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ILLINOIS STATE BAR ASSOCIATION

FAMILY LAW

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

Editor's column

By Matt Kirsh

The Illinois State Bar Association has much to offer all practitioners in the state of Illinois. In addition to the many opportunities available for CLE and in the Marketplace (see www.isba.org), each Section of the ISBA publishes a newsletter at least four times a year. You can subscribe to as many newsletters as you would like, although an unlimited subscription does not come with your regular dues. Reading the newsletter in your area(s) of practice is a great way to not only keep up with the developing law, but also to see how your colleagues, i.e., the authors, view what is happening in your area of practice.

One of the benefits of being involved in a statewide organization like the ISBA is that you get to find out how your area of the law is practiced in different parts of the state. For example, thanks to my colleagues over the years on the section council from places such as Springfield, Champaign, Carbondale, Mt. Vernon, Peoria and Belleville, I have learned that although the law is the same throughout the state, the practice of law is exponentially different the farther you travel from Cook County. Reading the articles written by lawyers who live far away from me has been a great way to gain insight into how family law is being practiced outside of my own backyard and, for us Chicago-area lawyers, to gain some, I believe, much-needed perspective.

As Editor of the Family Law Section Newsletter for the past number of years, it has been my pleasure to read dozens of articles written by practicing attorneys and judges throughout the state. Most of the articles are written by members of the section council; however, authorship of newsletter articles is not limited to members

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The Supreme Court weighs in on a question of income

By Marilyn Longwell and Aurelija Juska

The definition of income for child support purposes is somewhat murky, but in a recent Illinois Supreme Court decision, *In re Marriage of McGrath*, 2012 IL 112792, family law practitioners got the final word on whether money regularly withdrawn from savings accounts can be considered income. According to the Illinois Supreme Court, it cannot.

In *McGrath*, the judgment dissolving the marriage of Mary Ellen and Martin McGrath was entered in September 2007. The parties' marital settlement and joint parenting agreements were incorporated into the judgment, providing, inter alia, that the parties' two children would live with Mary Ellen, and, because Martin was then unemployed, child support was reserved. In July 2008, Mary Ellen filed a petition seeking child support. At the hearing, the evidence showed that Martin, who remained unemployed, covered his living expenses by withdrawing $8,500 per month from his savings account. The trial court held that the savings account withdrawals constituted Martin's net income. Based on that finding, the judge set child support at an amount which it found to be a slight downward deviation from guidelines.

Martin appealed, arguing that the court erred in ruling that money withdrawn from a savings

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Editor's column

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of the section council. Many articles have their genesis in a case recently handled by the author and the research done in connection with that case. Many articles are inspired by recent decisions or current events. At any given moment, every one of us probably has a motion or brief that, with a little editing and commentary, can be turned into an excellent article. If you have never considered writing an article, I am urging you to consider it now. If you want to see your name in print and receive the accolades of your colleagues, draft an article and submit it to me. I promise you it will be seriously considered.

I hope you enjoy the two articles in this edition, both commenting on the recently decided Illinois Supreme Court case of *In Re Marriage of McGrath*. ■

—MK

The Supreme Court weighs in on a question of income

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account constituted "net income" for the purposes of determining his child support obligation. The Appellate Court affirmed, saying, "An unemployed parent who lives off regularly liquidated assets is not absolved of his child support obligation." *In re Marriage of McGrath*, 2011 IL App (1st) 102119, ¶11. The Appellate Court reasoned that, because the legislature adopted an expansive definition of "net income," defining it as "the total of all income from all sources" in section 505(a)(3), regular withdrawals from an unemployed obligor's savings account could be considered income when setting a child support obligation. Id, ¶11.

Undaunted, Martin appealed to the Illinois Supreme Court, which overturned the Appellate Court's decision. The Court declined to interpret the statutory term "income" as meaning anything other than its plain and ordinary meaning. The Court turned to Webster's and Black's for the ordinary definition of income—"the money or other form of payment that one receives, usually periodically, from employment, business, investments, royalties, gifts, and the like." Therefore, the justices reasoned that, because the money in the savings account already belonged to Martin, withdrawing it did not create a gain or benefit to him and could not therefore transform it into income for purposes of calculating child support. 2012 IL 112792, ¶14.

So what has the Court left us with? There remain avenues of redress where a child support obligor is unemployed or vastly underemployed and using financial resources to cover his/her living expenses.

