

**THE REVOLUTION THAT WASN'T:**  
**LEVELING THE PLAYING FIELD -**  
**ONE DECADE LATER**

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Since June 1, 1997 detailed legislation has been in force controlling attorney's fees in divorce and matrimonial law matters (cases under the Illinois Marriage and Dissolution of Marriage Act). The legislation applies to attorney's fees as between the parties and to an attorney seeking fees against the client. We have now had nearly eight years of experience in working with the group of amendments commonly referred to as the "Leveling of the Playing Field" legislation.

The *Leveling of the Playing Field* (Leveling) legislation amends several sections of the IMDMA, specifically sections 102, 501, 503 and 508. The purposes of the attached outline is to give a comprehensive sense of the key areas of dispute regarding the legislation and discuss the case law addressing this legislation.

The Leveling amendments were drafted and promoted by the Chicago Bar Association Domestic Relations subcommittee headed by David Hopkins of the Schiller, DuCanto & Fleck firm, with the legislative sponsorship of Senator Kathleen Parker (R-Northbrook) and with the input of Professor John Elson of the Northwestern University School of Law. There were competing goals of the proponents of the legislation.

**Law of Unintended Consequences:** The Leveling legislation had the best of intentions. One goal of the legislation was to create pro-consumer legislation that would allow an attorney for the impecunious spouse to seek interim fee awards. Shortly after the passage of the "Leveling" amendments, David Hopkins addressed the McHenry County Bar Association. He stated that the goal was to streamline interim fee cases — especially in large asset cases where the fee hearing might span multiple days.

A competing goal of the legislation, however, was to codify the *IRMO Pagano*, Sec. 2-1401 decision, 181 Ill.App.3d 547, 130 Ill.Dec. 331, 537 N.E.2d 398 (2d Dist. 1989), which found there to be a conflict of interest inherent in fee awards sought by a lawyer against her or his own client. The *Pagano* decision was one of several decisions involving the Rinella law firm — decisions which were adverse to lawyers in fee disputes.

While at The Gitlin Law Firm, I formally and informally surveyed lawyers in Illinois as to their experience with the Leveling amendments. We have found more attorneys would represent the less wealthy spouse under previous law and seek an award of fees at the conclusion of the case. However, the various hurdles created by the Leveling amendments have given Illinois

matrimonial lawyers a disincentive to do so.

Probably the most significant disincentive is the complexity of the legislation itself. An example is the perceived requirement that the attorney must withdraw before seeking fees against his or her own client. While there is a vehicle that supposedly could be used to work around this problem -- the praecipe procedure. Because few lawyers understand how this praecipe procedure works, it is commonly misunderstood that withdrawal of an attorney is required before the attorney may **file a petition** for fees against her or his own client. It is true that the fee hearing cannot take place until after the lawyer's withdrawal.

**Lawyer Who Remains in Case Until Conclusion Seeking Fees:** There are two scenarios in which a lawyer may seek fees from his client -- either the lawyer will choose to withdraw from a case while the case still is pending, or the lawyer will handle the case to its conclusion hoping to be paid at the conclusion of the case.

**Client Consent:** Assume the best-case scenario -- the lawyer representing the impecunious spouse handles a case to its conclusion and the client states she will agree to a consent judgment. Even with a consent fee judgment, rather than merely including language within the marital settlement agreement, now the lawyer must file four forms -- all of which are attached.

If the lawyer has done thorough research, the complexity of the legislation discussed below comes into play. The legislation states, "The petition may be filed at any time during which it is permissible for counsel of record to file a petition (or a praecipe) for a final fee hearing..." A final fee petition against a lawyer's own client can only be filed after filing a motion to withdraw or after the lawyer's withdrawal. While the legislation is not crystal clear, it seems a praecipe can be filed before the lawyer's withdrawal. Therefore, if a praecipe for a final fee hearing can be filed before a lawyer's withdrawal, a lawyer may file a consent judgment without withdrawing. Thus, the labyrinth nature of the legislation creates issues most family lawyers would like to avoid while in the midst of a hectic family law practice.

**Without Client's Consent:** Without the client's consent for a fee award at the conclusion of the case, there are more obstacles for the lawyer who has not been paid as a case progresses. The lawyer files the appropriate documents. First, the lawyer must go through ADR (or opt out of ADR in counties other than Cook). Next, the lawyer must file a motion to withdraw or follow the less than clear praecipe procedure for a final fee hearing. Under this praecipe procedure instead of withdrawing the lawyer may choose to file a praecipe for fee hearing without the petition reserving the lawyer's rights to file a petition at a later date. The cut-off time for filing a petition at such later date is 60 days after filing the praecipe. In the usual case the petition or the praecipe must be filed within 30 days after the judgment. Then, the lawyer is in a position to file a petition for setting final fees and costs against his own client.

The bottom line is that in the usual case the lawyer representing a non-paying party is forced to withdraw to seek attorney's fees. Because the praecipe procedure is only tangentially addressed

in the legislation, I have not encountered on lawyer who uses it to avoid the necessity of withdrawing from the client's representation. Once the lawyer has withdrawn, and even if the lawyer and former client have opted out of ADR, the former client would be allowed time to select his or her own attorney, to file a responsive pleading to the underlying petition, etc.

**Lawyer Who Withdraws While Case Pending Seeking Fees:** If the lawyer withdraws or is otherwise discharged while a case is still pending, the lawyer has two alternatives: 1) wait 90 days following a withdrawal and file a complaint at law for fees in independent proceedings; or 2) file a petition in the underlying proceedings, go through ADR (or opt out if appropriate), monitor the case and wait until the conclusion of the case to go forward with a hearing on petition for setting final fee hearing.

**Independent Proceedings:** Allowing a lawyer the ability to choose to wait 90 days and go forward with independent proceedings, however, undermines the rationale of the previous line of cases suggesting that while a case was still pending it was a matter of judicial economy to have the fees litigated before the same judge, i.e., the judge who heard the underlying proceedings. Additional complexity in bringing such an independent action exists because in many of these cases the spouse who owes attorney's fees has the lesser ability to pay for the same. Rather than bring a third-party complaint as outlined in the statute, it is possible that a party might become upset because she or her must hire a lawyer to represent him or her in third party proceedings, etc., and file a "beef" with the ARDC, complaining about the entire process.

**Proceedings Within Divorce Case:** If the lawyer chooses to file a petition in the underlying divorce case, the lawyer must first file a petition for setting final fees and costs, supported by an affidavit and incorporating a copy of the written engagement agreement together with the statement of client's rights and responsibilities. Next, depending upon the county where the proceedings are pending, there may be required ADR. The most significant hurdle of the legislation is not the requirement for ADR but the prohibition against seeking a hearing until there has been a § 503(j) contribution judgment. The § 503(j) contribution petition supposedly is to be heard "after proofs are closed in the final hearing ... (or in conjunction with the final hearing if the parties so stipulate)." Thus, the lawyer has to wait in the usual case until the close of proofs before the court could hear a petition for fees against the former client. Complicating matters further, however, is that in the vast majority of cases there is no specific "close of proofs," but the matter is resolved by proving up the marital settlement agreement. How does the discharged lawyer learn of the date of the prove-up, etc.? Most courts will require the attorneys to give notice to former counsel of the date and time of any final hearing. The attached two-count form specifically requests that the attorney seeking fees be given notice of the date and time of the final hearing.

Even if the lawyer is given notice of the final hearing, in many cases the parties often choose that the former client (who has the lesser ability to pay for attorney's fees), will pay exclusively for any attorney's fees. Because this is often the scenario, I have drafted a two-count petition which incorporates both a request for fees from the client as well as a request for fees from the opposing party. It could be argued on behalf of the former client that the lawyer does not have

privity with which to bring such a petition. The counter-argument to this, however, is the [Lee v. Lee](#) decision, 302 Ill.App.3d 607, 236 Ill.Dec. 222, 707 N.E.2d 67 (1st Dist. 1998), GDR 99-2. *Lee* held that the parties cannot, by a marital settlement agreement provision, provide that each party will be responsible for his and her own attorney's fees and thus preclude an attorney from seeking fees against the party with the greater ability to pay. However, the fee petitions in *Lee* were heard at a time prior to the enactment of the "Leveling" amendments.

The danger, however, to the lawyer in pursuing such a petition where the former client does not want to seek an award of fees from the former spouse is the possibility of receiving an ARDC complaint from the former client. The reason such a complaint is a significant possibility is that the discharged lawyer will be seen as standing in the way of an agreement that has ostensibly been reached between the parties as to all issues.

Most lawyers are aware of the studies showing a client's satisfaction in a divorce case is highest at the commencement of litigation and shortly before the prove-up of the case. After the case is concluded, the client's reported satisfaction with the lawyer steeply declines. Thus, the lawyer who seeks to be paid a substantial amount of attorney's fees following resolution of the case faces a client who usually no longer perceives a great value for the services rendered. The manner in which the Leveling amendments are drafted ensure that a lawyer cannot sue the former client until after the ex-client's perceived value for services rendered is at its lowest point.

Thus, the unintended consequence of the Leveling amendments has been that fewer lawyers will agree to defer being paid for services rendered until the conclusion of the case. Certainly this result could be perceived as being consumer-hostile because many spouses greatly in need of quality representation cannot afford to pay for the same while the case is progressing. Under the Leveling amendments, such litigants often find it more difficult to find appropriate representation. Keep in mind that one of the significant goals of the legislation was to recognize and codify the perceived conflict of interest where a lawyer sues his own client for attorney's fees while a case progresses.

While it can be argued that the provisions for interim attorney's fees make it easier to obtain fee awards while a case progresses, the awards are usually only a very small percentage of the overall fees incurred. Nearly eight years of experience with the Leveling amendments has demonstrated that the interim fee portion of the statute has a limited impact on an attorney's ability to be paid for services rendered while a case progresses.

**Interim Fees and Parentage and Post-Divorce Applicability:** Additional complexity with the Leveling amendments is caused by the legislation not yet being further amended to specify whether the interim fee provisions apply to parentage proceedings. As is addressed below, there is one appellate court case which has held that the statutory language does apply to post-divorce proceedings.

**Parentage Proceedings:** The Illinois Parentage Act of 1984 states at §17 that, "[T]he court may order reasonable fees of counsel, experts and other costs of the action, pretrial

proceedings, post-judgment proceedings to enforce or modify the judgment and the appeal or the defense of an appeal of the judgment to be paid by the parties in accordance with the relevant factors specified in § 508 of the Illinois Marriage and Dissolution of Marriage Act." Therefore, the amendments to § 508 apply to parentage proceedings. This would mean the statement of client's rights must be attached to the engagement agreement in parentage proceedings.

