

# Family Law

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

## Chair column

BY MATTHEW A. KIRSH

**Human experience and any lawyer over 40 years old will tell you that everything used to be better back in the day.** A common complaint I am confident we all hear from colleagues is about the lack of civility in today's practice. I am not sure if our practice is any more lacking in civility now than it was 20 years ago. However, I am also not sure if that is a testament to how great things were way back when or a timeless indictment of our

practice in general. Perhaps recognizing a growing lack of civility in the practice of family law, in 2009 the Circuit Court of Cook County enacted Local Rule 13.11, entitled "Civility," that is applicable to domestic relations proceedings. I know that other judicial circuits have rules on professionalism and civility that no doubt echo the same theme.

*Continued on next page*

Chair column.

1

**Child support in parentage cases: Does *In re Marriage of Turk* apply?**

1

**We need a statewide dialogue on the use of attorneys appointed to represent children**

5

Upcoming CLE programs.

7

## Child support in parentage cases: Does *In re Marriage of Turk* apply?

BY SEAN MCCUMBER

**Child support is already a contentious issue.** Recently, the Illinois Supreme Court revised and reiterated that, at least in a dissolution case, the Court can direct the custodial parent to pay child support to the non-custodial parent, at least in certain circumstances. *In re Marriage of Turk*, 2014 IL 116730 (2014). The fundamental principle is quite clear – both parents have a duty to support their child or children. This is codified, as the statute provides that the court may order either or both parents

owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for the child's support. 750 ILCS 5/505(a) (West 2015). The statute further directs the court to consider financial resources of the custodial and non-custodial parents in setting a support amount. *Id*; see also *Riordan v. Riordan*, 47 Ill. App. 3d 1019, 365 N.E.2d 492 (1st Dist. 1977).

Also, the court must consider the

*Continued on page 4*

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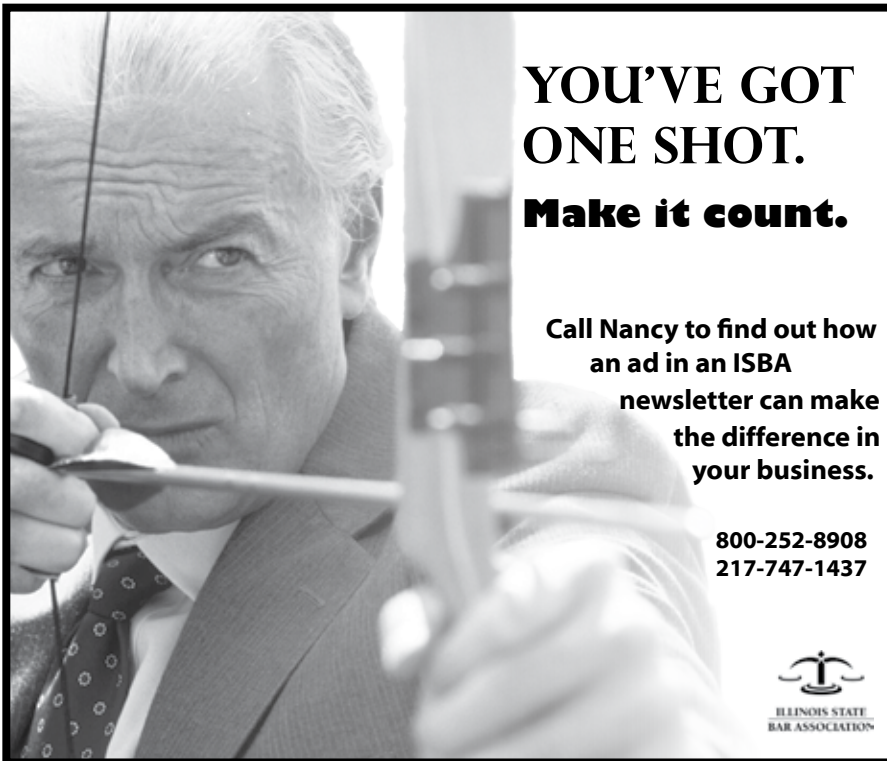
I have never seen Rule 13.11 cited in a motion nor have I seen or heard of a court imposing a sanction for its violation. This is a shame, because the rule contains some very basic rules of behavior that should be second nature to all of us. We would all be better lawyers if the court or opposing counsel called our attention to those instances when we stray from these basic rules of professional decency. Some excerpts from rule 13.11:

