bankruptcy proceeding.

In both cases, the Appellate Courts applied the five elements of judicial estoppel to the Illinois personal injury proceedings and ruled that the plaintiffs were judicially estopped from proceeding with the personal injury proceedings.

In essence, the Appellate Courts held that the plaintiff's causes of actions were assets that should have been disclosed in the bankruptcy proceeding and that were not disclosed in the bankruptcy proceeding. A debtor who does not disclose an asset cannot later realize a benefit from that concealed asset after having his or her debts discharged in bankruptcy. In both cases, the Appellate Court affirmed the trial court's judgment to dismiss the personal injury causes of action based upon the doctrine of judicial estoppel.

The question then becomes how does this rule of law apply to divorce proceedings? Although there may be other applications, there are two obvious applications. When a spouse files a bankruptcy petition while the divorce proceeding is pending, the divorce attorney should always look for two issues; the disclosure of assets and the value of assets.

As previously outlined, a spouse has an equitable interest in marital property while a divorce proceeding is pending, even if she/he are not on title and do not have a legal interest. If that spouse files a petition for bankruptcy during the divorce proceeding and does not disclose the equitable interest in the marital property in the bankruptcy proceeding, then under the doctrine of judicial estoppel that spouse should be barred from claiming a marital interest in the property in the divorce proceeding.

The same logic would apply to the disclosure of the value of an asset. For example, a spouse states in the bankruptcy court that an asset has a value of $2,000 and then attempts to argue in the divorce proceeding that the asset has a value of $10,000. The spouse should be judicially estopped from taking the contrary position in the divorce proceeding as to the different value (this would not prevent the spouse that did not file for bankruptcy from claiming a different value because they did not take a contrary position under oath in the bankruptcy proceeding).

In both of these situations, all of the elements of judicial estoppel would be present. The same spouse took two different positions, the positions were taken in a bankruptcy proceeding and a divorce proceeding, the spouse would have signed the bankruptcy petition under oath and would have signed an affidavit of disclosure of assets in the divorce proceeding (assuming they completed a comprehensive financial statement, discovery and/or testified under oath as to their interest in assets), the spouse's petition for bankruptcy was granted and a discharge order was entered and, as held in *Shoup* and *Berge*, the positions in the bankruptcy proceeding and the divorce proceeding would be totally inconsistent.

The application of judicial estoppel will probably only apply to bankruptcy and divorce proceedings if the petition for dissolution of marriage is pending at the time the spouse files a petition for bankruptcy. According to the Rights of Married Persons Act, "a married person may own in his or her own right real and personal property obtained by descent, gift, or purchase and may manage, sell, and convey that property to the same extent and in the same manner as an unmarried person." § 750 ILCS 65/9.

Further, Section 503(e) of the Dissolution Act expressly states that a spouses interest in "marital" property vests at the time the dissolution proceedings are commenced and continues during the pendency of the proceeding. Under Section 503(e), a spouse only acquires an equitable interest in "marital" property when a petition for dissolution of marriage is filed and remains pending. As a result, if a spouse filed a petition for bankruptcy and received a discharge and then a petition for dissolution of marriage was filed, the doctrine of judicial estoppel would probably not apply because the spouse did not have an equitable "marital" property interest in the property held in only the other spouse's name at the time of the bankruptcy proceeding.

This inquiry however does not answer all questions. For example, what is the impact if both spouses fail to disclose an asset and/or if they misrepresent the value of an asset in a joint bankruptcy proceeding? What result would occur if the spouse that filed the petition for bankruptcy did not disclose to the bankruptcy court a non-marital asset held in his/her name? Section 503 of the Dissolution Act states that the trial court in divorce proceedings must allocate the property between the spouses and the statutory mandate exists even if both spouses did not disclose the asset in the bankruptcy proceeding. Moreover, Section 503 states that the trial court must allocate the non-marital asset to the spouse that owns the asset. It would seem, in these situations, that the doctrine of judicial estoppel would not apply and the trial court would still have to allocate the property as set forth in the Dissolution Act. However, what impact might the non-disclosure have on the credibility of the non-disclosing spouse(s) in connection with the failure to disclose in the bankruptcy proceedings?

