



FAMILY LAW

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

Chair's column

By William J. Scott, Jr.

As many of you know, a large part of the task of the Family Law Section Council is to consider and wade through legislation proposed to the General Assembly. On its face, that doesn't seem like a big deal but, as of March 1, 2013 the Senate had proposed 2,406 bills and the House 3,417. The total number of bills presented during this session is 5,823. Granted some are, for reasons no one knows, duplicates but, by anyone's measure, a lot of legislation is presented annually.

The great Chicago columnist, Mike Royko often said that lawyers took to politics like a fish to water. I suppose that is true and it makes sense.

We are trained in the law and politics is government. Government is the application of law or the enactment of law. So who better to understand the process and the necessity for law than lawyers? Unfortunately, Illinois has seen a decline in the number of lawyers serving in the legislature.

As pointed out by Bethany Krajelis of the *Chicago Daily Law Bulletin* in the April 23, 2011 issue, the number of lawyers serving the legislature has declined. In 1971 nearly 35 percent of the state legislators were lawyers. In 2011, not even

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Evolving standards on standing to child care

By Jeffrey Parness

In the February 2013 issue of the ISBA Family Law Section Newsletter, Nanette McCarthy and Bridget M. Storrs reviewed four recent Illinois Appellate Court decisions involving child-care disputes within "unconventional" families wherein parentage was disputed. In the cases neither biological ties nor adoption was utilized by those pursuing standing to seek childcare orders. The authors observed that the decisions "had ironically different results" for the petitioners who all had "agreed and planned" to rear children with the parents under law. They lamented that often "the victims are the children." In concluding the authors asked: "will the standing requirement" in the Illinois Marriage and Dissolution of Marriage Act (IMDMA) and the Illinois Parentage Act (IPA) "continue to stand in the way of the modern evolving family?"

This spring, the Illinois General Assembly may

consider significant amendments to both the IMDMA (HB 1452) and the IPA (HB 1243) that were proposed by its own Family Law Study Committee. The proposals would alter the standing requirements so that more childcare agreements within modern families would be honored. Yet even if the amendments be enacted, the new Illinois statutes will still stand in the way of many unconventional child caretakers and victimize many children.

The pending proposals alter not only standing requirements, but also terminology. Thus under the proposed IMDMA, trial judges would allocate either "parental responsibilities" or "parenting time" (and therefore seemingly no longer determine custody or visitation). These allocations could be made to either "a legal parent or an equitable parent," with the latter often living

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Chair's column

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20 percent were lawyers. Can this trend be good? I would submit that the answer is no. It is like saying that 20 percent of the mechanics at the local car dealership are certified mechanics. The rest are insurance salesman, businesspeople, schoolteachers and retirees. They maybe know how to fix your Ford, but I would rather bet on the mechanic.

Many years ago, I had the privilege of going to Springfield to testify before legislative committees on behalf of legislation supported by the ISBA. As I listened to the testimony regarding other bills, it was clear that the trend in regulating activities that the legislature disapproved of was to make it a criminal offense to violate a civil statute. The best example is the criminal penalties potentially imposed for denial of visitation. I don't know what your experience is, but this provision is, in my experience, overwhelmingly ineffective. A different solution, more well thought out by experienced, trained lawyers would have been more effective.


The point of this is that some legislation which is reviewed by the section council needs to be, shall I say, more thought out. The solution to a perceived visitation problem often is to automatically bar the offender from having custody. The solution to a cus-

tomodial parent removing a child from Illinois without the permission or knowledge of the non-custodial parent is immediate and automatic loss of custody. Such draconian measures, frequently constituent driven, are of questionable constitutionality and, in addition, are likely not going to be effective.

A recent proposal suggested adding an additional factor to the factors a court can take into account in deciding custody. The section council almost uniformly opposed the addition of language requiring the court to consider, as a factor, whether there had been a false report of abuse. This seems like a great idea on its face but one wonders why the legislator thinks that judges don't consider this. Or worse, does the legislator think that the legislature can tell or restrict the court from considering factors?