**Parentage / Removal Case Law:** Since § 508 incorporates by reference § 501(c-1) and § 503(j), there is a question of whether these sections would be incorporated by reference in parentage cases by IPA § 17. Based upon the line of parentage cases such as the parentage removal case law, it appears only the portion of the statute directly referred to would be incorporated by reference. See, for example, *IRMO Harbour v. Melton*, 333 Ill. App. 3d 124, 266 Ill. Dec. 729, 775 N.E.2d 291 (4th Dist. 2002), *Tysl v. Levine*, 278 Ill.App.3d 431, 215 Ill.Dec. 14, 662 N.E.2d 915 (2d Dist. 1996), GDR 96-20. *In Re Parentage of R.M.F.* 275 Ill.App.3d 43, 211 Ill.Dec. 754, 655 N.E.2d 1137 (2d Dist. 1995), GDR 95-62, held that IMDMA § 609 did not apply to parentage cases despite the language in § 14(a)(1) of the Parentage Act providing:

The judgment may contain provisions concerning . . .custody . . .of the child . . . [and] visitation privileges with the child . . .which the court shall determine in accordance with the relevant factors set forth in the Illinois Dissolution of Marriage Act, and any other applicable law of Illinois, to guide the court in a finding in the best interest of the child. In determining custody, joint custody, or visitation, the court shall apply the relevant standards of the Illinois Marriage and Dissolution of Marriage Act.

Additionally, §16 of the Parentage Act states:

The court has continuing jurisdiction to modify an order for support, custody or visitation included in a judgment entered under this Act. Any custody or visitation judgment modification shall be in accordance with the relevant factors specified in the Illinois Marriage and Dissolution of Marriage Act. . . .

The appellate court in *R.M.F.* noted because visitation and custody are decided according to the IMDMA, but the Parentage Act contains no provisions requiring that removal actions be governed in accordance with § 609 of the IMDMA, that IMDMA § 609 is not implicitly incorporated into the Parentage Act. This was the reason for the recent amendments to the Parentage Act. The appellate court decided *R.M.F.* was based on statutory construction: enumeration of certain elements of the IMDMA implies the exclusion from the Parentage Act of all other elements of the IMDMA.

**Parentage Visitation Line of Cases / Stella I and II:** Another line of cases addressing incorporation by reference issues is the parentage/visitation line of case law. One such case is *Stockton v. Oldenburg*, 305 Ill.App.3d 897, 238 Ill.Dec. 1013, 713 N.E.2d 259 (4th Dist. 1999), GDR 99-57, that followed the decision of *Department of Pub. Aid v. Gagnon*, 288

Ill.App.3d 424, 223 Ill.Dec. 776, 680 N.E.2d 509 (4th Dist. 1997), GDR 97-51. The issue was whether the above quoted reference to § 14(a)(1) of the Parentage Act issue was to § 607 of the IMDMA [stating that a parent not granted custody is entitled to reasonable visitation unless the court finds reasonable visitation would seriously endanger the child] or whether it referred to IMDMA § 602 [providing that custody is determined based upon the best interest of the child]. *Gagnon* ruled that the reference in § 14(a)(1) of the Parentage Act is a reference to IMDMA § 602 (custody) but not to § 607 (visitation).

The same analysis in *Tysl, R.M.F., Gagnon, etc.*, is pertinent to the law as to whether Sections 501(c-1) and 503(j) apply to parentage proceedings. If the legislature intended these statutory sections to apply, it is urged the legislature would have specifically amended the pertinent provisions of the Parentage Act as well as the IMDMA.

However, this interpretation is not consistent with the First District's October 2004 decision in *Stella II*. In the original *Stella v. Garcia* opinion (*Stella I*), 339 Ill. App. 3d 610, 791 N.E.2d 187 (2003), the First District court held that section 501(c-1) of the IMDMA regarding interim attorney fees does not apply to parentage proceedings. It stated that the court in parentage proceedings does not have authority to order "disgorgement" of a retainer. This rationale of this case was exactly in line with my original discussion. The quotation from the case was, "(n)owhere in section 17 of the Parentage Act did the legislature refer to disgorgement of fees. Nor does it cross-reference subsection 501(c-1) of the Marriage Act. The only cross-reference to the Marriage Act in section 17 of the Parentage Act is to section 508."

In *Stella II* (October 2004), the appellate court took the position that in parentage proceedings the court can award interim attorney's fees under the provisions of Section 501(c-1) of the IMDMA, so long as it does not require disgorgement. The appellate court stated in the beginning of its decision:

The trial court in this case, relying entirely on *Stella I*, held the Parentage Act does not provide for interim attorney's fees. We intended no such result and today we clear the air by addressing two questions certified for interlocutory appeal pursuant to Illinois Supreme Court Rule 308(a):

"Question 1: Can interim attorney's fees be awarded under section 17 of the [Parentage Act]?"

Question 2: If the answer to Question 1 is "Yes," can those interim attorney's fees be awarded using the methods, factors, and procedures, set forth in section 501(c-1)(1), (2), and (3) of the [Marriage Act] without considering disgorgement?"

We answer the certified questions "yes" and "yes."

The *Stella II* court first commented that, "Neither of the articles written by the bar association committees that promoted the 1997 amendments suggests that the level playing field provisions

in subsection (c-1)(3) were intended to apply to parentage actions.” Stella II then stated, “Our courts have held attorney's fees cannot be awarded in paternity actions without contractual or statutory authority. That flat statement does not resolve our inquiry, it begins it.” The labored reasoning of the appellate court then suggests, “While section 17 makes no specific reference to interim fees, it requires entry into section 508, which does.” In defense of its position the court opines, “We do not see that the lack of a marital estate as a source of fees has any particular bearing on our resolution of legislative intent.”

I disagree with the decision in *Stella II*. The opinion seems persuasive until one reasons that overlaying the provisions of the temporary relief in divorce cases is extraordinarily troublesome. One of the key safety provisions in divorce cases is that while the proceedings are summary in nature any “overpayment” may be recovered at the conclusion of the case because all fees would be deemed an advance against the marital estate. There simply is no marital estate in parentage cases so overlaying this statute makes little sense.

After drafting this article, an article was published in the ISBA’s Family Law Newsletter addressing the same issue, i.e., attorney’s fees in paternity cases. See April 2005, Vol. 48, No. 3. <http://www.isba.org/Sections/FamilyLaw/4-05.pdf>. The authors of that article suggest that the language in *Stella II* might be used to argue against a requirement of disgorgement by an attorney in divorce cases. The authors stated, “The authorizing paragraph of the Parentage Act is no more limiting: “the court may order reasonable fees of counsel... to be paid by the parties...” Therefore, while this court has clarified that interim awards are authorized and disgorgement orders are not, it may have opened the door yet another unintended consequence.”

**Interim Fees and Post-Dissolution of Marriage Proceedings and First District's Beyer Opinion:** An issue which has been clarified by one First District appellate court decision is whether IMDMA § 501(c-1) and § 503(j) apply to post-dissolution of marriage proceedings. Trial courts had been divided on this issue. A 2001 opinion addressed this issue. [IRMO Beyer](#), 324 Ill.App.3d 305, 257 Ill.Dec. 406, 753 N.E.2d 1032 (1st Dist., 1st Div. 2001). However, *Beyer* did not address the issue of whether a hearing in post-decree proceedings should be an expedited basis.

**Argument Re 501(c-1) Applying:** The argument that the interim fee portion of the statute applies to post-judgment proceedings (as made in *Beyer*), is:

- 1) **508(a)(2)'s Reference to Enforcement or Modification Proceedings:** The language of IMDMA § 508(a) that provides in pertinent part that, “Interim attorney's fees and costs may be awarded from the opposing party, in accordance with subsection (c-1) of Section 501.” Next it states that, “Awards may be made in connection with the following: (2) The enforcement or modification of any order or judgment under this Act.”
- 2) **§501's Reference to All Proceedings Under the Act:** Additionally, the language

of Section 501 provides, “**in all proceedings under this Act**, temporary relief shall be as follows...” These provisions include the provisions for interim attorney's fees.

**Argument Re 501(c-1) Not Applying:** The arguments that these amendments do not apply to post-judgment proceedings are:

- 1) **Standards that Apply — Property or Maintenance Standards:** A contribution award under § 503(j) is based upon either the property standards of the maintenance standards of the IMDMA. However, virtually none of these standards is applicable to post-divorce proceedings.
- 2) **Fees Being Deemed Advance Against Marital Estate:** The interim fee petition portion of the statute per § 501(c-1) provides that:

**Unless otherwise ordered** by the court at the final hearing between the parties or in a hearing under subsection (j) of Section 503 or subsection (c) of Section 508, interim awards, as well as the aggregate of all other payments by each party to counsel and related payments to third parties, **shall be deemed to have been advances from the parties' marital estate**. Any portion of any interim award constituting an overpayment shall be remitted back to the appropriate party or parties, or, alternatively, to successor counsel, as the court determines and directs, after notice.  
(Emphasis added).

It is definitional that there can be no marital estate in post-decree cases. The reason for including the above language into IMDMA § 501(c-1) was to get around the argument that it violated a party's rights to due process by not allowing an evidentiary hearing. If the Leveling legislation was intended to apply to post-divorce proceedings, the statute should have specifically provided that there is presumption of an expedited hearing (non-evidentiary, summary in nature and expeditious). Furthermore, in post-divorce proceedings, a disgorgement provision (requiring half the attorney's fees already spent to be paid over to the other spouse) would likely be unconstitutional because there is no marital estate in which to balance any inequities that would result from the expedited hearing, etc.

Therefore, while there is an argument that the interim fee statute should apply to post-decree proceedings the better reasoned approach is that the interim fee statute does not apply in post-dissolution of marriage proceedings. Nevertheless, we now have one appellate court decision, *IRMO Beyer*, which takes the opposite approach. It will be interesting to determine if the other districts follow the First District's approach in *Beyer*. As set forth below, we already have at least two divisions among the districts as to issues relating to the “Leveling” amendments: 1) whether in contribution awards reasonableness is a necessary element; and 2) whether in post-judgment

proceedings the contribution petition must be heard before judgment is entered.

**Interim Fees and Expert's Fees:** [IRMO Alexander](#), No. 5-05-0109 (Fifth Dist., September 7, 2006) addressed whether expert fees are authorized under the interim fee legislation. The appellate court stated that using a liberal reading of the statute, an interim fee award may include an interim award of expert's fees.

**Case Law Re Contribution Petitions:** The common theme of case law addressing the Leveling Amendments is that the changes make it more difficult for lawyers and appellate courts to understand the complexities of the statute. Recent case law also points out the less than revolutionary aspects of the Leveling amendments.

**McGuire — Changes Are Procedural and Not Substantive:** Specifically, in [IRMO McGuire](#), 305 Ill.App.3d 474, 238 Ill.Dec. 689, 712 N.E.2d 411 (5th Dist. 1999), GDR 99-60, the appellate court held the Leveling amendments make only procedural changes, while keeping intact the substantive criteria for awards. Thus, *McGuire* held a contribution award was not mandatory even though the party seeking the fee award received a disproportionate property division.