The Supreme Court in *McGrath* observed that the Act itself provides a method of remedying the problem. "If application of the guidelines generates an amount that the court considers inappropriate, then the court should make a specific finding to that effect and adjust the amount accordingly. One factor that the court can consider . . . is 'the financial resources and needs of the non-custodial parent.'" Id, ¶16. Thus, a needs-based order would have been appropriate in the circumstances of the case on appeal and in other circumstances where an obligor has access to funds which cannot be defined as income but insufficient or no income on which to base a reasonable support order.

Similarly, the Supreme Court recognized the doctrine of imputing income as set forth in *In re Marriage of Gosney*, 394 Ill.App.3d 1073 (2009). The *Gosney* court reviewed the case law on imputing income and determined three instances in which imputing income is appropriate: 1) where the obligor voluntarily becomes unemployed; 2) where the obligor is trying to avoid having to pay support; and 3) where the obligor hasn't accepted an offer or opportunity for employment. If these factors do not apply, income cannot be imputed. Id. at 1077.

Nevertheless, in *McGrath* the Illinois Supreme Court declined to address the issue of whether disbursements from an IRA consti-

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tuted net income, the basis for the trial court's conclusion that savings withdrawals were income. In the First District case of *In re Marriage of Eberhardt*, 387 Ill.App.3d 226 (2008) and the Second District case of *In re Marriage of Lindman*, 356 Ill.App.3d 462 (2005), withdrawals from IRAs were held to be income for purposes of child support, while the Fourth District rejected that proposition in *In re Marriage of O'Daniel*, 382 Ill.App.3d 845 (2008). Since *McGrath* involved no withdrawals of retirement funds, the Supreme Court specifically side-stepped the issue in a footnote.

While the Supreme Court in *McGrath* has eliminated one means of establishing a child support order in the case of unemployed obligors with one hand, it has given its imprimatur to alternative methods of obtaining relief for custodial parents. How long will it be before the High Court settles the IRA as income debate? ■

The disparities in the calculation of net income as it relates to child support: The Supreme Court provides well-reasoned clarity and direction in *In re McGrath*

By Erin J. Bognar

As family law practitioners, we are all aware that net income is simply defined as "the total of all income from all sources" for purposes of calculating child support. In rendering its 2004 decision in *In re Marriage of Rogers,* 213 Ill.2d 129 (2004), the Supreme Court expanded the application of this definition to include annual gifts and loans received from family, particularly when those "loans" have never been required to be repaid.

Rogers has since been cited by Illinois Appellate Courts as support for holding that IRA distributions constitute income, regardless of whether the IRA was awarded to the spouse as part of the property settlement in the divorce decree. See *In re Marriage of Lindman,* 356 Ill.App.3d 462 (2nd Dist. 2005). The *Lindman* court reasoned that an IRA distribution fell within the definition of income, which is "something that comes in as an increment or addition, or a gain that is measured in money." While the Fourth District of the Illinois Appellate Court agreed that IRA distributions constitute income, it refined the reasoning provided by the *Lindman* court, and explained that only the portion of an IRA distribution that is an *actual gain* to the investor would stand as income, not distributions that are a return of contributions. *In re Marriage of O'Daniel,* 328 Ill.App.3d 845 (4th Dist. 2008) (emphasis added).

It is clear from these cases that an asset which has been allocated to one party as part of a divorce decree has no bearing on whether funds subsequently received from that asset constitute income. What is unclear, however, is the extent to which funds from a source such as an IRA may be considered. What if, for example, a parent has received little to no actual gain from an amount of funds or investment, but he/she uses those funds as their sole source for paying all of their basic and discretionary expenses, in lieu of income from some form of employment? Is a parent seeking child support left with a lower support amount because the other parent technically has very little income, but remains able to maintain a high standard of living?