Until we can get more lawyers doing legal work in the legislature, the Family Law Section Council will continue to plow through legislative proposals, rejecting those which seem pointless, supporting those with merit, suggesting our own and doing our best to clean up the language of proposals which should be considered. In the meantime, your suggestions and comments are always appreciated. ■

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Standing in the way of the modern evolving family

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within an unconventional family.

As to standing to pursue a childcare order, the proposed IMDMA defines as a "legal parent . . . a biological or adoptive parent of a child" and as "an equitable parent" a man who acted as a parent for at least two years while believing himself to be the biological parent as well as one who acted as a parent for at least two years "under an agreement" with the child's legal parent or parents.

As to a "legal parent" via biology, the proposed IPA seemingly (though not certainly as only an "equitable parent" may result) presumes parentage in either a man or a woman in a state-recognized civil union or marriage with a mother who bears a child during the union or marriage. The proposed IPA also presumes a man to be a parent, again seemingly a "legal parent" under the proposed IMDMA, if "for the first two years of the child's life, he resided in a household with the child and openly held out the child as his own during that time." Unless a belief as to possible biological ties is required, it is hard to understand why there is no comparable presumption for a woman.

Do the proposals avoid all "ironically different results" for childcare petitioners who "agreed and planned" to rear children in unconventional families? Unfortunately not. The stepfather in *In re Parentage of Mancine*, 2012 IL App (1st) 111138 is helped as the term "equitable parent" is defined to include a stepparent who "was married to a legal parent." But an equitable parent can usually only be allocated parenting time, and not parental responsibilities which include both parenting time and "significant decision-making responsibilities with respect to a child." The unwed boyfriend in *In re Parentage of Scarlett Z.D.*, 2012 IL App (2d) 120266 is helped, but only because he can seek equitable parent status as he lived with the child for at least two years under an agreement with the child's adoptive mother. Had he lived with the child for under two years, the proposed IMDMA would "stand in the way" even of any "parenting time" regardless of the child's best interests. The former lesbian partner in *In re TPS and KMS*, 2012 IL App (5th) 120176 needed no help as she prevailed on the standing issue in a childcare dispute with the birth mother on common law contract and promissory estoppel grounds. But the holding

was expressly limited to births arising from assisted reproduction. Had the two children been born of sex rather than of artificial insemination, under the proposed IMDMA the former partner would not be helped as to either of the two children born during her relationship with the birth mother because the proposal only speaks of standing for men who lived with children since birth, or for at least two years. This distinction under the proposed IMDMA between men and women who rear children under agreements with legal parents seems particularly worthy of close scrutiny by lawmakers.

The pending proposals also do not consider all forms of unconventional families. For example, under the proposed IMDMA many grandparents seemingly cannot be equitable parents with standing to pursue "parenting time" even if they childcared since birth, or for at least two years, under agreements with legal parents. The reason is that under the proposal, they would also need to hold themselves out as parents. Comparably, aunts,

uncles and other extended family members providing childcare would have no standing regardless of the children's best interests. Outside of Illinois the doctrine of de facto parenthood is recognized, as in the Delaware Code tit. 13, §8-201 where a parent-child relationship arises for one with "a parent-like relationship" who exercised "parental responsibility" with the consent of the legal parents and thereby established "a bonded and dependent relationship with the child that is parental in nature." But see *Bancroft v. Jameson*, 19 A.3d 730 (Del. Fam. 2010) (finding the statute is unconstitutionally overbroad by including the boyfriend of the mother where her child already has two fit parents).