**Brackett — Trial Court Must Conduct Hearing on Previously Filed Contribution Petition:** Another significant case addressing the Leveling Amendments was the *Brackett* case in which I was the appellate lawyer for Mrs. Brackett. *Brackett* held that following the filing of a petition for contribution for fees, the trial court must conduct a hearing on the petition. [IRMO Brackett](#), 309 Ill.App.3d 329, 242 Ill.Dec. 798, 722 N.E.2d 287 (2d Dist. 1999). One question in *Brackett* was whether a separate hearing is necessary for a contribution petition. *Brackett* held:

We, however, temper our agreement with *McGuire* by cautioning against too literal a reading of section 503(j). We do not read section 503(j) as requiring an additional hearing, which would further burden already overburdened trial courts, but, rather, as requiring a trial court to hear, through testimony or otherwise, additional proofs when a petition for contribution is filed in accordance with section 503(j) in the context of preexisting proceedings. If the trial court wishes to hold a separate and distinct hearing on the petition, it has the discretion to do so.

**Selinger -- Appellate Court Affirmed Denial of Separate Fee Hearing Where Not Sought on Timely Basis:** A relatively recent case addressing whether a separate hearing is required in a contribution hearing is the Fourth District 2004 *Selinger* decision. In *Selinger*, the appellate court affirmed the trial court's denial of any right to contribution. The wife in *Selinger* earned approximately \$36,870 per year from her job as a registered nurse while the husband earned more than \$100,000 from his various jobs. Regarding the issue of whether a separate fee hearing must be conducted, the appellate court stated:

The lack of a hearing here is not dispositive. The assets and liabilities of the two

parties were already before the court, as was the amount of Pamela's attorney fees. We fail to see what other evidence had to be presented for the court to rule on Pamela's request. Further, we note Pamela waited to file her request for fees until several weeks after the close of proofs in this case, at a time when the parties were not in person before the court. It was then up to her to call it to the court's attention if she believed an additional hearing was necessary prior to issuance of the court's order. Failing that, it was then Pamela's responsibility to call to the court's attention its failure to hold a hearing within 30 days of the entry of the order and before this appeal was filed. The failure to hold a hearing would have been easily correctable in the trial court. Her failure to take these steps does not allow her to now challenge the trial court's alleged failure to hold a hearing on her motion for contribution to attorney fees. See [Minear](#), 287 Ill. App. 3d at 1079-80, 679 N.E.2d at 862;

As to the court's finding no contribution to attorney fees was warranted, we find no abuse of discretion. In view of our decision to award permanent maintenance in a greater amount, disparity in income levels between the parties will not be large enough to require contribution to Pamela's attorney fees.

**DeLarco — Four Significant Holdings:** [IRMO DeLarco](#), 313 Ill.App.3d 107, 245 Ill.Dec. 921, 728 N.E.2d 1278 (2nd Dist. 2000) was the next significant appellate court case involving the fee contribution statute. It had several significant rulings, mostly related to contribution petitions. The *DeLarco* court ruled:

1. **Contribution Awards Does not Equate to Fee Equalization:** The fee equalizing portion of the statute, section 501(c-1)(3) of the IMDMA applies only to temporary fee awards. Equalization does not apply at the contribution hearing.
2. **Advance Against the Marital Estate — Court May Consider Relevant Economic Circumstances of Parties:** While attorney's fees paid by each party from marital assets may be deemed as an advance against the marital estate, the trial court may consider in a contribution hearing the relevant economic circumstances of each party in the apportionment of marital property. This is in line with both *DeLarco* and *Holthaus*.
3. **Reasonableness is a Mandatory Factor:** Although section 503 does not mention reasonableness for contribution hearing, the reasonableness requirement of section 508 also applies to contribution fees.
4. **Reasonableness Finding Re Other Party No Effect on 508(c) Petition:** Finding of reasonableness or unreasonableness in contribution hearing may not be asserted against the attorney in a hearing for attorney's fees against either a client or former client.

5. **Business Records — Actual Timeslips Must be Made Available to Other Party if These are Original Documents — An Incentive to Direct Input:**

Where a lawyer does not directly input timeslips into a time and billing program, for the records to be admitted under the business records exception of the hearsay rule, the original documents must be in court or made available to the opposing party. The party seeking admission of the summaries must also be able to provide the testimony of a competent witness or witnesses who has seen the original documents and can testify to the facts contained in the individual timeslips.

*IRMO Schneider*, 343 Ill. App. 3d 628, 1295;278 Ill. Dec. 485,798 N.E.2d 1242 ((2nd Dist., 2003) [The same case as the Illinois Supreme Court case addressing personal goodwill] ruled that the trial court did not err in refusing to award contribution toward attorney's fees where the parties "were equally unreasonable, litigious, and quarrelsome throughout the divorce proceedings, resulting in an unnecessarily expensive divorce." The appellate court also stated, "Furthermore, although Jodi's earning potential pales in comparison to Earl's, she has failed to show an inability to pay her own attorney fees. See *McCoy*, 272 Ill. App. 3d at 132 (ability to pay does not mean ability to pay without pain or sacrifice)." Moreover, the appellate court commented that the wife was awarded a disproportionate and substantial share of the marital estate (worth approximately \$326,000). *Schneider* is the newest of a line of cases which states that the court did not make a contribution award in a case with litigation where both parties are to blame resulting in an expensive and litigious divorce where there is no showing of "inability to pay." See, e.g., *IRMO Aleshire*, 273 Ill.App.3d 81, 209 Ill.Dec. 843, 652 N.E.2d 383 (3d Dist.1995) [In cross-petitions for enforcement the court may apportion attorney's fees in a manner that reflects the parties' relative culpability.] *IRMO Mandei*, 222 Ill.App.3d 933, 164 Ill.Dec. 870, 583 N.E.2d 1192 (4th Dist. 1991). Trial court did not abuse its discretion in ordering each party to pay own fees where the fees were generated largely from the result of the parties' unwillingness to compromise.

A 2004 Illinois appellate court decision addressing the issue of a fee contribution hearing took the traditional view that fees should not be granted where one party has the ability to pay. In *Adams* (348 Ill. App. 3d 340, 246;284 Ill. Dec. 124, 809 N.E.2d (3<sup>rd</sup> Dist, 2004) the appellate court reversed a fee award despite affirming the trial court's increase in support. The appellate court stated:

The primary obligation for payment of attorney fees rests upon the party for whom the services are rendered. In re *Marriage of Mantei*, 222 Ill. App. 3d 933, 583 N.E.2d 1192 (1991). However, the court may order one spouse to pay some or all of the attorney fees incurred by the other. 750 ILCS 5/508 (West 2000). In order to justify an award of attorney fees, the party seeking the award must demonstrate both financial inability to pay the fees and the ability of the other spouse to do so. *In re Marriage of Cotton*, 103 Ill. 2d 346, 469 N.E.2d 1077 (1984).

In this case, Carol's financial disclosure statement indicates that she had a savings

account with a balance of \$74,000, as well as other financial assets. We conclude that the trial court erred in awarding Carol attorney fees because the record shows that she had the ability to pay her own attorney fees upon seeking the default judgment.

*IRMO Pond*, 885 N.E.2d 453, 379 Ill.App.3d 982 (2<sup>nd</sup> Dist., March 11, 2008), will be analyzed at length because there are very few cases which involve reversals of a failure to make a contribution award. In fact, the appellate court was able to cite only three previous appellate court cases, each prior to the “Leveling” amendments. On the same day that the parties signed the marital settlement agreement, the trial court entertained the parties' petitions for contribution to attorney fees. The trial court denied both petitions. The trial court stated:

"The issue of contribution is set forth in the attorney's petitions and essentially request the court to, after looking at the division of property and the relative financial circumstances of the property [sic] after the division of this property is made and any other factors, there being no maintenance, that would be the other major consideration, looking at their incomes and ability to pay, the Court is going to deny any relief by [petitioner] in this case. The Court finds that, as I say, at the end of the day, the economic circumstances available to [respondent] would not, in this Court's judgment, constitute \*\*\* an equitable basis for him to make a contribution towards any attorney's fees that will be paid. So [petitioner's] request for contribution to attorney's fees is denied.

The appellate court cited *Minear* in support of the proposition that “Inability to pay does not require a showing of destitution, and the party seeking fees is not required to divest himself of capital assets before requesting fees. It stated, “Rather, a party is unable to pay her fees if the payment would strip her of her means of support or undermine her financial stability. *Schneider*, 214 Ill. 2d at 174. In determining whether and in what amount to award attorney fees, the court should consider the allocation of assets and liabilities, maintenance, and the relative earning abilities of the parties. *IRMO Suriano*, 324 Ill. App. 3d 839, 852 (2001). Regarding earnings, the court may consider both current and prospective income. *IRMO Selinger*, 351 Ill. App. 3d 611, 622 (2004).”

In *Pond*, the ex-husband had agreed in the Marital Settlement Agreement to pay \$5,000 toward attorney’s fees which was apparently due to violations as to discovery issues. The court then pointed out that the fee award was not one made per §508(b) but per §508(a) – incorporating the contribution provisions by reference. The ex-wife argued that the court could consider a party’s conduct as to the reason for the litigation, citing *IRMO Ziemer*, 189 Ill. App. 3d 966, 969 (1989). The ex-wife also argued that her ex-husband should be required to contribute toward the \$63,000 balance of fees owed because she had already borrowed \$28,000 to pay her attorney, because the house which was the majority of the estate awarded to her was illiquid and because her ex-husband could afford to pay via a contribution award payments over time. The ex-husband argued in part that he had over \$38,000 in credit card debt he was therefore left with no money after paying the credit card debt. The ex-husband thus argued that while his ex-wife had similar debt (excluding attorney fees), she also has the house. He also urged that the ex-wife had waived

the argument that he could make installment payments, because she did not offer such a proposal in the trial court. The ex-husband's further arguments were:

On the subject of income, respondent points out that petitioner was earning \$38,422 in 2005 when she quit her job, and he argues that the trial court was imputing an income to her of \$25,000 for college contribution purposes only. Respondent maintains that we should not ignore that petitioner quit her job in the middle of the proceedings and then asked for contribution based on a lower imputed income for college purposes. Respondent further argues that petitioner received 65% of the assets to balance his higher income. According to respondent, petitioner already benefitted from the differences in income but now seeks to double dip.