- (a)(i) A lawyer shall treat the court, opposing counsel and witnesses in a civil and courteous manner, not only in court, but also in all written and oral communications.
- (a)(iv) A lawyer shall not, even when called upon by a client to do so, abuse or engage in offensive conduct or do any acts that may contribute to hostility or acrimony between the parties or others related to the pending action.
- (a)(ix) A lawyer shall not interrupt the court or opposing counsel, except where necessary to make an effective objection.
- (a)(xix) A lawyer shall at all times act

*reasonably to protect minor children of the parties engaged in a dispute from adverse effects of the proceedings.*

- (b)(iv) Lawyers shall agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided that the clients' legitimate rights will not be materially or adversely affected.
- (c)(i) Lawyers shall not use any form of discovery or discovery scheduling as a means of harassment.
- (c)(ix) Lawyers shall base their discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information.

Please read the rule or your local equivalent. Politely remind your colleagues when they violate these basic principles and do not bristle when you are politely reminded that perhaps you have strayed. Those of us who are parents tell our children how important it is to have good manners. We should all try to extend our good manners to the office and courtroom and not limit them to the dinner table. ■




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## Family Law

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standard of living the child would have enjoyed absent parental separation and dissolution. *In re Marriage of Lee*, 246 Ill. App.3d 628, 643-44, 615 N.E.2d 1314 (4th Dist. 1993). Further, the Courts have firmly held that the obligation of a parent to support a child is not affected by a decree granting a divorce nor by a decree granting custody to the other parent. *Elble v. Elble*, 100 Ill. App. 2d 221, 241 N.E.2d 328 (5th Dist. 1968) *Nelson v. Nelson*, 340 Ill. App. 463, 92 N.E.2d 534 (1st Dist. 1950).

What should happen with child support when the parent who is granted physical custody of the minor child or children also earns a substantial salary and/or has substantial financial resources (a non-marital home, a sizeable trust, etc.) and the parent who is not the physical custodian has insignificant or insubstantial resources and income? While the Court acknowledges generally that both parents should exercise responsibility for a child's support, this obligation is not mandatory in all situations. *In re Marriage of Reed*, 100 Ill.App.3d 873, 875-6 (5th Dist. 1981).

At one point in history, the Illinois Supreme Court held that the trial court does not abuse its discretion by failing to award a "husband who has custody of the children child support, where wife's monthly adjusted income is substantially less than the husband's income." *In re Marriage of Minear*, 181 Ill.2d 552, 565-6, 693 N.E.2d 379 (1998). In *Minear*, the husband was awarded physical custody of the minor child in that case. The trial court's reasoning hinged on the fact that the mother's monthly, adjusted net income was \$1,086.26 and the father's monthly adjusted net income was \$3,063.21, and in light of the support awards herein, it was appropriate not to require the mother to pay child support to the father. The Supreme Court, as already noted above, agreed.

While deviating from the guideline support obligation is statutorily permissible and certainly one option, the Second District took a different tack. It found that an award of child support to a non-custodial parent was proper, where the court has awarded husband temporary custody, but specifically stated that the child would spend approximately equal time with each parent. *In re Marriage of Cesaretti*, 203 Ill.App.3d

347, 356 (2nd Dist. 1990). The Court further held that while the financial responsibility for the support of a child is a joint obligation of the parents, it is only equitable that the parent with the disproportionately greater income should bear a greater share of the costs of support. *Cesaretti* at 356-357. In *Cesaretti*, the husband (custodial parent) earned \$20,000 annually and had monthly expenses of \$1,000, and the wife earned \$7,000 per year, had monthly expenses of \$2,000, and had debts in excess of \$20,000. The award of child support of \$75 per week from the custodial parent to the non-custodial parent was deemed appropriate and not in error.

The Fifth District also determined that an award of child support to a mother for the children during her visitation time was appropriate as her monthly expenses exceeded her monthly income. *In re Marriage of Pitts*, 169 Ill.App.3d 200, 206-7, 523 N.E.2d 664 (5th Dist. 1988). In that case, the mother, who was designated the non-custodial parent, had possession of the minor child for one month in the summer vacation period. The trial court denied her request for child support in that one month. The Appellate Court reversed, specifically finding, "[the mother] has monthly expenses of \$875 a month and an assured income of \$527 a month. This difference of \$348 a month between income and expenses evinces an inability by respondent to properly care for the children without additional support while the children are in her custody during the month of visitation in July." *Id.* at 207.