The proposed IMDMA and IPA are steps in the right direction. Fewer children will be victimized. But if enacted, "ironically different results" in childcare cases will likely continue as not all "unconventional" families will have been statutorily recognized and some, but not all, courts will extend childcare standing beyond the explicit statutory boundaries. ■

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ILLINOIS STATE BAR ASSOCIATION

Things judges love and things they don't about lawyers

By Robert J. Anderson, Circuit Judge – 18TH Judicial Circuit Court

About two months ago, I made a mistake. I volunteered to write an article for the Family Law Section Council Newsletter. That was not the mistake! Writing for the Newsletter is a good thing! It seemed like it would be easy and fun. Then it came time to actually write the article. Our esteemed editor, Matt Kirsh, sent me a reminder. I wrote him back that I was happy to write a case note. That was the mistake! Matt sent me a return e-mail saying: "No; since I was a Judge I had to write something for lawyers about what Judges like or don't like". It is easier and more fun to write a case note!

I work in the Domestic Relations Division in DuPage County with wonderful Judges. I asked for and received their help in writing this article. It still wasn't easy or fun; but, it would have been impossible without them!

I promised my fellow Judges that I would not quote any of them; but would thank them in this article for their help. So, I went to thank: Judges Cerne, Coco, Davenport, Demling, Dudgeon, Equi, Marchese, McJoynt, McKillip and Miller for their help and assistance. Anything good in this article is due to them. Blame me for the bad!

All of us Judges like and respect Family Law Attorneys. For the most part, all of you are courteous, professional and well prepared. We all recognize that you have a very difficult job dealing with clients who are often going through the worst time of their life. Family Law is an intellectually complex area of the law made more difficult by the incredible emotions that your clients experience with each step of their case. We love how you care about your clients. You often take difficult cases for little or no money and do a great job for your clients.

We all love lawyers who are well prepared each time they appear before us. We appreciate and respect those that focus on what matters and spend little or no time on those things that are not really relevant to the issues before us. We recognize that some of your clients simply do not understand the concept set out in the Illinois Marriage and Dissolution of Marriage Act that certain things are to be decided "without regard to marital misconduct". We look to you to be the filter for their anger and to focus only on what is relevant.

We love you when we receive courtesy copies of your pleadings and any pre-trial memorandum at least 24 hours in advance. (Our local court rules actually require earlier service of Courtesy copies; but, that will be in my next article!) We actually read what you file! Several Judges commented that they like "informative" pleadings that actually tell us what is going on in your case. We also like when you cite cases in your pleadings so that we can read them ahead of time. Please make sure that you actually have read the cases you cite and that they actually say what you cite them for in your pleading. Not much is more embarrassing than to have a case not say what you said it does.

All the Judges love lawyers who actually settle cases when it is possible to do so. All of us want you to at least talk to the other side to see what is in dispute before you have a pre-trial conference with us. If you can settle some or all of the issues without us, you should. Why waste time – an important commodity for Judges and for lawyers – if you don't need to? All of the Judges indicated that they are happy to conference with you before a trial or a hearing to settle the case; but be ready for the trial or hearing if it is actually scheduled that day, if it does not settle.

We don't love lawyers who prepare unrealistic pre-trial memorandums for settlement conferences. We understand that lawyers must be paid and that you work for your clients; however, it hurts your credibility to come into a settlement conference with wildly unrealistic suggestions for settlement. Experienced lawyers know what is or is not realistic. It's your responsibility to help educate your clients on what is really going to happen in these cases. This is better for you and your goal of getting paid; as well as for your clients in their goal of resolving these cases.

We love you when you get to court on time; or if you have to be in two different courtrooms, at least check in so that we know you are alive and well and will be coming. As one Judge eloquently put it: "Don't saunter in at 11:00 a.m. for your 9:00 a.m. case with no explanation."

We don't love you when you make oral motions; particularly, when a case is only up for status. Making an oral motion denies your

opponent notice and an opportunity to look into the issue. Making an oral motion during a crowded status call is a sure way to make the Judge unhappy.

When motions involve discovery – a topic that Judges hate – we love you when you are specific as to what you want and what has not been provided. Let us know why you need this information. If you are on the receiving end of a Motion for Discovery remember that Judges are going to order that you produce relevant information. Our view of relevant is probably broader than your clients. You should educate them about this fact.