As a family law attorney, what should you do when a spouse files a petition for bankruptcy during a divorce proceeding? If you represent the spouse that files the petition, you must advise them to disclose any potential marital property, as well as any non-marital property. If you represent the spouse that did not file the petition, then you should obtain a copy of the petition to determine if you can use the doctrine of judicial estoppel in the divorce proceeding. ■

How a bill becomes a law—ISBA style

By Lisa M. Nyuli

"I'm just a bill
Yes, I'm only a bill
And I'm sitting here on Capitol Hill …"

This *Schoolhouse Rock!* ditty was one of my favorites on Saturday mornings, back in the 70s when I didn't work or attend meetings on Saturdays. For some reason, every month, when the Family Law Section Council discusses the status of new legislation, the catchy verse jumps into my head.

As a member of the Board of Governors, I am often asked what the ISBA does for lawyers. There are many things that ISBA does for lawyers, and one of the biggies relates to legislation. Although I am primarily a family law attorney, and this is a family law section newsletter, this benefit is not limited to family law. We are just one cog in the wheel. But, I give the following as an example of the ISBA's role in the legislative process, from the viewpoint of family law.

Most practitioners know a lot of proposed family law-related legislation comes out of Springfield each session. House Bill 1452, which is a complete rewrite of the Illinois Marriage and Dissolution of Marriage Act, is an example of such legislation. Jim Covington is the Director of Legislative Affairs for ISBA. When he sees a bill introduced that may affect family law, Lori Kohlrus sends it out to the ISBA Family Law listserv with a link to the text of the bill.

This gives anyone on the listserve a chance to review, discuss and comment on the proposal in a quick fashion. And we should. As Jim points out, sometimes a bill will get filed and posted for hearing with a short turnaround time-usually 5- 6 days- and amended bills may have only an hour or two advance notice prior to consideration. Jim gets contacted by legislators and their staff to find out what the ISBA position on a bill is, and the listserv is the first measure of interest and opinion of the members that enables Jim to provide feedback to legislators and staff.

Most ISBA sections have legislative subcommittees, and Family Law is no different. Our subcommittee reads the legislation, reviews the traffic on the listserv, and generally makes a recommendation to the full council as to approval or opposition. Occasionally a bill will be referred to Family Law for comment that doesn't actually involve a substantive or procedural area of family law. In these instances, the subcommittee will recommend taking "no position" on the bill, meaning that family law will leave it up to the practice disciplines with greater experience in that area of the law to make recommendations.

Since HB 1542 is a completely new act, in this instance the substantive subcommittees of the family law section broke the bill down for each particular area, such as child support, custody, parentage, maintenance, etc., and reviewed it for the full Section Council, making suggestions as to changes in form and substance. These suggestions, in turn, were referred to the sponsoring legislator, Kelly Burke, and her staff for their consideration.

Some proposed bills will affect other practice areas as well, and the bills will also go to those section councils for the same vetting. If there is no conflict, Jim will often take action and advise the legislators or staff of the position of ISBA. If there is opposition or conflict between different sections or committees, the proposed bill will then go to the ISBA's Legislation Committee for further review and recommendations.

The Legislation Committee is made up of 25 to 30 lawyers from different areas of practice who are tasked with the responsibility of trying to reach a consensus position on the bill. Since family law bills are often emotionally motivated and deal with people in conflict, a great many end up being reviewed by the Legislation Committee.

From there, particularly when there is much ado about a bill, it may go before the Board of Governors, or, if there is no time to wait for the next Board meeting, before the Executive Committee of the ISBA for a position of approval or opposition.

The key here is the speed and velocity of the legislative calendar is difficult to mesh with section and committee meetings. So, the listservs act as a distant early warning for problematic bills, and enable our ISBA legislative team to get a quick sense for our members' sentiments to any given bill.

ISBA councils also will prepare proposed legislation, which takes a different, and much slower route. The most recent internal bill is the maintenance guidelines bill, which, as of the date of this writing, was on Governor Quinn's desk, waiting for his signature.

The maintenance guidelines bill was created by the family law section council. It then was sent to other sections in the ISBA for comment. The bill then went to the ISBA Legislation Committee, then to the Board of Governors, and then to the Assembly for approval. Now it has passed through the General Assembly, and is on the verge of becoming law.

How does the ISBA help you as a lawyer? It gives you the chance to have a voice in legislation affecting the area of law in which you practice. You can simply offer your view on the listserv, take a more in depth and active role by reviewing proposed bills, help to create bills that can be presented by the ISBA, or help to keep the junk proposals from becoming law. Your help is crucial and then ISBA takes it from there.

To subscribe to the family law listserv, go to the ISBA homepage, click on Practice Tools tab, sign in, and check off your desired list or lists. Easy.

Now I'll be moving on to Conjunction Junction. ■

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