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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

I was Secretary of this committee when Angela Peters asked us to consider an Animal Subcommittee. I remember the fun I had writing those minutes. There were individuals barking, oinking, mooing, you name it. We had a great time that day. Angela, however, stood firm, and although some complained, the Animal Subcommittee was approved.

We still hear complaints from members about this committee, when subjects like pet custody come up and are ridiculed. Rory Weiler will say that he loves animals.....for dinner. We start joking about who will be the 604(b) evaluator, and should the custody of a pet be completed with the best interest standard in mind. But the other day during a trial, I witnessed first-hand how pets affect our behavior, and it wasn't very funny.

One of the acts the mother stood accused of was controlling her young daughter by threatening to drop the girl's pet lizard off the balcony. When I asked the mother about that act, people in the courtroom snickered. I'll admit, when I first heard that story, I even rolled my eyes a bit. But when I heard how traumatized that little girl was by the act, I thought about it a little harder. It's not funny to hurt animals, I am sure we'd all agree with that. But this was something different. This was about hurting that girl through her pet. I had a new understanding of Angela's passion for her committee after that hearing.

I recently read in the *Chicago Tribune* that men and women in a divorce will fight more for their pets than they will for money. If we can be so attached to animals that it will make us forgo mon-

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What is income?

By Hon. Timothy McJoynt

The topic of this article is the calculation of child support under the Marriage and Dissolution of Marriage Act. Specifically, how does the court (or parties) determine payor's income to apply guideline child support calculations?

Sounds simple but it has become, due to various case law, a complicated task. Obviously we start with the statute. Section 505 of the Act tells us to set support based not on fault but on reasonable and necessary needs of the child, (section A). It goes on and gives us percentage guidelines to do these calculations. It also gives a list of factors to consider when setting child support. It then gives us a "formula" for determining "net" income of payor. Income is defined as "income from all sources."

Black's Law Dictionary says income is "the return of money from ones business, labor, and capital invested, gains, profits, salary, wages, etc." It goes on to define earned income, unearned income, net income and other similar concepts but of course those concepts are not mentioned in Section 505.

The Internal Revenue Code has a definition of income too. Case law seems to disregard this and so income for child support purposes can be taxable or non taxable income. Simply put, other factors determine what is income and taxability is just one such factor.

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Chair's column

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ies entitled to us, it seems that the subject of pets in our cases should be treated more seriously.

Pet lovers are making headway in the courts. Illinois has now allowed us to protect animals in order of protection cases. I believe more laws will be passed that not only protect the pet, but we will see more statutes in family law dealing with possession. I strongly support legislation that address our clients' pets. For more information regarding arguments made in other jurisdictions, I'd recommend that you look at Shannon Burke's PowerPoint presentation which she gave at a recent ISBA conference dealing with animal law and family law. She did a great job and gave a lot of useful information that can be argued when you are facing an issue dealing with pets in your cases. Look for this presentation to be on the ISBA Web site soon, at <http://www.isba.org/cle/fastcle>. ■

What is income?

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The analysis at first is easy. Income from wages, labor, salary, etc. All clearly are parts of income for child support calculations. There is a line of cases which deal with basically high earner payors and when a court should deviate from guidelines. A sample of these cases is *Singletary* 293 Ill. App 3d 25 (1997, 1st Dist.), *Lee* 246 Ill. App 3d 628 (1993, 4th Dist.), and *Keon* 344 Ill App 3d 1137 (2003, 4th Dist). These topics are beyond the scope of this article.

There are many older cases (before *Rogers,* see infra) which sort of favor payors and somewhat limit what is income for child support purposes. Some of those cases are:

1. *Villanueva vs. O'Gara* – 282 Ill App 3d 147 (2nd Dist., 1996) – only lost earnings in an injury settlement is income – not pain and suffering. (This is Judge Equi's favorite).
2. *Bowlby* 338 Ill App 3d 720 (5th Dist., 2003), gifts are not income (but see *Rogers* infra).
3. *Fressen* 275 Ill App 3d 97 (4th Dist., 1995), passive (not actually received) corporate income (but it was taxable) to payor was not income.
4. *Tegeler*, 365 Ill App 3d 448 (2nd Dist., 2006), line of credit draws are not income, if it's a loan.
5. *Department of Public Aid v. Rivera* 324 Ill App 3d 476 (2nd Dist., 2001), SSI income to payor cannot be used for income to pay child support.