The appellate court determined that the ex-wife did not waive the issue of seeking payments over time by now raising it at the trial court level. Because the ex-wife quit her job earning \$38,000, the appellate court stated that it was reasonable to consider that her future income would likely rise. See *Selinger*, 351 Ill. App. 3d at 622 (court may consider both current and prospective income). Regarding the ex-husband's income, the settlement agreement recited that he earned \$93,610 in 2005 and had a projected 2006 income of \$83,000 based upon his October year to date income. The appellate court focused its attention on the cases reversing the trial court's denial of attorney's fees: *IRMO Carpenter*, 286 Ill. App. 3d 969 (1997), *IRMO Haas*, 215 Ill. App. 3d 959 (1991), and *Sullivan v. Sullivan*, 68 Ill. App. 3d 242 (1979).

Those cases break down as follows as to the income comparison:

Case	Amt Sought	Wife	Note	Husband	Note
<i>Carpenter</i>	\$3,543	\$12,000		\$45,000	Estimated for H
<i>Hass</i>	\$5,647	\$15,000	Less Than	\$49,000	Excluding Bonus
<i>Sullivan</i>		\$4,176	W's Gross	\$14,676	Net figure for H

Applying the facts, the appellate court stated:

Petitioner clearly demonstrated that she is unable to pay her attorney fees without invading her capital assets or undermining her financial stability. Although petitioner received a greater portion of the marital assets, they consist largely of retirement accounts and illiquid assets such as the house. Petitioner also received around two-thirds of the liabilities, giving her over \$100,000 in debts. These debts are in addition to petitioner's attorney fee debts of over \$91,000 and the approximately \$52,000 debt she incurred to pay respondent his share of the home's equity. These circumstances, along with petitioner's limited income, show that petitioner is unable to pay her attorney fees.

We also conclude that petitioner showed that respondent is able to pay at least a portion of her attorney fees. While respondent may still have about \$20,000 in

credit card debt if he applies his remaining equity from the house to the outstanding credit card balance, this is his only remaining debt, and he has no child support or maintenance obligations. Respondent's income of over \$83,000 is over three times petitioner's imputed income and more than twice her previous income at Dick Pond Shoes. The courts in *Carpenter*, *Haas*, and *Sullivan* all emphasized the differences in the parties' incomes in determining that the trial courts abused their discretion in refusing to order attorney fee contributions. Though respondent argues that petitioner has already benefitted from the differences in income by receiving 65% of the marital assets, as stated, in determining whether and in what amount to award attorney fees, the court should take into account the allocation of assets and liabilities, maintenance, and the parties' relative earning abilities. Thus in analyzing this issue, we are cognizant of petitioner's greater assets. But we also consider that this benefit was diluted by her waiver of maintenance and her assumption of a much greater share of the liabilities. We agree with respondent that he should not be responsible for the entire remaining balance of petitioner's attorney fees. At the same time, considering the nature of petitioner's assets, her vast debts, and the significant income disparities, we believe that the trial court abused its discretion by not ordering respondent to contribute to petitioner's attorney fees in any amount beyond the \$5,000 he already paid.

Accordingly, the appellate court reversed and remanded the case to the trial court to determine the contribution award.

**Nesbitt – Standards in Contribution Hearings and Bundled Billing Statements:**

[IRMO Nesbitt](#), (First Dist., November 14, 2007) involves Schiller, DuCanto and Fleck's (SDF) fee contribution petition seeking \$1.109 million in fees (\$227,000 being previously paid). Filing the initial filing, wife's counsel filed two supplemental fee petitions seeking for a four month period of an additional \$111,784 and for a three month period of \$228,779.

One of the factors in this case was that in the SDF billing statements there is a listing of tasks during a day and a listing of the total time per day but not a breakdown per task. The SDF policy is that the employee may aggregate the time for all of the work on a given day. It was noted that while some associates itemize their time that this is eliminated when billing records are sent to the client.

The appellate decision addressed the reasons for the very high attorney's fees. David Hopkins of SDF conceded that the charges for litigation were "overwhelmingly high when compared to [Lisa's] share of the marital estate" but explained the unique circumstances and complexities of the case. A lawyer for the first law firm representing the husband testified that the husband "was very angry at Lisa because he had been thrown out of his house." The husband terminated his relationship with his firm because they were "not aggressive enough in representing Mr. Nesbitt." That firm filed an action to recover their fees and the husband filed a lawsuit against the lawyer individually and against his firm. The ex-husband conceded that he wrote in a

settlement proposal at the beginning of the case, “conceded that in a settlement proposal generated in 2001, he wrote, “If Lisa chooses not to come to a reasonable agreement as set forth below, we can simply go to court and have a full, blown out litigation slash war.” In previous years the husband’s gross income had been over \$1M but in 2004 it was approximately \$400,000. The husband had an interest in three businesses and received a yearly salary. The trial court ultimately “ordered Bruce to contribute \$700,000 to Lisa’s attorney fees because “Bruce holds a financial position far superior to [Lisa’s] and is well able to help defray her fees, and because the Court believes that Bruce protracted the litigation out of sheer vindictiveness.” There were appeals and cross-appeals and the appellate court generally affirmed the trial court’s decision.

The critical discussion on appeal addressed the bundled services of SDF and stated:

Though not explicitly required by section 503(j), we have found that contribution awards under that section must be reasonable. *Hasabnis*, 322 Ill. App. 3d at 596 (“Section 503(j) does not expressly require the award of fees be reasonable, but since we cannot envision a grant of legislative authority that tells judges to be unreasonable, we read the statute as incorporating a reasonability requirement”). Bruce, relying primarily on our holding in *Hasabnis*, argues on appeal that “the trial court’s finding—that it is impossible to tell with precision whether all the work performed was reasonable—should have resulted in a denial of all of the fees requested in [Lisa’s] contribution petition,” because such a finding is necessary to award contribution under section 503(j) of the Act. We disagree.

The appellate court stated that based upon *Hasabnis* did not require the necessity of fees but did require the fees to be reasonable. The court cited this case for the proposition that, While a trial court may review the petitioning party’s billing records, it is not required to do so” although it recognized that *DeLarco*, 313 Ill. App. 3d 107 (2000), had held that the trial court “ ‘must,’ in making an award of fees pursuant to a contribution petition, ‘consider whether the attorney fees charged by the petitioning party’s attorney are reasonable.’

**Fee Equalization and “Unless Otherwise Ordered” of the Interim Fee Statute:** The holding in *DeLarco* regarding “fee equalization” not being a part of the contribution statute is significant in light of the potentially confusing language of the statute. The interim fee portion of the statute states that “unless otherwise ordered” all fees paid shall be deemed an advance against the marital estate. The query was what the phrase “unless otherwise ordered” refers to. In one case that I tried, the trial judge treated all fees paid by each party as an advance against the marital estate — despite the fact that the lion’s share of these fees were paid in fighting for custody on the father’s behalf due to the mother’s active alcoholism. Her alcoholism created multiple delays of the trial. Unfortunately, the case I had was tried shortly prior to the *DeLarco* decision and far prior to the *IRMO Holthaus*, (Second Dist., November 18, 2008). I had hoped that the client would have authorized an appeal of this matter but he did not do so. I previously wrote, “ I believe the court has full discretion to choose to treat attorney’s fees paid by each party through the marital estate as tantamount to “dissipation” or to choose not to do so.”

*Holthaus* has addressed most directly the “unless otherwise ordered” language of Section 501(c-1)(2) of IMDMA. Despite the potential waiver issue in terms of the issue not being argued at the trial court level, the *Holthaus* appellate court stated that, “We choose to address Angeline's contention because it is necessary to the development of a sound body of precedent concerning the application of section 501(c-1)(2) of the Act.” Thus, this case presents an instance of what might be called judicial activism. The appellate court in *Holthaus* stated:

The plain language of section 501(c-1)(2) makes apparent that the trial court is required to treat the parties' attorney fees as advances, “[u]nless otherwise ordered.” (Emphasis added.) 750 ILCS 5/501(c-1)(2) (West 2006); see also [\*In re Marriage of Beyer\*](#), 324 Ill. App. 3d 305, 314 (2001) (noting that section 501(c-1)(2) creates a presumption that attorney fees will be treated as advances, but that the presumption does not apply where the court orders otherwise).

Here, the trial court ordered otherwise when following trial it ordered that, subject to the division of the marital estate, which was skewed so as to compensate Nicholas for attorney fees incurred as a result of Angeline's behavior during the proceedings, the parties were to be responsible for their respective attorney fees. Accordingly, the trial court's decision falls squarely within the confines of the statute.

The *Holthaus* court then stated:

Thus, we cannot say that the trial court abused its discretion in requiring the parties to be responsible for their respective attorney fees. See *In re Marriage of Bussey*, 108 Ill. 2d 286, 299 (1985) (“The awarding of attorney fees and the proportion to be paid are within the sound discretion of the trial court and will not be disturbed on appeal, absent an abuse of discretion”).

**Reasonableness as a Mandatory Factor Per *DeLarco***: Another reason *DeLarco* is a significant Second District case is its discussion of reasonableness. The ruling was that in contribution petitions, fees must be shown to be reasonable. You might respond by believing that of course contribution awards should only be made if the fees were reasonable. The problem is that the contribution portion of the statute never mentions reasonableness. It just states that the court shall make contribution awards based upon the maintenance factors if maintenance is awarded or otherwise based upon the property factors.

While the *DeLarco* decision appeared to put an end to the query about whether fees in contribution petitions must be reasonable, there has now been a conflict among the judicial districts in this regard. The Second District per *DeLarco* has held that fees must be reasonable in contribution proceedings

**IRMO *Hasabnis* — Reasonableness Not a Mandatory Factor**: However, the First

District chose not to adopt the reasoning of *DeLarco* in *Hasabnis*, a case involving the Schiller, DuCanto & Fleck law firm. The legal issue in this case was whether a party who is seeking a contribution award should be required to disclose detailed billing records. The Schiller firm brought a motion to quash the discovery request in this regard and the trial court granted this motion. The appellate court affirmed holding that reasonableness of fees is a permissive factor in contribution proceedings rather than a mandatory factor. *IRMO Hasabnis*, 322 Ill.App.3d 582, 749 N.E.2d 448 (1st Dist, 3d Div. 2001), GDR 01-95. The language of *Hasabnis* was curious. It states:

We realize one court has held that under section 508(a) the trial judge "must," in making an award of fees pursuant to a contribution petition, "consider whether the attorney fees charged by the petitioning party's attorney are reasonable." In re Marriage of DeLarco, \*\*\*. Although we do not see that requirement in any of the relevant statutes, we need not decide whether we will part company with *DeLarco* on this point. It is clear to us the trial court did examine the amount of fees [the wife] had paid and still owed her attorneys. The trial court was asked by [the wife] to award fees it found "equitable, just, and in accordance with the provisions of section 503(j) \* \* \*." We believe the trial court did so.