As "equal parenting time" continued to be considered as a viable and strong option to benefit the minor children, some presume that both parties should simply support the children during their respective parenting times, resulting in a "zero child support" scenario. Despite the prior case law, the issue seemed murky until the *Turk* case. The First District noted that courts are charged with protecting the best interests of the children in child support matters and that, in some cases, the best interests of the children may require the custodial parent to pay support to the noncustodial parent where the parents have comparable parenting time and there exists a significant disparity

in income between the parents. *Turk*, 2013 IL App (1st) 122486, ¶42. In affirming the First District, the Illinois Supreme Court explained further, stating:

"If custodial parents were categorically exempt from child support obligations, the wealthier parent's resources would be beyond the court's consideration and reach even though the visitation schedule resulted in the child actually residing with the poorer parent for a substantial period each week. This could be detrimental to the child psychologically as well as economically, for the instability resulting from having to "live a dual life in order to conform to the differing socio-economic classes of his or her parents" may cause the child to experience distress or other damaging emotional responses. . . Such an outcome would plainly not serve the child's best interest."

*Turk*, 2014 IL 116730 ¶25. The obligation to pay child support to a non-custodial parent, though appearing to be fair, presents an interesting argument. Is the Court legislating from the bench? Should the Court be making this determination which could seem like a backdoor for non-taxable maintenance? What are the implications in paternity cases?

Statutorily, the parent and child relationship, including support obligations, extends equally to every child and to every parent, regardless of the marital status of the parents. 750 ILCS 45/3 (West 2015). At first glance, it seems logical that *Turk* should apply to children in parentage cases. However, the Illinois Parentage Act of 1984 specifically considered and expressly states that child support is paid by the non-custodial parent. See 750 ILCS 45/14 (all subsections specifically place the onus and obligation on the non-custodial parent). Specifically, while the Parentage Act does direct courts to utilize Sections 505 and 505.2 of the IMDMA, it defines net income of the "non-custodial parent," as well as requiring courts to order the non-custodial

parent to pay minimum support of “not less than \$10 per month.” 750 ILCS 45/14(a)(1).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning. *Lulay v. Lulay*, 193 Ill. 2d 455, 466 (2000). When the language of the statute is clear, it must be applied as written without resort to aids or tools of interpretation. *JP Morgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461 (2010). The Parentage Act specifically mentions the phrase “non-custodial parent” in reference to payment of support and how the obligation is to be considered. There is no ambiguity opening the matter for interpretation—the language is clearly and concisely worded.

This reinvigorates the earlier question: Should *Turk* apply in parentage cases? What happens if the custodial parent is earning \$250,000 per year and the non-custodial parent is earning less than minimum wage and receiving housing assistance? In a divorce setting, the answer is clear after *Turk*. That being said, the answer is just as clear in a parentage setting: the non-custodial parent should pay \$10 per month in child support. The Parentage Act does not direct the Court to look at Section 505 of the IMDMA in its entirety, as was done in *Turk*. Instead, the Parentage Act directs the Court to look only to certain, clear portions of Section 505 in setting support under the Paternity Act, particularly, the percentage guidelines. The guideline is to be applied to the non-custodial parent, never to the custodial parent, and that remains true even post-*Turk*.

This is especially true given that *Turk* also cited *In re Paternity of Perry*, 260 Ill.App.3d 374 (1st Dist. 1994). In *Perry*, the Court held that the custodian may not always be entitled to full guideline support in that the Court can deviate downward if the non-custodial parent has a high income. So, *Perry* stands out as a thorn in the side of any argument that *Turk* applies to parentage cases.

Finally, the public policy arguments are numerous, but one thing remains clear: parentage cases and dissolution cases are inherently different. Given the statutory language in the Parentage Act contains very specific and different provisions than the IMDMA, any *Turk*-like changes to support obligations in parentage cases must come from the General Assembly, rather than the Courts. ■

# We need a statewide dialogue on the use of attorneys appointed to represent children

BY TREVA O'NEILL AND MARILYN LONGWELL

**Most judges and many practitioners in family law would agree** that perhaps the most important attorney in a custody case is the person appointed as Guardian ad Litem, Child Representative, or Attorney for the Child. However, there is little, if any, uniformity as to how those attorneys are expected to function, much less how they are selected. Nevertheless, it appears that the selection and use of attorneys to represent children in custody cases is not often discussed by judges across Circuits in the state. Is it beneath their radar? Do they assume other circuits use the same criteria? Is it merely because appellate courts are rarely, if ever, presented with such issues?