In hearings or trials, we love you when you stipulate to what you can. Don't waste time on things that are unimportant to the issue that you want us to decide. Judges love stipulations that save time. Be intellectually honest; don't try to trick us into ruling your way. Don't say that a case says something that it doesn't say. Judges love lawyers who get to the point in a prompt and efficient manner. If you are mentioning a case for the first time at a trial or hearing, have copies of the case for us and your opponent.

In a courtroom during a hearing or trial, we don't love lawyers who talk or argue with the other lawyer in front of the bench. This is a waste of time for you and for the Judge. The other lawyer is not going to be deciding the case. They are representing their client's interest and it is unlikely that you are going to change their mind. Your job is to try to help us make up our minds in making a decision. On that same topic, personal attacks against the other lawyer are unprofessional and not ever appropriate. Your opponent can be "mistaken"; don't say that he or she is a "liar". Focus on the real issues not things that are tangential or irrelevant to what we, as Judges, have to decide.

Judges don't love lawyers who argue after they have ruled. This applies to both objections and to substantive rulings. Nothing is more certain to upset a Judge than to argue after the Judge has ruled. Rulings on objections are not "an invitation for further argument". If you disagree with the ruling on a substantive issue, you can file an appropriate motion to reconsider.

We love you when you remember that,

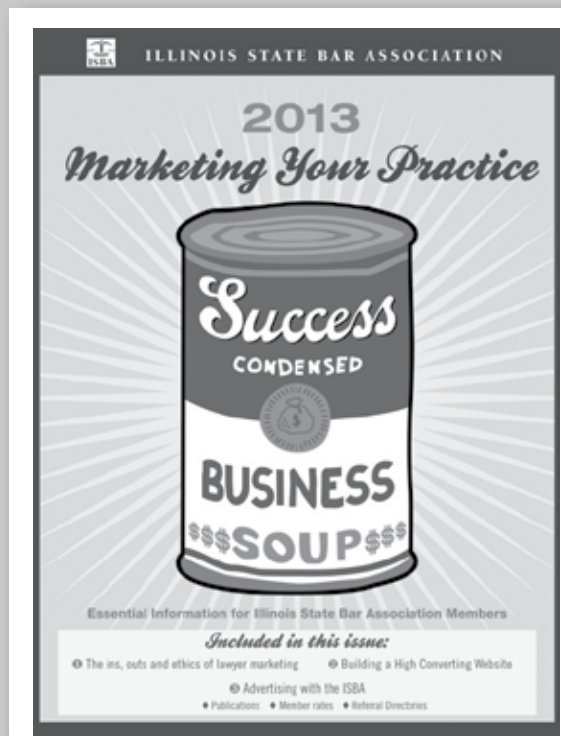


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sadly, we have more than just your case before us at any one time. Don't assume that a Judge remembers everything that's happened in your particular case. If there is something important that you want us to be sure to recall, we like you to remind us of it either in your written motion or in your argument on the motion.

After Judges rule, someone has to draft the order. Typically, Judges like the prevailing party to draft the order. However, remember only put in the order things that were ruled on. If it wasn't argued and ruled on, you cannot put it in the order. We don't love you if you do so! Also, in orders setting hearings, it is helpful to list all the petitions that will be

up for hearing in the court order. That way everyone is on the same page and there can be no dispute as to what is up for hearing on the next court date.

Judges do not love lawyers who unnecessarily inflate the cost of litigation. As mentioned before, we love lawyers who only fight the fights that must be fought. Do not let your client be emotion driven. It makes no sense to spend \$500 in attorney fees to argue about the crockpot which cost \$75. Experienced lawyers explain these facts of life to their clients. In the long run this is better for you in your quest to be a well-paid family law lawyer; and, for your client in their quest to obtain a divorce and move on with their

lives.