The Illinois Supreme Court recently answered this quandary by providing an avenue for courts to establish a higher amount of child support when a payor parent has little to no income. The primary holding of *In re McGrath*, No. 112792, 2012 WL 1881408 (Ill. May 24, 2012) is that money regularly drawn by a father from his savings account in order to support himself while unemployed is not "net income" for use in calculating a child support obligation. A thorough reading of the case, however, offers an alternative to parents seeking a more just support amount when the payor parent, who is not found to be voluntarily unemployed, maintains a certain standard of living despite his unemployment.[1]

In *McGrath,* child support was reserved at the time of the divorce because the payor parent, the father, was unemployed at the time. When the mother later petitioned the court to determine child support, the father was still unemployed, and he was living off of assets awarded to him as part of the marital estate. Each month, he withdrew $8,500 from his savings account to pay his expenses. The trial court noted that Illinois case law provided that a parent who regularly obtains money on a regular basis, even if it's not from employment, should be ordered to pay child support off of the regular money obtained each month. The trial court thus concluded that the father's monthly net income for child support purposes was $8,173.69[2] and it ordered child support in the amount of $2,000, after finding that a guidelines child support amount of $2,380 was inappropriate and deviating downward in the amount of $380. The Appellate Court affirmed the trial court decision and held that the monthly withdrawals should be included in the expansive definition of net income and that an unemployed parent who lives off of regularly liquidated assets is not absolved of a child support obligation. *McGrath and McGrath,* 2011 IL App (1st) 102119. The father then appealed to the Supreme Court of Illinois wherein he argued that the trial court incorrectly included the funds drawn from his savings account when calculating his income.

The Supreme Court of Illinois agreed with the father and reversed the Appellate court judgment and Circuit court judgment. The Court held that an application of the definition of "income," *i.e.,* "something that comes in as an increment or addition *** a gain or recurrent benefit that is measured in money," would *not* include money that a person withdraws from a savings account because that money already belongs to the account's owner. No. 112792, 2012 WL 1881408 at *3

(Ill. May 24, 2012). A withdrawal of the money does not bring about a gain or addition in funds to the recipient, and in fact, the definition of "income" *itself* excludes the savings account withdrawals. *Id* at *3-4 (emphasis in original). Thus, the trial court's calculation of the father's net income was incorrect. *Id* at *3. Essentially, the father's income was almost $0.00 if the monthly withdrawals from the savings account were not included.

Fortunately, the court's analysis of the case continued. The court stated that the trial and appellate courts were right to be concerned about the small amount generated by the father's actual net income, particularly when he had considerable assets and regularly withdrew such a large amount from his savings each month. *Id* at *4. In these situations, the court stated that the proper procedure for a trial court is to first determine the net income of the obligor. After so doing, if an application of guidelines results in an inappropriate amount after considering the best interests of the child, then the trial court should make a finding to that effect. *Id.* Making such a finding brings about a deviation from guidelines wherein the court can consider, among other factors, the financial resources and needs of the non-custodial parent. *Id.* In following this method, although a correct calculation of the obligor's net income might result in a nominal amount of income, a non-custodial parent is not absolved of his child support obligation. *Id.* Although the lower court decisions were reversed and the case was remanded to the trial court for a new calculation of the father's net income (in which the saving account withdrawals would be disregarded), further direction was given to the trial court to consider the possibility of adjusting the child support amount if a guidelines calculation was found to be inappropriate. *Id.*

Practitioners should note that the *McGrath* decision does not consider whether IRA distributions are to be considered income, and the Supreme Court specifically limits its holding to funds withdrawn from savings accounts. An application of the reasoning stated in *McGrath*, however, seems to support the holding in *O'Daniel*, which did involve IRA distributions and in which the Fourth District echoed the holding in *McGrath*: there must be a gain or addition in funds to the recipient in order for money received to constitute income. Like savings accounts, IRAs are self-funded, and the money placed into an IRA already belongs to the individual. The *McGrath* decision allows a family law lawyer to make this comparison and argue to a court that, for an IRA or any similar type of account, only the interest and appreciation accrued (and received by the obligor) should be considered income.

But the *McGrath* court also takes its inquiry a step further, thus providing an argument for the practitioner representing the parent seeking a more just amount of support under certain circumstances. If it appears that funds received by the obligor will not be considered income for child support purposes, you may take the position that the guideline support amount is inappropriate after considering the needs and resources of the payor parent, thus necessitating a deviation from guidelines which more accurately represents the obligor's ability to pay and prohibits the parent from circumventing a child support obligation.

Overall, this approach is more fact-dependent and equitable. It alleviates the argument that a court is double counting in considering as income monies that were already earned. It also, however, takes into account those situations in which a parent has funds that provide him/her with an ability to pay child support, even if the ability to pay does not arise from funds that are defined as income. This method will likely bring about more objective child support determinations. ■

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1. Note that a court may impute income to a noncustodial parent if the payor parent is 1) voluntarily unemployed; 2) attempting to evade a support obligation; or, 3) the payor has unreasonably failed to take advantage of an employment opportunity. In *McGrath,* the trial court stated that it was not imputing income because it was not making an assessment of the father's employability and was treating the case not as a case of a voluntarily unemployed parent, but rather as one of a parent who uses assets as a substitute for income rather than seek employment.

