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Family Law

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FAIR Is the Four-Letter 'F-Word' in Divorce

BY L. STEVEN RAKOWSKI

How many times have you heard this from a divorce client: "I just want what's fair!" If there is a more loaded statement by a client than that, I have yet to hear it. Any seasoned divorce practitioner will tell you a key to a happier (notice I didn't say happy) client at the end of the case is realistic goal setting (i.e., expectation management) early in the case. The trick is in aligning the client's ideals with prevailing law and case facts.

Interpretations by the client of their experiences result in perceptions that they believe should predominate settlement negotiations. Identifying the client's perceptions and the facts or experiences underlying them is often the key to unlocking a case's settlement potential. In her article *Perceptions of Fairness in Negotiations*, Nancy Welsh identifies two core types of perceptions to be aware

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Cases and Issues to Watch

BY RALEIGH D. KALBFLEISCH

Abortion and Healthcare

The Supreme Court has granted review in *Food and Drug Administration v. Alliance for Hippocratic Medicine*, No. 22A902 (5th Cir.) in which the Court will review the 5th Circuit decision that overturned actions of the FDA which made it easier to prescribe mifepristone, a drug used to induce abortions. There are three issues before the Supreme Court: (1) Whether respondents (anti-abortion group) have Article III standing to challenge the Food and Drug Administration's 2016 and 2021 actions with respect to mifepristone's approved conditions of use; (2) whether the FDA's 2016 and 2021 actions were arbitrary and capricious; and (3) whether the district court properly granted preliminary relief.

One of the arguments being advanced by the anti-abortion groups in this litigation is the application of the 150-year-old federal Comstock Act which makes it a crime to mail or ship anything that could intend that an abortion occur. Application of this law could effectively lead to a nationwide ban on abortion. As more than half of all abortions in the United States are medically induced using

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of during negotiations: Distributive, procedural, and cultural. Nancy Welsh, *Perceptions of Fairness in Negotiations*, Marquette 87 Marquette L. Rev. 753-67 (2004). Knowing about these perceptions and consciously taking steps to manage them can help shorten your path to case resolution.

Distributive perceptions are the more common preconception. They are often rooted in principles and sometimes those principles are firmly rooted in the client's sense of identity. Principles that drive this perception include:

- Equality (50/50 split);
- Need (income disparity);
- Generosity (equalize lifestyles); and
- Equity (relative contributions during the marriage).

These concepts lead people to feel they are receiving a just share of available resources. The closer the outcome of a negotiation to the application of these principles, the greater the chance the negotiator will accept the outcome as "fair."

The problem is that myriad variables influence which principles apply to any given negotiation. And they are unpredictable and irrational. Self-interest, cultural norms, needs, and relationship all drive their perceptions of a fair outcome. So how does one manage these variables in a way that can positively impact a negotiation? Messages from "neutral sources," respectful treatment during the negotiation process, and an experienced lawyer's rational analysis on a range of potential outcomes can all interject rationality into an otherwise social and psychological morass.

Next is the procedural perception. This perception is driven by the facts and circumstances a litigant or negotiator experiences during the dispute resolution process. If a person feels they were treated fairly, the outcome is more likely to be perceived as "fair" even though it may be inequitable. They are also more likely to comply with terms of the outcome and afford the decision-making process more respect.

Some good news: Unlike with distributive perceptions, there is consistency in the criteria used to judge whether a process is procedurally "fair." As subjective as one's perceptions of distributive principles may be, a person's perception of procedural "fairness" is predictable and promotable. As attorney for a litigant in negotiations, one should focus on four process-promoting features including: allowing a person to tell their story; consideration received from the decision-maker; signs from the decision-maker of effort to treat each in an even-handed manner; and affording a party respect. Whether we are a mediator or advocating for a litigant in the most acrimonious case we can do a great deal to foster process promotion. More importantly, we should avoid behaviors that compromise perceptions of procedural "fairness." Whether in a litigated, mediated, or negotiated setting, research shows treatment that promoting dignity and respect can lead to decisions not necessarily in one's own interest.