As I mentioned at the beginning, the Judges overwhelmingly think that most of the lawyers who appear before them are courteous and professional in how they handle their cases. To some extent, we all share the fear that this article is preaching to the choir. Being a member of the Illinois State Bar Association Family Law Section Council is probably a sign that you are one of those courteous, professional and civil lawyers we already love. We can only hope that this article gets circulated to those who don't fit that description. ■

Upcoming CLE programs

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April

Tuesday, 4/2/13 – Webinar—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00 – 4:00 p.m. CST.

Tuesday, 4/2/13 – Teleseminar—Overtime, Exempt and Non-Exempt: 2013 Wage and Hour Update, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 4/3/13 – Teleseminar—Overtime, Exempt and Non-Exempt: 2013 Wage and Hour Update, Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, 4/4/13 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00 – 4:00 p.m. CST

Thursday, 4/4/13 — Friday, 4/5/13 – New Orleans, Hyatt French Quarter—Family Law Update 2013: A French Quarter Festival. Presented by the ISBA Family Law Section. 12:50-6:30; 9:30-5.

Friday, 4/5/13 - Chicago, ISBA Regional Office—Privacy & Security: Online Marketing and Other Hot Topics. Presented by the ISBA Antitrust & Unfair Competition Section. Half day AM.

Tuesday, 4/9/13 – Teleseminar—Estate Planning for Farmers and Ranchers. Presented by the Illinois State Bar Association. 12-1.

Friday, 4/12/13 - Chicago, ISBA Regional Office—Corporate Legal Ethics. Presented by the ISBA Corporate Law Section. 8:30 am – 12:45 pm.

Friday, 4/12/13 – Rockford, NIU—Practicing in Juvenile Court: What to Expect, What to Do, and How to Help Your Clients. Presented by the Child Law Section. 8:45 – 5:00.

Monday, 4/15/13 – Live Studio Webcast (Tape in CLASSROOM C)—Managing E-Discovery When Resources Are Limited. Presented by the Federal Civil Practice Section and Co-sponsored by the 7th Circuit E-Discovery Pilot Program. 11:00 am – 1:00 pm. (rehearsal prior at 9:00 – requesting classroom for studio set-up with regular studio cameras due to panel of four people – not just studio space).

Tuesday, 4/16/13 – Teleseminar—Structuring Preferred Stock and Preferred Returns in Business and Real Estate Transactions. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 4/16/13 – Live Webcast (Studio)—Starting a Law Firm on a Budget. Presented by the ISBA Standing Committee on

Law Office Management and Economics. Noon – 1:00 pm.

Wednesday, 4/17/13 - Webinar—Introduction to Boolean (Keyword) Search. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00 – 4:00 p.m.

Thursday, 4/18/13 - Chicago, Loyola University Chicago School of Law—Civility and Professionalism in 2013. Presented by the ISBA Bench and Bar Section. 9-4:30.

Thursday, 4/18/13 – Teleseminar—Religious Accommodation in Workplace. Presented by the Illinois State Bar Association. 12-1.

Friday, 4/19/13 - Chicago, ISBA Regional Office—Emerging Healthcare Delivery Models. Presented by the ISBA Health Care Section. 8:30-12:45pm.

Friday, 4/19/13 – Live WEBCAST—Emerging Healthcare Delivery Models. Presented by the ISBA Health Care Section. 8:30-12:45pm.

Friday, 4/19/13 - Lombard, Lindner Conference Center—What Real Estate Attorneys Should Know: Residential and Small Business Leases and Estate Planning and Administration. Presented by the ISBA Real Estate Law Section. 9-4:15. ■

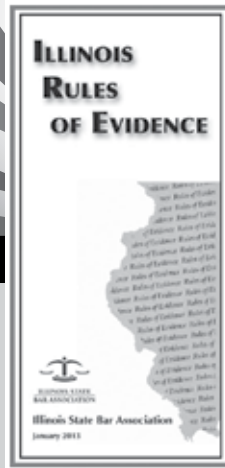


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