The argument that reasonableness is a "permissive" factor is the argument set forth in David Hopkins' Illinois Bar Journal article, "Leveling the Playing Field in Divorce: Questions and Answers About the New Law." 85 IBJ, 410 (Sept. 1997). Hopkins suggests, "If contribution awards were to be determined on the basis of traditional section 508 criteria — i.e., reasonableness and necessity of fees — the conflict of interest problem posted by prior law would have persisted." Hopkins urges that contribution awards should be determined "in a manner akin to other types of debts in the divorcing couple's marital estate."

*Hasabnis* tried to make a distinction in stating that necessity is not an element of the contribution statute but that fees still must be reasonable. The specific quote as to reasonableness states: "Section 503(j) does not expressly require the award of fees be reasonable, but since we cannot envision a grant of legislative authority that tells judges to be unreasonable, we read the statute as incorporating a reasonability requirement." While the appellate court gave lip service to reasonableness being a factor, it then went on to appear to reject this assumption. Picking up from the argument made in the Hopkins' Illinois Bar Journal article the court stated, "A critical examination of the reasonableness of the petitioner's attorneys' fees would not be consistent with the obvious goals of section 503(j) -- to avoid conflicts of interest between petitioner and her attorney and to preserve the lawyer-client privilege." I disagree. As pointed out in *DeLarco*, a finding of reasonableness or unreasonableness in a contribution hearing may not be asserted against the attorney in a hearing for attorney's fees against either a client or former client.

It is urged that the First District appellate court decision is poorly reasoned and the Second District's *DeLarco* decision was better reasoned. It does not make sense to exact the supposed conflict of interest between lawyer and his or her client when he is pursuing a fee contribution petition as against the depth of Illinois law which requires fees to be reasonable. It is urged that the court is not in a position to properly determine whether fees are reasonable unless detailed

billing records are submitted.

**Gattone — A Second 2nd District Case Holding Fees Must be Reasonable:** We have one more case which conflicts with the First District's approach in rejecting reasonableness as a mandatory consideration in contribution petitions: [IRMO Gattone](#), 317 Ill.App.3d 346, 251 Ill.Dec. 65, 739 N.E.2d 998 (2d Dist. 2000). Consistent with *DeLarco*, the Second District *Gattone* court held that if the court makes a contribution award, it should make a determination that the fees requested are reasonable.

**Pond – Second District Case Comprehensively Addressing Ability to Pay and Allocation Factors:** [IRMO Pond](#), (2<sup>nd</sup> Dist., March 11, 2008) the same day that the parties signed the marital settlement agreement, the trial court entertained the parties' petitions for contribution to attorney fees. The trial court denied both petitions. The trial court stated:

"The issue of contribution is set forth in the attorney's petitions and essentially request the court to, after looking at the division of property and the relative financial circumstances of the property [sic] after the division of this property is made and any other factors, there being no maintenance, that would be the other major consideration, looking at their incomes and ability to pay, the Court is going to deny any relief by [petitioner] in this case. The Court finds that, as I say, at the end of the day, the economic circumstances available to [respondent] would not, in this Court's judgment, constitute \*\*\* an equitable basis for him to make a contribution towards any attorney's fees that will be paid. So [petitioner's] request for contribution to attorney's fees is denied.

The appellate court cited *Minear* in support of the proposition that "Inability to pay does not require a showing of destitution, and the party seeking fees is not required to divest himself of capital assets before requesting fees. It stated, "Rather, a party is unable to pay her fees if the payment would strip her of her means of support or undermine her financial stability. *Schneider*, 214 Ill. 2d at 174. In determining whether and in what amount to award attorney fees, the court should consider the allocation of assets and liabilities, maintenance, and the relative earning abilities of the parties. *IRMO Suriano*, 324 Ill. App. 3d 839, 852 (2001). Regarding earnings, the court may consider both current and prospective income. *IRMO Selinger*, 351 Ill. App. 3d 611, 622 (2004).

This case will be analyzed at length because there are very few cases which actually reversals of a failure to make a contribution award. In fact, the appellate court was able to cite only three previous appellate court cases, each prior to the "Leveling" amendments.

In this case the ex-husband had agreed in the MSA to pay \$5,000 toward attorney's fees which was apparently due to violations as to discovery issues. The court then pointed out that the fee award was not one made per Section 508(b) but per Section 508(a) – incorporating the contribution provisions by reference. The ex-wife argued that the court could consider a party's

conduct as to the reason for the litigation, citing *IRMO Ziemer*, 189 Ill. App. 3d 966, 969 (1989). The ex-wife also argued that her ex-husband should be required to contribute toward the \$63,000 balance of fees owed because she had already borrowed \$28,000 to pay her attorney, because the house which was the majority of the estate awarded to her was illiquid and because her ex-husband could afford to pay via a contribution award payments over time. The ex-husband argued in part that he had over \$38,000 in credit card debt he was therefore left with no money after paying the credit card debt. The ex-husband thus argued that while his ex-wife had similar debt (excluding attorney fees), she also has the house. He also urged that the ex-wife had waived the argument that he could make installment payments, because she did not offer such a proposal in the trial court. The ex-husband's further arguments were:

On the subject of income, respondent points out that petitioner was earning \$38,422 in 2005 when she quit her job, and he argues that the trial court was imputing an income to her of \$25,000 for college contribution purposes only. Respondent maintains that we should not ignore that petitioner quit her job in the middle of the proceedings and then asked for contribution based on a lower imputed income for college purposes. Respondent further argues that petitioner received 65% of the assets to balance his higher income. According to respondent, petitioner already benefitted from the differences in income but now seeks to double dip.

The appellate court determined that the ex-wife did not waive the issue of seeking payments over time by now raising it at the trial court level. Because the ex-wife quit her job earning \$38,000, the appellate court stated that it was reasonable to consider that her future income would likely rise. See *Selinger*, 351 Ill. App. 3d at 622 (court may consider both current and prospective income). Regarding the ex-husband's income, the settlement agreement recited that he earned \$93,610 in 2005 and had a projected 2006 income of \$83,000 based upon his October year to date income. The appellate court focused its attention on the cases reversing the trial court's denial of attorney's fees. *IRMO Carpenter*, 286 Ill. App. 3d 969 (1997), *IRMO Haas*, 215 Ill. App. 3d 959 (1991), and *Sullivan v. Sullivan*, 68 Ill. App. 3d 242 (1979).

Those cases break down as follows as to the income comparison:

Case	Amt Sought	Wife	Note	Husband	Note
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<i>Sullivan</i>		\$4,176	W's Gross	\$14,676	Net figure for H

Applying the facts, the appellate court stated:

Petitioner clearly demonstrated that she is unable to pay her attorney fees without invading her capital assets or undermining her financial stability. Although petitioner received a greater portion of the marital assets, they consist largely of retirement accounts and illiquid assets such as the house. Petitioner also received

around two-thirds of the liabilities, giving her over \$100,000 in debts. These debts are in addition to petitioner's attorney fee debts of over \$91,000<sup>10</sup> and the approximately \$52,000 debt she incurred to pay respondent his share of the home's equity. These circumstances, along with petitioner's limited income, show that petitioner is unable to pay her attorney fees.

We also conclude that petitioner showed that respondent is able to pay at least a portion of her attorney fees. While respondent may still have about \$20,000 in credit card debt if he applies his remaining equity from the house to the outstanding credit card balance, this is his only remaining debt, and he has no child support or maintenance obligations. Respondent's income of over \$83,000 is over three times petitioner's imputed income and more than twice her previous income at Dick Pond Shoes. The courts in *Carpenter*, *Haas*, and *Sullivan* all emphasized the differences in the parties' incomes in determining that the trial courts abused their discretion in refusing to order attorney fee contributions. Though respondent argues that petitioner has already benefitted from the differences in income by receiving 65% of the marital assets, as stated, in determining whether and in what amount to award attorney fees, the court should take into account the allocation of assets and liabilities, maintenance, and the parties' relative earning abilities. Thus in analyzing this issue, we are cognizant of petitioner's greater assets. But we also consider that this benefit was diluted by her waiver of maintenance and her assumption of a much greater share of the liabilities. We agree with respondent that he should not be responsible for the entire remaining balance of petitioner's attorney fees. At the same time, considering the nature of petitioner's assets, her vast debts, and the significant income disparities, we believe that the trial court abused its discretion by not ordering respondent to contribute to petitioner's attorney fees in any amount beyond the \$5,000 he already paid.

Accordingly, the appellate court reversed and remanded the case to the trial court to determine the contribution award.

***IRMO Beeler***, (2nd Dist., November 19, 2004) involved a post-decree fee awarded regarding minor issues in which a Chicago law firm and their client sought \$70,000 of attorney's fees from the ex-husband in a contribution award. In this case the Chicago Law firm represented the mother in disputes regarding summer camp and vacation schedules. The final bill from that firm was for \$73,490.82 of attorney's fees which was broken down as follows: \$6,939.37 for spring break of 2002 issues; \$5,834.16 for summer vacation 2003 issues; \$15,184.38 for a "financial disparity analysis); \$14,520 for obtaining and responding to discovery; \$ 3,182.50 for responding to a summer judgment motion; \$14,085 for trial preparation; \$3,182.50 for responding to a motion for summary judgment; \$790 for ancillary matters including mediation; and \$2,237.32 for costs. The law firm filed various fee petitions against the ex-husband and the trial court found that "the sum of \$70,000+ is not reasonable and that the reasonable sum at best is \$10,000." The ex-husband [who had an estate worth over \$6 million] was ordered to pay \$6,000 of the ex-wife's attorney's fees. The parties were to equally divide the cost of summer camp fees and certain

camp supplies.

The appellate court concluded that the trial court was within its discretion to determine that only \$10,000 of the more than \$70,000 were reasonable. Regarding the contribution petition, the appellate court cited previous precedent as follows:

The party seeking attorney fees has the burden of establishing an inability to pay those fees and the ability of the other spouse to do so. *Schneider*, 343 Ill. App. 3d at 637. Financial inability to pay the fees exists where the payment would strip a party of his or her means of support and undermine the party's economic stability, but the party need not show destitution. *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 832 (1992). Still, the ability to pay does not mean the ability to pay without pain or sacrifice. *Schneider*, 343 Ill. App. 3d at 638.

In another striking finding the appellate court stated:

Appellants argue that "[c]learly, [respondent] is unable to pay the balance of her attorneys' fees in the amount of \$67,304 (\$73,304 less \$6,000 award)." Appellants misconstrue the issue, as the question is whether respondent can pay \$4,000, which is the remainder of the \$10,000 attorney fee award deemed "reasonable" by the trial court.