In this author's experience there is a third perception we need to acknowledge—the cultural preconception. Cultural perception is rooted in pride and loyalty: Pride in the achievements and attributes of a particular ethnic group and loyalty to the social mores that group promulgates. Mores are strict in the sense that they determine the difference between right and wrong in a given society, and people may be punished for their immorality which is commonplace in many societies in the world, at times with disapproval or ostracizing. A striking example of this is how in a certain culture, a male child becomes the property of the father upon reaching a particular age. This dynamic can be as difficult to deal with as the distributive perception because it, like distributive perceptions, can be irrational and unpredictable. Often, the litigant is not even aware they possess this preconception because it has been part of how they were

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raised. It is just who they are.

To address the cultural perception a practitioner should encourage the client, or both parties in the negotiation setting, to focus on the neutral application of the law. Downplay the conflict between the effect of the relevant law and the social more. Explain how the law is the result of years of objective debate on a particular issue and designed to promote an entirely neutral outcome-though in application it appears biased. Stress that the application of the law is not a form of disrespect but a necessary tool to eliminate the unresolvable problem of conflicting mores.

Client expectations and attitudes drive our cases. Managing those attitudes is not just to reduce stress of our job or shorten the case duration. In this author's opinion it is an ethical obligation we have to the client to guide that client to a less damaging outcome and point out a more direct path to healing. In some cases, your efforts will be rebuked by one or both parties and that is just the reality of our business. However, identifying the perceptions, having a colleague on the other side who shares your ideals, and having the tools to counter-act the perceptions could make all the difference in baggage laden cases.■

Cases and Issues to Watch

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this drug, the stakes could not be higher, and because many states have greatly restricted or prohibited virtually all abortions, medially induced abortions have taken on even greater importance.

Assisted Reproduction

The Alabama Supreme Court in *LePage et al v. the Center for Reproductive Medicine, P.C., et a*l, SC-2022-0515 (Alabama Supreme Court, February 16, 2024) held that frozen embryos are "children" under state law. This decision could have sweeping implications for fertility treatment in the state and other states along with a chilling effect on anyone seeking IVF treatment. Noting here that the Pope has said that IVF and other fertility treatments are "against natural law" and condemning these treatments.

The decision was issued in a pair of wrongful death cases brought by three couples who had frozen embryos destroyed after a break-in at a fertility clinic. Citing anti-abortion language in the Alabama Constitution as well as scripture, the court held that a state law allowing parents to sue over the death of a minor child "applies to all unborn children, regardless of their location." This sweeping definition includes fertilized eggs. U.S. Senator Tammy Duckworth has introduced a bill that would establish a statutory right to access IVF and other fertility treatments in Illinois, thereby pre-empting any state effort to limit such access and ensuring no hopeful parent - or their doctors - are punished for trying to start or grow a family; in the days since the decision was issued, Alabama state legislators, including conservative anti-abortion legislators, have been trying to statutorily protect IVF. This decision is likely to have a significant impact on any same sex couples seeking to become parents if it stands and is not reversed via legislation.

In *Smith v. Smith*, No. A23A0896 (Georgia Court of Appeals, September 18, 2023), the appellate court dealt with the use of single cryopreserved embryo upon a couple's divorce. Concluding that the embryo is marital property, and applying Georgia's equitable division of property doctrine, the trial court granted the divorce and awarded custody of the frozen embryo to the wife. The appellate court reversed and began its analysis by acknowledging the three approaches taken by courts in determining the disposition of an embryo in a divorce: (1) contract; (2) balancing; (3) contemporaneous mutual consent. The court followed the majority approach by first looking at any contractual provisions, and failing that, balancing the parties' interests. The challenge with this case was that the contract the parties signed was hopelessly confusing, contradictory, and overlapping. While the trial court focused on divorce specific language, the appeals court focused on broader language concerning disposition and the two courts reached completely different results.

**Practice tip here is to make sure we are asking our clients if they have frozen eggs or embryos, and if so, what are their plans for use of these 'assets' after the divorce.