The case law then starts shifting a bit leading up to *Rogers'* case in 2004. Some of these cases started chipping away at the usual payor defenses to child support calculations:

1. *People ex. Rel Myers v. Kidd* 308 Ill App 3d 593 (5th Dist., 1999), disability pension income is income for child support purposes.
2. *Klomps* 286 Ill App 3d 710 (5th Dist, 1997), military pension income is income.
3. *McGowman 265* Ill App 3d 976 (1st Dist., 1994), all types of military allowances are income for child support purposes.
4. *Posey v. Tate* 275 Ill App 3d 822 (1st Dist., 1995), deferred compensation money stream to payor is income.
5. *Winne* 239 Ill App 3d 273 (2nd Dist., 1992), capital account allocation to a partner which he "could" draw upon is income.
6. *Worral* 334 Ill App 3d 550 (2nd Dist., 2002), truck drivers "per diem" is income, less actual expenses proved and burden is on driver to show these expenses.
7. *Wolfe* 298 Ill App 3d 510 (2nd Dist., 1998), lost earnings part of injury settlement is income.
8. *Dodds* 222 Ill App 3d 99 (2nd Dist., 1991), post judgment lump sum workers comp. settlement is income.
9. *Boyden* 164 Ill App 3d 385 (2nd Dist., 1987), post judgment lotto winnings is income.
10. *Schacht* 343 Ill App 3d 348 (2nd Dist., 2003), workman's comp. award may be either a martial asset to be divided in a divorce, or its income. Can't have it both ways though. (See more on "double counting" infra).

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11. *People ex.rel Jennings v. White* 286 Ill App 3d 213 (3rd Dist., 1997), Federal Employers Liability Act settlement money is income for child support purposes.

Then along came the Illinois Supreme Court in *Rogers,* 213 Ill. 2d 129 (2004), and all bets on what's really income and what's not are off. In this case regular annual transfers of money to payor from his parents occurred. Loan v gift was argued of course. Payor never paid his folks back. These "gifts" were income for child support. *Harman* 210 Ill App 3rd Ill 3rd 92 (2nd Dist., 1991), and *Bowlby* 338 Ill App 3d 720 (5th Dist., 2003), were overturned. Dicta in the case stated that it doesn't have to be repeating or regular gifts either. The landscape of calculating income for child support took a dramatic turn. Taxable income now is clearly immaterial in many of these cases.

Cases following *Rogers* show how far some Appellate courts have gone:

1. *Colangelo* 355 Ill App 3d 383 (2nd Dist., 2005), stock options, which payor received in divorce settlement constituted income for child support (see infra on double counting).
2. *Einstein v. Nijim* 358 Ill App 3d 263 (4th Dist., 2005), auto allowance from employer is not taxable but is income for child support.
3. *Sharp* 369 Ill App 3d 271 (2nd Dist., 2006), distributions from a spend thrift trust to payor is income.
4. *Lindeman* 356 Ill App 3d 462 (2nd Dist., 2005), IRA distributions are income.

Confused yet? I am. It gets even more interesting. Consider the *Zells* case, 143 Ill 2d 251 (Supreme Court 1991), and it is now well-known prohibition against double counting—i.e., can't award the asset and also count it as a factor for income to calculate maintenance. This issue has now invaded the child support arena. *Lindeman* (already cited) seemed to stick with the rule, and in its dicta also addressed some sort of avoidance of double counting. *Schacht* addressed the issue and supported anti double counting, and cited *Derossett* is support of this position 173 Ill. 416 (1996).

To be clear, the double counting scenario is where payor in a divorce decree receives an I.R.A. account as the asset and as property distribution. Subsequently, income derived by payor from this IRA account is attacked by payee with the claim this is now income for child support purposes. Reasonable argument. See *O'Daniel* 382 Ill App 3d 845 (4th Dist., 2008), where IRA withdrawals were not income due to fact that the court found the account was self-funded and like a savings account.

But then read *Lindeman* again which still says regular IRA withdrawing is income despite the fact payor got this account in the divorce.

This leads us to *Eberhardt,* 387 Ill App 3d 276 (1st Dist., 2008), where the court held (like in *Klomps*) IRA liquidations are income to payor and the double counting defense simply fails. This court also disregarded *O'Daniel.*

The latest case, *McGrath* 2011 IL. App 102119 (2011, 1st Dist), held regular withdrawals from a savings account while were being used for living expenses by unemployed payor is income for child support purposes.