Because of the above quote, the appellate court believed that the interests of the law firm were potentially adverse to that of their client, the ex-wife, when it stated:

Both respondent and [the law firm] are represented by the same attorney on appeal even though their interests potentially conflict. For example, it was in [the law firm's] interest to obtain a ruling that the trial court abused its discretion in awarding just \$10,000 in attorney fees and that \$73,490.82 was a reasonable amount of fees. However, such a ruling could have been adverse to respondent, as we might still have held that the trial court did not err in apportioning 40% of the fees to respondent. Respondent would then be liable to [that law firm] for \$29,396.28, rather than just the \$4,000 she owed under the trial court's decision. As such, it was contrary to respondent's interest to challenge the trial court's ruling that \$10,000 was a reasonable amount of attorney fees. The court then instructed, "In this case, there is no indication that appellants' attorney did not make the necessary disclosures and obtain appellants' consent. We point out the conflict of interest only to remind practitioners of the potential perils involved with joint representation.

It is suggested that the appellate court in *Beeler* went beyond the issues which were specifically in dispute because of its apparent displeasure that a post-decree dispute involving such relatively minor matters totaled more than \$70,000. The appellate court seemed to limit fees that could be sought from the firm's own client to the remaining \$4,000 instead, of the remaining \$64,000+ owed to them by the terms of their contract. A fee petition against a lawyer's own client is not

limited to the fees which are customary in the community. The standards for a fee petition under Section 508(c) differs from a contribution petition where fees are more limited. This decision was at first published and it was very recently changed to a Rule 23 order.

**Timing for Filing Contribution Petition:** Case law is conflicting as to the timing issues for filing a contribution petition. The statutory law requires

Section 508(a) in pertinent parts states:

The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party's costs and attorney's fees. \*\*\* **At the conclusion of the case,** contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503.

The pertinent parts of section 503(j) of the IMDMA are:

**Time for Hearing — After Close of Proofs and Before Judgment is Entered:**

**After proofs have closed** in the final hearing *on all other issues* between the parties \*\*\* and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be **heard and decided**, in accordance with the following provisions:

**Time for Filing — Not Later than 30 Days After Close of Proofs / Order Such Other Period as Court Orders:** (1) A petition for contribution, if not **filed** before the final hearing on other issues between the parties, shall be **filed no later than 30 days after the closing of proofs in the final hearing or within such other period as the court orders.**

**IRMO Konchar — Must be Heard and Decided Before Entry of Final Judgment:** The first case to address the timing issue was [\*IRMO Konchar\*](#), 312 Ill.App.3d 441, 245 Ill.Dec. 224, 727 N.E.2d 671 (2d Dist. 2000). *Konchar* held that a 503(j) contribution petition must be heard and decided before a final judgment is entered. **When proofs are closed and a final order/judgment is entered on the same day, a petition filed thereafter is not timely filed and should be dismissed.**

In *Konchar*, within 30 days of the close of proofs and entry of final judgment, the father filed a petition for fees, claiming that he could not pay his own fees because he was unemployed and disabled. The trial judge, Margaret Mullen, denied the petition for attorney's fees because the petition was not heard and decided before the date the final judgment/order was entered. The father appealed. The Second District appellate court affirmed the trial court. The appellate court concluded that reading section 508(a) and 503(j) together, the conclusion is that a petition for contribution fees must be heard and decided before the final judgment is entered. The opinion stated:

Here, section 508(a) of the Act provides that attorney fees may be awarded at the conclusion of a case. The fees may be awarded in accordance with section 503(j) of the Act. Section 503(j) of the Act provides that a petition for fees must be **heard and decided** after the close of proofs in the final hearing and **before judgment is entered**. However, that language is qualified by section 503(j)(1) of the Act, which provides that if a petition for fees is not filed before the final hearing, then the petition must be filed no later than 30 days after the closing of proofs in the final hearing.

\* \* \*

We conclude that, under section 503(j) of the Act, a petition for attorney fees must be heard and decided **before the final judgment is entered**. We determine that the phrase "before judgment is entered" that is presented in section 503(j) **limits subsection (1) of section 503(j) of the Act so that the 30-day extension only applies to situations where a final judgment has not been entered**.

**Blum – Timing Requirements Apply to Pre-Decree Cases / Not Post-Decree Cases:** A 2007 case to address the timing of a contribution petition in post-decree cases is [\*IRMO Blum\*](#), No. 2-06-0235 (Second Dist., October 17, 2007 - modified opinion of November 20, 2007) (Lake County). In this case the trial court dismissed the ex-wife's contribution petition as untimely filed under the rule of *Konchar*. Because of the significance and of the *Blum* decision and because of its instructive and comprehensive nature, its language will be reviewed at length. The appellate court explained its reasoning as follows:

After careful consideration, we find it appropriate to revisit the question of how the legislature intended sections 508 and 503(j) of the Act to interact in the wake of the 1997 amendments to the Act. Section 508 of the Act (750 ILCS 5/508 (West 2004)) is the section most directly concerned with the recovery of attorney fees by one party against another within a dissolution action, and was the section of the Act that exclusively governed this area prior to the 1997 enactment of section 503(j) and the related amendment of section 508(a) (the 1997 amendments). *Konchar*, \*\*\* see also *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 344 (1999).

Considering all of the changes to section 508(a) together, we believe that the new reference to section 503(j) was intended not to impose an additional timing requirement for contribution petitions, but to codify other factors for courts to consider in awarding final fees. Prior to the 1997 amendments, the only factor that the statute expressly required a court to consider in deciding contribution issues was "the financial resources of the parties." 750 ILCS 5/508(a) (West 1996). Nevertheless, even before the 1997 amendments, courts actually considered other factors as well, including "the allocation of assets and liabilities, the award of maintenance, and the relative earning abilities of the parties when determining

whether one party should contribute toward the payment of the other party's attorney fees." In re Marriage of McGuire, 305 Ill. App. 3d 474, 478 (1999) (citing cases).

The amended section 508(a)'s reference to section 503(j), which directs courts to consider the factors listed in sections 503 and 504 of the Act when awarding attorney fees, makes the use of these factors explicit. See McGuire, 305 Ill. App. 3d at 479 (the 1997 amendments "merely codifie[d] the criteria that trial courts and courts of review have always considered in determining whether to award attorney fees and in what proportion." Thus, we conclude that section 508(a)'s mandate that fees and costs be awarded from the opposing party "in accordance with" section 503(j) must be read to mean that a court must take the factors delineated in section 503(j)(2) into account in deciding contribution petitions, not to mean that the timing requirements of section 503(j) govern all awards of attorney fees.

Our reading of section 508(a) is supported by the role of sections 508 and 503 in the overall statutory scheme of the Act. As we have noted, section 508 governs attorney fees and costs in proceedings related to dissolution or its aftermath. Section 508 makes no distinction between predecree and postdecree proceedings; in either proceeding, attorney fees are to be determined and awarded "[a]t the conclusion of the case."

By contrast, section 503 of the Act (750 ILCS 5/503 (West 2004)) is primarily concerned with the allocation of marital property, a process that takes place at the time the judgment of dissolution is entered. Entitled "Disposition of property," section 503 contains a variety of subsections relating to the equitable apportionment of the marital estate between the parties to a dissolution action. Only one of these subsections, subsection (j), deals with the allocation of attorney fees related to a dissolution proceeding. The overarching principle embodied in section 503 is that of equitable distribution: ensuring that marital property is fairly distributed between the parties, taking into account a variety of factors including a dozen factors listed in the statute. To ensure that equitable distribution is achieved, courts consider the issue of property distribution not in isolation but together with issues of \*\*\* and any other issue affecting the financial future of the parties and any children they have. In predecree proceedings, the apportionment of attorney fees is viewed as another aspect of financial allocation that a trial court must factor into the total picture at the time of dissolution.

Section 503(j) is clearly directed toward ensuring that all financial allocations are determined at the same time that attorney fees for predecree proceedings are sought. The timing requirements contained in section 503(j) thus are appropriate in the context of predecree proceedings. These same policy considerations have less force once the marital estate has been distributed and the initial allocation of financial assets has occurred. \*\*\* Accordingly, the imposition of section 503(j)'s time limits on the award of

attorney fees in postdecree proceedings is not warranted.

The appellate court finally addressed the practical reasons for its decision:

Prior to the entry of judgment in a case, attorneys face difficulties in preparing fee petitions that are sufficiently detailed, because fees typically continue to accrue throughout the final hearing or settlement negotiations that culminate in the judgment. Under *Konchar*, to preserve clients' rights to bring fee petitions later, attorneys must submit initial requests for fees long before the resolution of the issues raised by the postdecree petitions, and then prepare later, more detailed supplements immediately before the final hearings, a practice that results in the needless expenditure of attorneys' labor and clients' funds.

Moreover, the need for a petition for attorney fees may depend in part on the trial court's resolution of the postdecree request for relief. For instance, parties who receive financial relief on the merits may choose to forgo filing petitions, knowing that their financial situations are no longer likely to justify awards of contribution. \*\*\* Under the current practice, however, parties cannot wait until the issues are resolved before deciding whether to seek contribution; if they want to preserve the right to seek it at all, they must file petitions in advance. This creates an unnecessary drain on the resources of the courts and the parties.

*Blum* concluded:

In sum, we reconsider the holding of *Konchar* and hold that the time limits of section 503(j)(1) of the Act do not apply to petitions for contribution to attorney fees in postdecree proceedings. Rather, in conformity with the language of section 508(a) of the Act, such petitions are timely if filed "at the conclusion of the case," that is, within 30 days after the date on which judgment is entered.

**Macaluso — Case Contrary to *Konchar* Holding In Post-Divorce Proceedings No Bar Until 30 Days after Entry of Judgment:** For a while, the law seemed clear in this regard. A fee petition, even in post-judgment proceedings, must be filed before the final judgment is entered. However, the recent [Macaluso v. Macaluso](#), 334 Ill.App.3d 1043, 779 N.E.2d 250, 268 Ill.Dec. 636 (3rd Dist. 2002), GDR 02-55, decision, lends even less clarity to the issue. It disagreed with *Konchar* and held that a petition for contribution fees in post-judgment proceedings need not be filed before final judgment is entered, and the a petition may be filed at any time before the trial court loses jurisdiction — generally following the 30 day rule. *Macaluso* reasoned that the timing requirements of the contribution statute do not apply to post-divorce matters because Section 503(j)'s references to "the final hearing **on all other issues** between the parties," is specific to the bifurcated hearing required in pre-decree proceedings. I believe the *Macaluso* decision may be the better reasoned decision. Nevertheless, we have a clear conflict among the districts due to the fact that the legislation never really was drafted with post-divorce proceedings in mind.

**Lindsey-Robinson — First District Case Holding that Right to Object May be Waived by Participation and No Objection:** Muddying the waters even more as to the timing issue is the IRMO [Lindsey-Robinson](#), 331 Ill.App.3d 261, 265 Ill.Dec. 17, 771 N.E.2d 976 (1st Dist., 1st Div. 2002), (1st Dist., 1st Div. filed May 13, 2002), GDR 02-54 decision. Paulette Gray, now of The Gitlin Law Firm, successfully handled the appeal on behalf of Mrs. Robinson. This case stands for the proposition that there may be a waiver of the right to object to the timing of the contribution action. In this case, the appellate court ruled that the timing requirement may be waived by lack of objection and, at the hearing, by arguing to the merits of the fee petition.