In an even more bizarre ruling, the Virgina Court used its still (yes, still) current slave codes used to decide embryos are property that can be distributed in a divorce proceeding. In the case of *Weiland v. Weiland*, No. CL-2021-0015372 (Fairfax County, Virginia, February 8, 2023), a district court judge in the state of Virginia held that a divorced woman seeking the use of their stored embryos could sue on the basis of a law that governs the partitioning and distribution of goods or "chattels on land." The judge found that application of this law was not limited to goods or chattels on land being partitioned, given an 1849 version of the law titled "partition of slaves and other chattels." Slaves could be sold under the old law even though they were not annexed to the land. Given the "origins and evolution" of the current law, the trial judge reasoned, it permits goods or chattels to be partitioned as personal property not annexed to land." For more discussion of these case, see Antonio Planas, "Virginia judges cites slavery rulings when determining human embryos are property," The Associated Press, March 10, 2023.

Second Amendment, Gun Rights, and Orders of Protection

In *New York State Rifle & Pistol Association v. Bruen,* No. 20-843 (United States Supreme Court, June 23, 2022), Justice Clarence Thomas, writing for the majority, expressly rejected any balancing of the government's interests in regulating guns with a claim of Second Amendment rights and indicated that the government must demonstrate that the regulation is consistent with this nation's historical tradition of

firearm regulation; only if the regulation is consistent with that historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Given that under Illinois law, anyone who has a domestic violence order of protection against him/her, including an interim order of protection, emergency order of protection, or plenary order of protection, cannot legally have a firearm, this may have significant and serious implications in Illinois should gun rights advocates find a way to subvert the current laws to allow abusers to keep their firearms. Although this next case comes out of Texas *U.S. v. Perez Gallan*, PE:22 CR 00427 DC (United States District Court, Western District of Texas, Pecos Division, November 10, 2022) it has the same line of thinking that Justice Thomas Used. There, the court reasoned that because the framers did not care about domestic abuse or intimate partner violence, you could not regulate their access to firearms in domestic abuse proceedings. "[T]he historical record does not contain evidence sufficient to support the federal government's disarmament of domestic abusers. And without historical support, § 922(g)(8) does not overcome [the litigant's] presumption that the Second Amendment protects an individual's possession of a firearm. Thus, § 922(g)(8) is unconstitutional." To back up this nauseating conclusion, the court reasoned that in 1874, yes, 1874, "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous •.•, violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive." The court also noted that "prominent domestic violence researchers agree that even into the early twentieth century, judges were "more likely to confiscate a wife beater's liquor than his guns."

See also, *United States v. Rahimi*, No. 21-1101 (United States Court of Appeals, Fifth Circuit, February 2, 2023), now before the United States Supreme Court for review where the Fifth Circuit reached the same conclusion as the district court in *Perez Gallan*. In *Rahimi*, a three judge panel of the federal Fifth Circuit Court of Appeals held that the federal prohibition on gun possession for people subject to domestic violence restraining orders (DVROs) is unconstitutional under the Second Amendment, holding that§ 922(g)(8) "falls outside the class of firearm regulations countenanced by the Second Amendment." Although the panel stated that the statute "embodies salutary policy goals meant to protect vulnerable people in our society," it noted that "Bruen forecloses any such analysis in favor of a historical analogical inquiry into the scope of the allowable burden on the Second Amendment right." Accordingly, the court concluded that§ 922(g)(8) "is an 'outlier that our ancestors would never have accepted."

First Amendment and Discrimination

In *303 Creative v. Elenis*, No. 21-476 (June 30, 2023). The United States Supreme Court held that it violates the First Amendment to apply a state's anti-discrimination law to a business when doing so would require expressive activity that violates the owner's beliefs. There, the plaintiff owned a business designing websites. She wanted to expand her business to design websites for weddings but did not want to do so for same-sex weddings, saying it would violate her religious beliefs. Colorado law prohibits business establishments from discriminating based on sexual orientation. The Supreme Court held that to apply the anti-discrimination law for failing to serve same-sex weddings would violate Smith's freedom of speech. Notably, the Court did not address the free exercise of religion claim.