Now I bet you are a bit muddled in your thinking in this area. And as well you should be. We all want consistency in court rulings and we all would like to think we can tell the clients what the law is in this area. With this we can settle cases and avoid costly post decree issues and litigation. But with unsettled law, it's tough to predict and so we throw the dice and a ruling after a hearing may differ from Judge to Judge and district to district. That's not so good!

To be sure these cases are all quite fact specific and vary as to those factors a lot. A bright line test is not discernible in these cases really either. Results in most of these cases cited involved doing what's best for the child or children. Domestic cases are not your typical Plaintiff vs. Defendant civil proceedings. Domestic cases with minor children involve a defacto 3rd party beneficiary flavor which compels this Judge to consider the child along with the Plaintiff and the Defendant. The issue of best interest for a minor is always a consideration for the court. That's what makes these cases unique. That's why some of these cases, albeit terribly fact driven, come up with good results for the child but the path the court followed to get there is crooked and not always clear and logical. As we say, short on black and white and long on grey.

Solutions to this situation are not easy either. Certainly this area begs for legislation. Drafting I assume would be a challenge but I think we all need help as to adding language to 505 from the folks in Springfield.

In the meantime thoughts to consider:

1. Drafting your settlement documents with an eye at the future and with a strategy to "draft around" these uncertainties. Define income in the documents and use examples. This will at least deal with future post decree child support modification squabbles.

A side issue arises here. We all know setting child support always needs court approval and case law tells us a parent cannot "bargain away" child support. So can both parties enter into a binding enforceable contract as to the definition of income for purposes of calculating child support? Not sure.

2. Analyze facts in your case and then try to match them up with one of these many cases.
3. Get into the "family business" of your payor client; consult them on laws, gifts, family businesses, estate plans, etc. Now I have made you not only an attorney but also a wealth handling counselor. This doesn't feel good I think for most attorneys, but we all know divorce attorneys have to be conversant in many areas; i.e., social security, bankruptcy, estate planning, real estate, etc. I guess it goes with the territory!
4. Draft on behalf of your payee client to ask for more information post judgment from the payor. Get more than just a current tax return with all schedules attached. You need to know more about that payor's finances then just payor's taxable income. If you don't regularly check, the payee may miss out on opportunities for more child support.
5. Lastly go to the old standby—settle the case because the result is too unsure. Avoid an unknown result due to case uncertainty. Meet in the middle. This always keeps the litigant and the attorney's blood pressure in check!

P.S.: Since drafting this article another support case came out of the Third District. It is a Rule 23 opinion. The case is *Hutchison* no. 3-10-0052, Ill._____ App 3d _____ (8/8/11). Payor received a post judgment workers compensation award due to an on the job injury he sustained. A lump sum amount was received by payor of approximately $105,000. Payee sought 32% of this settlement sum for child support for the three minor children of the marriage. There were issues of social security disability monies received by the children too, but that issue is beyond the scope of this article. The court found the entire sum is includible in payor's income for child support calculations. The court did deviate from guidelines as to the child support awarded but the court considered all the money received as income to payor. ■

The *Spircoff* loophole to the *Peterson* bar to retroactive college educational expenses

By Michael W. Kalcheim, Kalcheim Haber, LLP, Chicago, Illinois

The Illinois Supreme Court's decision in *In re Marriage of Petersen*,[1] conclusively determined that the mother could not recover from the father for the children's college educational expenses predating the filing of her petition. While mother is barred, the Appellate Court in *In re Marriage of Spircoff*, 2011 IL App (1st) 1103189 (October 19, 2011), held that the son could recover from the parents for retroactive college expenses as *Petersen* was no bar.

In *Spircoff*, the son, as a third-party beneficiary, brought a post-decree breach of contract action to enforce a provision of his parents' marital settlement agreement concerning payment of his college expenses after he completed his college education. The trial court, pursuant to Supreme Court Rule 308, certified the question:

> Does the [Petersen] bar to retroactive relief for college expenses incurred prior to the filing date apply to a petition brought by a third[-]party beneficiary to enforce a provision of his parents[']marital settlement agreement to contribute to his college education[?]"