2. After subtracting amounts for health insurance premiums from the money received from the savings account each month.

Upcoming CLE programs

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

July

Tuesday, 7/3/12- Teleseminar—Planning for your Client's Biggest Assets: Personal Residences and Vacation Homes. Presented by the Illinois State Bar Association. 12-1.

Monday, 7/9/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary to ISBA Members. 9-10.

Tuesday, 7/10/12- Teleseminar—Fiduciary Standards in Business Transactions: Understanding Sources of Liability in Transaction Negotiations and Drafting. 12-1.

Wednesday, 7/11/12- Webinar—Advanced Tips for Enhanced Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary to ISBA Members. 9-10.

Thursday, 7/12/12- Teleseminar—Ethics and Dishonest Clients. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 7/17/12- Teleseminar—Practical Issues in Trust Administration. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 7/17/12- Live Studio Webcast—Admitting Facebook Information into Evidence. Presented by the ISBA Committee on Legal Technology. 12-1.

Thursday, 7/19/12- Teleseminar—Employee Separation Agreements: Reducing Risk and Liability When Employees are Discharged or Leave. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 7/24/12- Teleseminar—Commercial Real Estate Workouts: Making Broken Deals Work Again, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 7/25/12- Teleseminar—Commercial Real Estate Workouts: Making Broken Deals Work Again, Part 2. Presented by the Illinois State Bar Association. 12-1.

Monday, 7/30/12- Webinar—Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association- Complimentary to ISBA Members. 9-10.

Tuesday, 7/31/12- Teleseminar—Special Needs Trusts. Presented by the Illinois State Bar Association. 12-1.

August

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

Monday, 8/6/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary to ISBA Members. 12-1.

Tuesday, 8/7/12- Teleseminar—Ethics in Employment Law and Practice. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/8/12- Webinar—Advanced Tips for Enhanced Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary to ISBA Members. 12-1.

Thursday, 8/9/12- Teleseminar—Structuring Tax Free Mergers and Acquisitions. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 8/14/12- Teleseminar—Understanding Fiduciary Income Taxation for Estate Planners, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/15/12- Teleseminar—Understanding Fiduciary Income Taxation for Estate Planners, Part 2. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 8/21/12- Teleseminar—Innocent Spouse Defense. Presented by the Illinois State Bar Association. 12-1.

Monday, 8/27/12- Webinar—Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association- Complimentary to ISBA Members. 12-1.

Tuesday, 8/28/12- Teleseminar—Essential Due Diligence in Business Transactions. Presented by the Illinois State Bar Association. 12-1.

September

Friday, 9/7/12- Chicago, ISBA Chicago Regional Office—Child Custody and the Military Family. Presented by the ISBA Family Law Section and the ISBA Military Affairs Committee. All day, exact time TBD (lunch and reception included).

Friday, 9/7/12- Teleseminar—Valuing Closing Held Interests and Effective Planning without Discounts. Presented by the Illinois State Bar Association. 12-1.

Monday, 9/10/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary to ISBA Members. 2:30-3:30.

Wednesday, 9/12/12- Webinar—Advanced Tips for Enhanced Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary to ISBA Members. 2:30-3:30.

Thursday, 9/13/12-Saturday, 9/15/12- Itasca, Westin Hotel—8th Annual Solo and Small Firm Conference. Presented by the Illinois State Bar Association. Time TBD.

Tuesday, 9/18/12- Teleseminar—Ethics in Pre-Trial Investigations. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/20/12- Teleseminar—Tax Planning for the Entrepreneur. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/20/12- Chicago, ISBA Chicago Regional Office (DNP)—Introduction to Improvisation for Lawyers: Basic Communication Skills for Public Speaking, Teaching and Presenting. Complimentary for ISBA Law Ed Faculty. 9-11; 12-2; 2:30-4:30.

Thursday, 9/20/12- Chicago, ISBA Chicago Regional Office—Introduction to Improvisation for Lawyers: Basic Communication Skills for Attorneys. Presented by the Illinois State Bar Association. 9-11; 12-2; 2:30-4:30. ■

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