In the brief discussions of the committee on Representing Children of the Family Law Section Council, it is apparent that the differences across the state are substantial. For example, in some courts, new lawyers are appointed to represent children to give them experience. In others, only

experienced lawyers with at least one custody trial under their belts are qualified for appointment.

It has become apparent to many of us who serve in this function that a statewide dialogue is needed to raise awareness among the judiciary of the statutory and regulatory mandates on attorneys filling this important role, as well as the vast differences in judicial attitudes toward the use of GALs and child representatives. In some situations those representing children are required by the judge to act in a way which may violate Supreme Court Rules, and also our Rules of Professional Conduct.

We recognize, however, that economic factors play a significant part in the decisions of courts utilizing children's representatives in order to serve the best interests of the children at the center of the litigation. Our project is not meant to invoke blame or evaluate the actions of judges presiding over custody disputes, but

to promote an exchange of information which may elicit new approaches and alternatives and more deliberate, better practices tailored to the cases at hand.

Ultimately the ideal result will hopefully be that judges across the state form a consensus as to what are the best practices in using attorneys to represent children and what can be done within that context to accommodate for economic and other factors which impinge on those practices.

We intend to start by asking questions. And we don't know all of the questions which should be asked, so we encourage readers to contribute their own suggestions. Please feel free to email Marilyn Longwell at [mlongwell@longwell-law.com](mailto:mlongwell@longwell-law.com) or [trevaoneill@gmail.com](mailto:trevaoneill@gmail.com) so they may share your suggestions with other members of the committee.

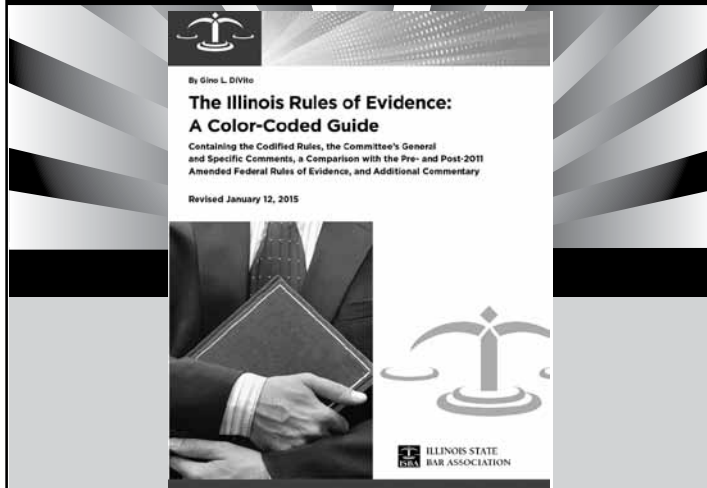
As a starting point, we believe that the following are important inquiries to be made:

1. How are children's representatives (this term is used in this article to include GALs, Child Representatives, and Attorneys for the child) qualified for appointment? Are there any training or experience requirements beyond admission to practice and the minimum education required by the Illinois Supreme Court?
2. Do judges in the circuit only appoint GALs or do they also appoint Child Representatives and/or Attorneys for the child?
3. If only one category is used, why?
4. If more than one category is used, what criteria are employed?
5. What is expected of those appointed? Are they also expected to serve as psychologist/social worker, mediator (in which mediation discussions are confidential), and lawyer?
6. Are Child Representatives expected to make recommendations during the litigation? Are those recommendations expected to be merely on temporary or procedural or discovery matters or as to the ultimate issue? Does any recommendation on any matter violate the statutory mandate?
7. Are GALs expected to function as a psychologist/social worker? In other words, are they simply supposed to report facts and a recommendation or are they expected to analyze family dynamics and the psychological effects of a parent's actions on a child?
8. Are Attorneys for the child expected to act like GALs or Child Representatives or like social workers?
9. How are children's representatives paid? Are they required to take on any pro bono cases?
10. Does the circuit utilize "temporary GAL appointments"? If so, what are the conditions of the appointments?

Do you have additional questions to suggest? Do you have experiences (as representative or lawyer for a party) to share which might assist in this inquiry?

We expect to interview some judges, children's representatives and others to elicit questions, experiences, and suggestions to aid our investigation. We welcome your participation as we delve into this inquiry. ■

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**Thursday, 10/1/15- Teleseminar**—Estate & Trust Planning for Non-traditional Families.

**Friday, 10/02/15- Rockford, NIU Rockford**—Solo and Small Firm Practice Institute Series—A Closer Look: Securing and Growing Your Practice – Fall 2015. Presented by the ISBA. 8:15-5:15 pm.