**Fees for Prosecuting Appeals: Substantially Prevailed for Fees for Appeals — Obtaining 50% of Relief Sought — Murphy:** Originally, I had stated:

Another example of the poorly thought out nature of some of the amendments was the amendment to Section 508(a)(3.1) which provides that a party may obtain attorney's fees for the prosecution of an appeal if that party has “substantially prevailed.” [IRMO Murphy](#) (327 Ill.App.3d 845, 763 N.E.2d 933, 261 Ill.Dec. 684 (4th Dist. 2002), addressed the issue of what was meant by the term “substantially prevailed.” It ruled that for fees to be awarded under Section 508(a)(3.1), the party prosecuting appeal must obtain at least 50% of the relief sought.: The opinion states that to substantially prevail means to prevail “largely but not wholly,” taken from one dictionary definition. The analysis in *Murphy* measures relief sought versus relief obtained. It states that determination was not based on the fact that appellant prevailed on only one of four contentions raised but next commented that substantially prevails “suggests” one must obtain at least 50% of relief sought. It relied on federal law regarding the term “prevailed” as to fee awards in which only a partial victory was required. *Murphy* states that the term “substantially” must have been intended to prevent the application of the lower threshold.

Justice Cook dissented and properly suggested that the goal of Leveling Statute was to resolve conflict in case law as to whether fees could be awarded for successful appeal. Cook stated that it not sufficient that a party prevails nominally or technically. There must be a victory in substance — a real victory. The dissent quotes the primary definition of “real” from Websters as “not imaginary or illusory, real, true,” and stated that the requirement of an overwhelming victory runs counter to the 1997 amendments:

If a party has a legitimate basis for appeal we should not attempt to discourage that party from raising other issues as well, even though the party thereby risks obtaining less than 50% of the relief sought. The appellate court should attempt to provide guidance on troublesome issues, not penalize parties for raising issues other than sure winners.

Note that the Illinois Supreme Court has accepted cert. I expect a reversal from the Illinois Supreme Court.

In fact, the Illinois Supreme Court did reverse the decision of the appellate court. In *IRMO Murphy*, Docket No. 93436, opinion filed January 24, 2003, the Court required fees to be awarded for appellate proceedings on a “claim-by-claim” basis, that is, if on an individual claim the petitioner substantially prevailed on the merits. The *Murphy* Supreme Court ruled, “ We believe that the appropriate reading of this section is that, in the context of a petition for fees for prosecution of an appeal, the circuit court may only award fees incurred for those individual claims on which the appellant can be said to have “substantially prevailed” on appeal.” The *Murphy* Supreme Court stated:

Our construction of the statute obviates this concern. An appellant may petition for fees incurred in the prosecution of any issue on which he substantially prevailed on a prior appeal, regardless of how many other issues may have been raised. However, awarding appellate fees on a claim-by-claim basis also removes any affirmative incentive for a party to add frivolous issues on appeal along with meritorious issues, in hopes of increasing the fees which his opponent may be required to pay. By our construction of the statute a party may raise any claims he desires on appeal. While the circuit court may award fees for issues deemed meritorious by the appellate court, no recompense will be had for preparation of claims on which the appellate court determined not to grant relief.

**Failure to Comply with Court Orders — Compelling Cause or Justification Standard / Burden of Proof is on Non-Complying Party:** 508(b) of the IMDMA states:

In every proceeding for the enforcement of an order or judgment when the court finds that the **failure** to comply with the order or judgment was **without compelling** cause or justification, the court shall order the party against whom the proceeding is brought to pay the costs and reasonable attorney's fees of the prevailing party.

This was one more place in the statutory scheme that they were well intentioned did not any lend enough clarity. The key legal issue in addressing fees per Section 508(b) is the burden of proof issue, i.e., is the burden of proof the same as in contempt proceedings. If the burden of proof is the same as in contempt proceedings, then once a party would show non-compliance then the burden would shift. The “Leveling” amendment added the word “compelling” to the cause or justification language of Section 508(b). However, the amendments did not eliminate the double negative contained in this section. The first negative is the failure to comply. The second negative is the “without compelling cause or justification” standard. The statute states that once the court makes a finding that there is no compelling cause or justification, then fees are mandatory. This begs the question, however. The potential legal issue is who has the burden of showing whether there is a cause or justification for non-compliance once non-compliance is demonstrated.

[\*McGuire\*](#), 305 Ill.App.3d 474, 238 Ill.Dec. 689, 712 N.E.2d 411 (5th Dist. 1999), (discussed above) stated:

Generally, courts have broad discretion in determining whether to grant attorney fees in dissolution proceedings. However, when a party's failure to comply with an order is without cause or justification, an award of reasonable attorney fees and costs is mandatory. See *In re Marriage of Baggett*, 281 Ill. App. 3d 34, 666 N.E.2d 850 (1996) [Discussed below]. It is within the court's discretion to decide whether the delinquent spouse's failure to pay maintenance was "without cause or justification". (Citations Omitted.)

The issue not clarified by the above is who has the burden of proof per Section 508(b) once a party is shown not to have complied with a court order. There are several cases all holding that the burden of proof is on the party who does not comply with a court order. *McGuire*, 305 Ill.App.3d 474, 238 Ill.Dec. 689, 712 N.E.2d 411 (5th Dist. 1999), was the most recent Illinois appellate court decision addressing this issue (and the only post-Leveling decision).

*McGuire* further stated:

**Under section 508(b), if a party to a dissolution does not fulfill a condition imposed upon him or her by an order, the burden is on that party to produce evidence of cause or justification. See *In re Marriage of Baggett*, 281 Ill. App. 3d 34, 666 N.E.2d 850 (1996); 750 ILCS 5/508(b) (West 1994). According to section 508(b), as amended, the noncompliant party is required to demonstrate compelling cause or justification. 750 ILCS 508(b) (West 1996).**

The opinion noted that in that case the husband offered evidence as to his cause or justification for his non-compliance and did not reverse the trial court's discretion in ruling that the husband had met his burden of proof.

Similarly, *Baggett* (cited by *McGuire*) stated:

When an order has not been complied with, the court need not find the respondent in contempt, but it should then determine whether any failure to pay was "without cause or justification" for purposes of mandatory attorney fees under section 508 of the Act. *In re Marriage of Roach*, 245 Ill.App.3d 742, 748, 615 N.E.2d 30, 34 (1993).

*Baggett* pointed out that in contempt proceedings a *prima facie* case of contempt is established merely by establishing the non-compliance. The burden of establishing a defense of course shifts to the alleged contemnor. The *Baggett* court applies the same evidentiary rule to the "without cause or justification" issue in an application for attorney's fees for enforcement. *Baggett* stated:

In this case, the record is devoid of any evidence of [the ex-husband's] cause or justification for not complying with the order. Therefore, we hold that the court erred in not granting Rebecca attorney fees, and we remand for the court to determine a fair and reasonable amount of attorney fees.

Another case consistent with *Baggett* and *Roach* is *IRMO Young*, 200 Ill.App.3d 226, 147 Ill.Dec. 178, 559 N.E.2d 178 (4th Dist. 1990). Based upon this line of cases, it appears clear that the word “compelling” was likely added to the statute to indicate that once non-compliance is shown, the burden of proof to avoid payment of attorney's fees is that the non-complying party must show his or her **compelling** cause or justification for non-compliance. At least in this regard the amendment to Section 508(b) did not have the opposite intended effect. It probably does lend some additional clarity to this aspect of the fee statute.

A recent case is curious as it relates to attorney's fees for an “unreasonable” party. In *IRMO Menken*, 334 Ill.App.3d 531, 778 N.E.2d 281, 268 Ill.Dec. 295 (2nd Dist.2002), at issue was the husband's failure to consent to the issuance of a QILDRO affecting his state retirement benefits (Rockford police benefits.) The trial court entered an order that the father would not be required to pay fees unless he refused to consent to the issuance of a QILDRO. Later, when the husband in fact refused to consent, the trial court entered an order for fees. The appellate court gratuitously commented (because the father did not appeal the issue) that, “we feel compelled to note that the trial court should not have conditioned the amount of attorney fees on whether respondent signed the consent form. The issues were unrelated...”

**Ancillary Litigation:** The amendment to the legislation added the word “compelling” was a positive amendment to the statute. A piece of the legislation which actually gave clarity to the existing body of law was the addition to Section 508 allow fees for ancillary litigation. There had already been a body of case law providing that fees could be awarded for ancillary litigation, i.e., litigation reasonably related to the underlying proceeding.

**Letsinger -- Fees Re Removal of Lien from Former Marital Residence:** In *IRMO Letsinger*, 748 N.E.2d 812 (2nd Dist.2001), the appellate court ruled that the former wife was entitled to award of fees, in post-judgment proceedings, in which she sought to have lien of judgment against husband removed from real estate she owned (former marital residence).

**A Warning to Lawyers -- Voluntary Dismissal -- Improper to Pursue Fee Claim Against Your Client Following Dismissal:** A final line of cases which is significant is the case law addressing voluntary dismissal and its effect on fee awards. *IRMO Lucht*, 299 Ill.App.3d 541, 233 Ill.Dec. 624, 701 N.E.2d 267 (1st Dist., 3d Div. 1998) held that a lawyer may not file a petition for attorney's fees after a case has been voluntarily dismissed even though the petition may be filed within thirty days of the entry of the judgment for dismissal. It would seem, then, the only recourse would be to file an independent action, i.e., a contract cause of action.

## An Outline of the "Leveling" Amendments — §508 Only

\* This numbering of this outline corresponds to Leveling Amendments, **effective 6-1-97.**

By: Gunnar J. Gitlin

1. **OUTLINE OF THE LEVELING OF THE PLAYING FIELD ACT:**

- a. **Overall Goal:** Timely awards of interim fees to achieve substantial parity in parties' access to funds for litigation costs. (See 750 ILCS 5/102(5))
- b. **§ 508 -- ATTORNEY'S FEES, CLIENT'S RIGHTS & RESPONSIBILITIES RESPECTING FEES AND COSTS:**

a. **TYPES OF ACTIONS:** The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party's costs and attorney's fees. Interim attorney's fees and costs may be awarded from the opposing party, in accordance with subsection (c-1) of Section 501. At the conclusion of the case, contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503. Fees and costs may be awarded to counsel from a former client in accordance with subsection (c) of this Section. Awards may be made in connection with the following:

- (1) The maintenance or defense of any proceeding under this Act.
- (2) The enforcement or modification of any order or judgment under this Act.
- (3) The defense of an appeal of any order or judgment under this Act, including the defense of appeals of post-judgment orders.
  - (3.1) The prosecution of any claim on appeal (if the prosecuting party has substantially prevailed).
- (4) The maintenance or defense of a petition brought under Section 2-1401 of the Code of Civil Procedure seeking relief from a final order or judgment under this Act.
- (5) The costs and legal services of an attorney rendered in preparation of the commencement of the proceeding brought under this Act.
- (6) Ancillary litigation incident to, or reasonably connected with, a proceeding under this Act.