The *Spircoff* court answered the certified question in the negative. The court found that the holding in *Petersen* does not bar an action by a third-party beneficiary to enforce retroactively a provision of his or her parents' marital settlement agreement related to payment of educational expenses "where such payment of such expenses was not expressly reserved for future consideration by the trial court."

The *Spircoff* court began its analysis by noting that an adult child has standing to enforce the educational provisions of the divorce decree on the basis that he or she is a third-party beneficiary.[2] The court then noted that Section 513 orders are always modifiable because a provision for payment of college education expenses is in the nature of child support, rather than a property settlement.[3]

The *Spircoff* court turned to the language in the marital settlement agreement, "[e]ach of the parties shall contribute . . . in accordance with Section 513." The trial court had concluded this language was a reservation because it failed to describe a sum certain or a percentage obligation of either party. The appellate court found the language was "clearly and affirmatively stated and was not expressly reserved . . . even though the actual allocation of those expenses was not made at the time judgment of dissolution was entered." The court stated that, "[A]ny dispute as to the parties' [mom and dad's] individual contribution could always be settled by the trial court, which retained jurisdiction to make specific allocations for that contribution."

Additionally, and perhaps more importantly, after reviewing *Petersen* and *Chee,*[4] the appellate court determined that *Petersen* was inapplicable to the instant case. *Petersen* was inapplicable because this case is "an action by a third-party beneficiary seeking enforcement of the provisions of a marital settlement agreement, which is by nature, a breach of contract action, and not an action to modify a section 513 order."

After the recent college contribution decisions in *Petersen*, *Chee* and *Spircoff*, it is crystal clear that whether a child may recover college educational expenses is primarily dependent upon the express language in the parents' marital settlement agreement. Whether a third party right is created depends on whether the court interprets the language of the agreement as a reservation or as language that creates an enforceable right. If it were the parties' intent to require contribution, then the following language would be appropriate:

- The *Spircoff* language "each of the parties shall contribute . . . in accordance with Section 513"; or
- The *Orr*[5] language "the husband . . . agrees to participate."
- The *Alibani*[6] language "the parties shall pay and be equally responsible for."

On the other hand, if it were the parties' intent to reserve the issue as to any college contribution which determination must be brought by a spouse prior to college, then the language need be express:

- The *Petersen*[7] language "expressly reserves the issue . . . pursuant to Section 513."
- The *Pearson*[8] language "either party may file an appropriate petition . . . pursuant to Section 513."

After *Petersen* and *Spircoff*, practitioners must be extremely careful in drafting college expense provisions. When the provisions are examined when the children reach college age, the court will presume that the drafter was aware of both cases and their meaning.

Michael W. Kalcheim is a partner with Kalcheim Haber, LLP. Michael Kalcheim concentrates his practice in matrimonial law. Mr. Kalcheim gratefully acknowledges the contributions and assistance by Jan R. Kowalski, Esq. and Ian N. Rothenberg, Esq. of Kalcheim Haber, LLP, in the preparation of this article.

1. 2011 IL 110984.
2. *Miller v. Miller*, 163 Ill. App. 3d 602, 612 (1987).
3. *In re Marriage of Loffredi*, 232 Ill. App. 3d 709, 712 (1992) and *In re Marriage of Dieter*, 271 Ill. App. 3d 181, 190 (1995).
4. 2011 IL App (1st) 102797.
5. *Orr v. Orr*, 228 Ill. App. 3d 234, 239 (1992)
6. *Alibani*, 159 Ill. App. 3d 519, 522 (1987).
7. *Petersen*, 2011 IL 110984, ¶4.
8. *In re Support of Pearson*, 111 Ill. 2d 545, 551 (1986).

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

January

Thursday, 1/5/12- Teleseminar—Estate Planning in 2012: Now That the Federal Tax is a Dead Letter, Part 1. Presented by the Illinois State Bar Association. 12-1.

Friday, 1/6/12- Teleseminar—Estate Planning in 2012: Now That the Federal Tax is a Dead Letter, Part 2. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 1/10/12- Teleseminar—Dangers of Using "Units" in LLC Planning. Presented by the Illinois State Bar Association. 12-1.

Friday, 1/13/12- Teleseminar—Bridging the Valuation Gap: "Earnouts" and Other Techniques. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 1/17/12- Teleseminar—Real Estate Finance in A World With Tight Credit and Less Leverage. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 1/18/12- Live Studio Webcast—Step-by-Step Appeals in Child Custody. Presented by the ISBA Child Law Section; co-sponsored by the ISBA Family Law Section. 11-1.