**Tuesday, 10/6/15- Webinar**—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3-4.

**Tuesday, 10/6/15- Teleseminar**—Insurance and Indemnity in Real Estate.

**Wednesday, 10/7/15- Teleseminar**—Choice of Law and Choice of Forum in Contracts.

**Thursday, 10/08/15- Webinar**—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3-4.

**Thursday, 10/8/15- Teleseminar**—Health Care Issues in Estate Planning.

**Thursday, 10/8-Friday, 10/9/15- Grafton, Pere Marquette State Park and Lodge**—A Family Law Financial Trial. Presented by the ISBA Family Law Section. 8:30-5:30 both days.

**Friday, 10/09/15- Springfield, Lincoln Land Community College Logan Hall Room 1138**—Computer Basics 2015: Is This Thing On? Presented by the ISBA Senior Lawyers Section, Co-sponsored by the ISBA Young Lawyers Division. 8:30-12:15 am.

**Monday, 10/12/15- CRO and Fairview Heights, Four Points Sheraton**—Advanced Workers Compensation. Presented by the ISBA Workers Compensation Section. 9:00

am – 4:00 pm.

**Monday, 10/12/15- Teleseminar- LIVE REPLAY**—Ethics, Disqualifications & Sanctions.

**Tuesday, 10/13/15- WEBINAR**—Health Care Workshop: “At Risk” – Advising Health Systems that Own a Health Insurer. Presented by ISBA Health Care Section Council. 12-1:30 (central time, speaker on Eastern).

**Tuesday, 10/13/15- Webinar**—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3-4.

**Tuesday, 10/13/15- Teleseminar**—Advanced Choice of Entity, Part 1.

**Wednesday, 10/14/15- Teleseminar**—Advanced Choice of Entity, Part 2.

**Friday, 10/16/15- CRO**—Guardianship Bootcamp 2015. Presented by the ISBA Trusts and Estates. ALL DAY.

**Friday, 10/16/15- Elgin Community College**—Traffic Law Updates- Fall 2015. Presented by the ISBA Traffic Law and Courts Section Council. 8:55- 4 pm.

**Monday, 10/19/15- Teleseminar**—2015 Americans With Disabilities Act Update.

**Tuesday, 10/20/15- Teleseminar**—2015 Americans With Disabilities Act Update.

**Wednesday, 10/21/15- Bloomington-Normal Marriott Hotel**—Real Estate Law Update- 2015. Presented by the ISBA Real Estate Law Section Council. 8:30 am – 4:30 pm.

**Wednesday, 10/21/15- Teleseminar- LIVE REPLAY**—Business Planning with S Corps, Part 1. Thursday, 10/22/15- CRO STUDIO WEBCAST. Navigating a Section

31 Enforcement Case. Presented by the Environmental Law Section Council. 9:30-10:45 am.

**Thursday, 10/22/15- CRO**—Practice Management, The Cloud, and Your Firm. Presented by the ISBA. 1:00 pm- 4:30 pm.

**Thursday, 10/22/15- Teleseminar- LIVE REPLAY**—Business Planning with S Corps, Part 2.

**Friday, 10/23/15—CRO—From Opening to Close**—A Construction Trial and the Technology to Win Your Case. Presented by the Construction Law Section Council; Co-Sponsored by the Real Estate Law Section Council. 8:30-4:45.

**Tuesday, 10/27/15- Teleseminar**—Offers-in-Compromise: Settling Tax Liability for Individuals and Business Owners.

**Wednesday, 10-28- Friday, 10-30—CRO**—Advanced Mediation/Arbitration Training Master Series. Presented by the ISBA. 8:00-5:00 each day.

**Friday, 10/30/15- Danville Public Library**—Pro Bono Practice and Professionalism: the Basics of Estate Planning, the Guardianship Process, and Family Law. Presented by the ISBA Standing Committee on the Delivery of Legal Services. 9:30 am- 4:30 pm.

## November

**Tuesday, 11/03/15- Teleseminar**—Indemnification & Hold Harmless Agreements in Business & Real Estate.

**Wednesday, 11/04/15- Teleseminar**—Estate & Income Tax Planning Issues in Divorce.

**Thursday, 11/05/15- ISBA Regional Office**—Hot Topics in Criminal Law in Illinois- 2015. Presented by the ISBA Criminal Justice Section Council. 9:00 am- 5:00 pm. ■

## FAMILY LAW

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