The court may order that award shall be paid directly to the attorney, who may enforce the order in his own name or that it shall be paid to the appropriate party. Except per 508(e)(1), 508(c) is exclusive as to right of counsel to petition for attorney's fees during the pendency of a proceeding

under this Act.

c. **FINAL HEARINGS AGAINST ATTORNEY'S OWN CLIENT:**

- (1) No petition may be filed unless motion for leave to withdraw has been filed or order of withdrawal has been entered. On receipt of petition of client under 508(c), counsel shall promptly file a motion to withdraw. If client and counsel of record agree, however, hearing on motion for leave to withdraw as counsel under 508(c)(1) may be deferred until completion of Alternate Dispute Resolution under 508(c)(4). As to any Petition for Setting Final Fees and Costs against a client or counsel over whom the court has not obtained jurisdiction, a separate summons shall issue. If summons not required, original notice to a petition may be served per Supreme Court Rules 11 (serving papers other than process on parties not in default) and 12 (proof of service). (*See 750 ILCS 5/508(c)(1)*).
- (2) **No final hearing permitted unless:**
  - (I) Counsel and client had entered into **written engagement agreement** within a reasonable time period after the client retained the counsel **and** the agreement meets the requirement of **508(f)**;
  - (ii) The written engagement agreement is **attached to an affidavit** of counsel that is filed with the petition or with counsel's response to a client's petition.
  - (iii) A contribution hearing judgment on behalf of the client has been entered or the **right to a contribution hearing under 503(j) has been waived**;
  - (iv) Counsel has **withdrawn**; and
  - (v) The petition seeks adjudication of all unresolved claims for fees and costs between counsel and client.

*Note: The key requirements can be summarized as follows:*

**Fee Agreement per 508(f):** The statute does not permit a final hearing for attorney's fees under § 508(c) unless a written engagement agreement (which includes the statement of client's rights and responsibilities per §508(f)) is attached to an affidavit of counsel that is *filed with the petition for attorney's fees*.

**Withdrawal:** *The lawyer must withdraw first.*

**Contribution Hearing:** *Either:*

Judgment in any contribution hearing has been already entered; or the client must waive the right to a 503(j) contribution hearing.

Query: Can a client waive a right to a contribution hearing in the engagement agreement? Assume you represent the spouse with greater financial ability to pay his attorney's fees. I believe that there could be a knowing waiver of this right in an engagement agreement. Clearly, I do not believe that waiving such rights is proper in a case where you represent the less monied party.

**Final Order Provision (508(c)(2) Continued):** Despite the fact that the petition for attorney's fees is heard in conjunction with an original proceeding under this Act, the relief requested under a petition for Setting Final Fees and Costs is a **distinct cause of action**. A pending but undetermined Petition for Setting Final Fees and Costs **shall not affect appealability of any judgment** or other adjudication in the original proceeding. (*See 750 ILCS 5/508(c)(2)*).

I have always claimed that the explicit language of this provision should not be read explicitly. Recently, the Illinois Supreme Court confirmed this point as to the "distinct cause of action" language when it addressed this language in *IRMO King* (December 18, 2003). It stated:

However, in ascertaining the meaning of a statute, a court should not read language in isolation, but must consider it in the context of the entire statute. *People v. Trainor*, 196 Ill. 2d 318, 332 (2001). Accordingly, the phrase "distinct cause of action" must be read together with the sentence immediately following, which states that a pending, but undetermined, petition for fees shall not affect the appealability of any judgment or other adjudication in the dissolution proceeding. By use of this language, section 508(c) contemplates that a petition for setting final fees may still be pending at the time a final judgment of dissolution of marriage is entered. In fact, the section recognizes that in some cases, a petition for fees will not even be filed until after a judgment of dissolution has been entered. Section 508(c)(5) provides that a petition, or a praecipe for fee hearing without the petition, must be filed no later than the expiration of the period in which it is permissible to file a postjudgment motion under section 2-1203 of the Code (735 ILCS 5/2-1203 (West 2000)). 750 ILCS 5/508(c)(5) (West 2000). Accordingly, given the separation of final fee petitions from other issues in the dissolution proceeding under the new procedures, there is no reason to defer finality and appealability of dissolution judgments until fee petitions are resolved. In such cases, the concerns we expressed in *Leopando* about the appealability of orders on interrelated issues in a dissolution case do not apply. It is in this context that the phrase "distinct cause of action" in section 508(c)(2) must be understood. The use of that phrase is simply a recognition that the issue of fees owed by a client to his or her attorney is not interrelated with other issues, such as child support, property division, and maintenance. As such, once these other interrelated issues are finally determined, the judgment

of dissolution is final and appealable, despite the continued pendency of the issue of attorney fees under section 508(c). Conversely, the amendments do not address the finality of attorney fee awards made prior to the entry of the judgment of dissolution of marriage.

- (3) **Impact of Written Engagement Agreement:** The determination of reasonable attorney's fees and costs under 508(c), whether initiated by counsel or a client or in an independent proceeding for services within the scope of subdivisions (a)(1) through (5), is within discretion of trial court. The court shall first consider the written engagement agreement and if the court finds that the former client and the filing counsel, pursuant to their written engagement agreement, **entered into a contract which meets the applicable requirements of court rules and addresses all material terms, then the contract shall be enforceable in accordance with its terms, subject to the further requirements of 508(c)(3).** Before ordering enforcement, however, the court shall consider the **performance pursuant to the contract.** Any amount awarded by the court must be found to be fair compensation for the services, pursuant to the contract, that the court finds were reasonable and necessary.

*Quantum meruit* principles shall govern any award for legal services performed that is not based on the terms of the written engagement agreement (except that, if a court expressly finds in a particular case that aggregate billing to a client were unconscionably excessive, the court in its discretion may reduce the award, otherwise determined appropriate or deny fees altogether). (See 750 ILCS 5/508(c)(3)).

*Thus, under 508(c) if there is a proper written engagement agreement, the issue is not whether hourly rates are reasonable (unless the aggregate billing is unconscionably excessive). Instead, the issue is performance under the contract and whether the services were reasonable and necessary. Further, it appears that as an element of the contract there may be a requirement for the client to inform the lawyer within a time certain or the account statement is valid. (See the 508(f)(5) language requiring the client to review each billing statement promptly and address any objection or error in a timely manner.)*

- (4) **Alternative Dispute Resolution:** No final hearing under 508(c) unless any controversy over fees and costs (that is not otherwise subject to some form of Alternative Dispute Resolution) has first been submitted to mediation, arbitration or any other court approved ADR procedure, except as follows:

(B) In any circuit court, other than Cook County, the requirement of the controversy being submitted to an ADR procedure is mandatory only if neither the client nor the counsel affirmatively opts out of such procedure, i.e., either client or counsel may opt out. After completion of

ADR, or after one side has opted out of such procedure, any pending motion for leave to withdraw shall be promptly granted and a final hearing under 508(c) shall be expeditiously set and completed. (See 750 ILCS 5/508(c)(4)).

- (1) **Independent Proceeding**: Counsel may pursue an award and judgment against a former client for legal fees and costs in an independent proceeding in the following circumstances:
  - (a) **While Case Pending 90 Days after Entry of Order Granting Leave to Withdraw**: While a case under this Act still pends, a **former counsel** may pursue such an award and judgment, at any time subsequent to **90 days after entry of order granting counsel leave to withdraw**; and
  - (b) **After Close of Period During which a Petition may be Filed under 508(c)(5) Filed Within One Year**: After the close of the period during which a petition (or praecipe) may be filed under 508(c)(5), if no such petition (or praecipe) for the counsel remains pending, any counsel, or former counsel, may pursue such an award and judgment, provided the complaint in the independent action is filed within one year after the close of the petition.

☞ In an independent proceeding, the prior application of this Section shall in no way be deemed to have diminished any other rights of any counsel to pursue an award and judgment for legal fees and costs on the basis of remedies that may otherwise exist under applicable law.

*The Leveling amendments in effect provide a one-year statute of limitations. First note that one year would be determined not from the date of the entry of the judgment of dissolution of marriage, but one year after the close of the period under which the lawyer could file a petition under §508(c)(5). The statute states that, "counsel may pursue an award and judgment against a former client for legal fees and costs in an independent proceeding in the following circumstances." It then states that, "**in an independent proceeding**, the prior applicability of this Section shall in no way be deemed to have diminished any other right of any counsel (or former counsel) to pursue an award and judgment for legal fees and costs on the basis of remedies that may otherwise exist under applicable law."*

**Third Party Complaint**: In an independent proceeding under 508(e)(1) in which the former counsel had represented a former client in a dissolution case that still pends, the former client may bring in his or her spouse as a third-party defendant.

**Third Party Complaint per §2-406 of the Code:** Former client (on or after the final date for filing a petition (or praecipe) under 508(c)), files an appropriate third-party complaint under §2-406 of the Code of Civil Procedure.

**Joint and Several Liability:** If so, any judgment later obtained by the former counsel shall be against both spouses or ex-spouses, jointly and severally:

**503(j) Contribution Action Exception:** If a hearing under 503(j) has already been concluded, the court hearing the contribution issue has imposed a percentage allocation between the parties as to fees and costs otherwise being adjudicated in the independent proceedings, the allocation shall be applied without deviation by the court in the independent proceeding and a separate judgment shall be entered against each spouse for the appropriate amount.

After the period for the commencement of a proceeding under 508(c) [end of period permissible to file a motion pursuant to §2-1203 of the Code -- generally within 30 days after the entry of a judgment], the provisions of this Section (other than the standard set forth in Section (c)(3) and the terms respecting consent security arrangements in 508(d)) shall be inapplicable. (See 750 ILCS 5/508(e)).

*Query: In an independent proceeding do the standards of §508(c)(3) in terms of assessing attorney's fees based upon performance under the contract apply? Yes. § 508(c)(3) includes attorney's fees and costs in an independent proceeding for services. Similarly, § 508(e) also refers to the applicability of the standards at § 508(c)(3).*

- (2) **Statement of Client's Rights and Responsibilities:** (See 750 ILCS 5/508(F)). Note, there is a provision which states, “**The client should review each billing statement promptly and address any objection or error in a timely manner.**” This language is one of the few areas which are favorable to a lawyer seeking fees against his or her own client. This language may be consistent with an account stated theory of case and the language should be included as part of the fee agreement itself.

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