Thursday, 1/19/12- Teleseminar—Ethics, Technology and Solo and Small Firm Practitioners. Presented by the Illinois State Bar Association. 12-1.

Friday, 1/20/12- Teleseminar—Rescission in Business Transactions: Techniques for Fixing Transactions Gone Awry. Presented by the Illinois State Bar Association. 12-1.

Friday, 1/20/12- Chicago, ISBA Chicago Regional Office—Practical Professional Responsibility for Health Care, Life Sciences and Corporate Attorneys and their Outside Counsel. Presented by the ISBA Health Care Section. 1-4:15.

Friday, 1/20/12- Collinsville, Gateway Center—Pre-Trial Motion Practice- 2012. Presented by the ISBA Tort Law Section. 9-12.

Monday, 1/23/12- Live Studio Webcast—Green Building Law and Practice. Presented by the ISBA Environmental Law Section. 10:30-12:00.

Tuesday, 1/24/12- Teleseminar—Incentive Trusts: Approaches and Limits to Encouraging "Good" Behavior in Beneficiaries. Presented by the Illinois State Bar Association. 12-1.

Thursday, 1/26/12- Chicago, Union League Club—A View From the Bench: Effective and Ethical Advocacy. Presented by the Illinois State Bar Association, the Illinois Judges Association and the Women's Bar Association of Illinois. 1:30-4:55 CLE; 5-6:30 Reception.

Friday, 1/27/12- Teleseminar—Drafting Effective and Enforceable Promissory Notes. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 1/31/11- Teleseminar—Choice of Entity for Service Businesses, Including Law Firms. Presented by the Illinois State Bar Association. 12-1.

February

Thursday, 2/2/12- Teleseminar—2012 Ethics Update, Part 1. Presented by the Illinois State Bar Association. 12-1.

Friday, 2/3/12- Bloomington, Holiday Inn & Suites—Hot Topics in Agricultural Law 2012. Presented by the ISBA Agricultural Law Section. 8:30-4:15.

Friday, 2/3/12- Teleseminar—2012 Ethics Update, Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, 2/3/12- Chicago—Navigating the Foreclosure Maze. Presented by the ISBA General Practice, Solo & Small Firm Section. 8:25-5:15.

Tuesday, 2/7/12- Teleseminar—Estate Planning for the Elderly, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 2/8/12- Teleseminar—Estate Planning for the Elderly, Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, 2/9/12- Lincolnshire, Lincolnshire Marriott—GP Regional Event-Lake Co. Presented by the ISBA General Practice Section; co-sponsored by the Lake County Bar Association and the North Suburban Bar Association. 8-5.

Thursday, 2/9/12- Chicago, ISBA Chicago Regional Office—Starting Your Own Law Firm: A Nuts and Bolts Primer. Presented by the ISBA young Lawyers Division. 12:30-5:00.

Friday, 2/10/12- Chicago, ISBA Chicago Regional Office—Limited Representation: The Ethical, Legal and Practice Issues Exposed. Presented by the ISBA Law Office Management and Economics Committee and the ISBA General Practice Solo and Small Firm Section. 8:30-12:45.

Tuesday, 2/14/12- Teleseminar—Compensation & Other Techniques for Getting Money Out of a Closely Held Business. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 2/15/12- Webcast—The Prosecutor's Duty to Seek Justice. Presented by the Illinois State Bar Association; originally presented by the Illinois Academy of Criminology on October 6, 2011.

Thursday, 2/16/12- Teleseminar—Ethics Issues for Lawyers Supervising Other Lawyers and Paralegals. Presented by the Illinois State Bar Association. 12-1.

Monday, 2/20/12- Chicago, ISBA Chicago Regional Office—Advanced Worker's Compensation- Spring 2012. Presented by the ISBA Worker's Compensation Law Section. 8:30-4:00.

Monday, 2/20/12- Fairview Heights, Four Points Sheraton—Advanced Worker's Compensation- Spring 2012. Presented by the ISBA Worker's Compensation Law Section. 8:30-4:00.

Tuesday, 2/21/12- Teleseminar—Negotiating and Drafting the Purchase of Bank-Owned Commercial Real Estate. Presented by the Illinois State Bar Association. 12-1. ■

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