Definition of a Parent

Legal recognition of three-plus parent families continues to expand. The existence of more open and polyamorous relationships and novel family structures generally continues to expand, with many families looking for legal recognition of more than two parents including heterosexual families where a stepparent seeks to establish legal parentage or families where more than two adults plan to act as parents to a child, whether or not there is a romantic relationship with the other parents. A group called the Polyamory Legal Advocacy Coalition (PLAC) has drafted a model ordinance for multi-partner domestic partnerships that has been adopted in Cambridge, MA and Arlington, MA. Interestingly, Great Britain's government agency that regulates fertility matters recently confirmed the births of the UK's first babies created using an experimental technique combining DNA from three people as part of an effort to prevent the children from inheriting rare genetic diseases. Maria Cheng, Star Tribune, May 11, 2023.

Miscellaneous

Colorado has passed a law giving rights to donor conceived persons. There, adults who were conceived with egg or sperm donors sought to establish a legal right to know the identities of their biological parents. The U.S. Donor Conceived Council, many of whose board members found out in adulthood they have a donor parent, spearheaded the introduction of a law passed last in Colorado that requires, beginning in 2025, that people who donate genetic material must reveal their identities to biological children who inquire after turning 18. Intended parents, and families in the LGBTQ community are concerned the law puts emphasis on biological parentage over functional parentage and will cause donors who want anonymity to not be donors. For more information, see the article by Amy Dockser Marcus, "Laws Spur Debate on What is Family," The Wall Street Journal, June 27, 2023.

Based on a statute passed last year, family courts in Colorado custody cases cannot cut off a child's contact with a protective parent to whom they are bonded just to improve a relationship with a rejected parent accused of abuse or domestic violence. Nor can Colorado courts order "reunification treatment" for children that is based on cutting off contact with the protective parent, and "reunification treatment" cannot be ordered at all unless there is generally accepted and scientifically valid proof of the therapeutic value and safety of such treatment.

Michigan stands alone as the only state in the country that criminalizes surrogacy.

However, efforts are now underway to change that and make surrogacy contracts both enforceable and protective of the parties to them.

A broad trend has been established favoring guardianship transfers over terminations of parental rights and adoption in juvenile court child protection proceedings. *See* the Academy of Adoption and Assisted Reproduction list serve. There also appears to be a related trend of more and more foster parents pushing more aggressively to obtain party status in child protection and permanency proceedings in order to challenge the return of the children in their care to biological parents or relatives.

South Korea's Truth and Reconciliation Commission has announced that it will investigate 237 more cases of South Korean adoptees who suspect their family origins were manipulated to facilitate their adoptions in Europe and the U.S. The new cases involve adoptees from 11 nations, including the US, who were adopted from 1960 to 1990. The allegations are that some of the children were falsely described as orphans or their identities were misrepresented by borrowing details from a third person. The potential findings could allow adoptees to take legal actions against agencies or the government. About 200,000 South Koreans. mostly girls, were adopted to the West in the past six decades, creating what is believed to be the world's largest diaspora of adoptees. Kim Tong-Hyung, Omaha World Herald. June 11, 2023.

The credit for putting together the list of family law cases from which I cherry picked the cases cited above belongs to Minnesota Attorney Gary A. Debele. If anyone is interested in the 30 pages of case law from around the United States, please let me know and I will send you the information.■

Order of Protection Against Transphobic Parent Upheld

BY PETER SULLIVAN

In its recent opinion in *In re A.A. v. Nita A.,* the Illinois Appellate Court addressed the issue of transphobia within the family and cleared a path for the issuance of orders of protection against a family member who harasses a transgender child for being transgender.

Too often and for too long, we have heard of unaccepting parents expelling minor children from the home for being LGBTQ.[1] Similarly problematic, other parents have harassed their children, even into adulthood, waging an unwanted campaign to reverse their LGBTQ children's sexual identity. The recent decision in *In re A.A. v. Nita A.*, 2023 IL App (1st) 230011 (Nov. 22, 2023) (hereafter referred to as "the A.A. case"), is the first reported case in Illinois confronting this latter type of parenting.

In brief, the A.A. court recognized that such intra-family behavior can constitute abuse under the Illinois Domestic Violence Act of 1986 (hereafter referred to as "the Act").[2] Further, in the spirit of the stated purposes of the Act,[3] the court rejected arguments that would render the statute potentially unhelpful to such. As examples, the A.A. court ruled: (1) Under the Act, once personal jurisdiction over the respondent is established, a court has subject matter jurisdiction over abuses the respondent may have committed beyond the borders of Illinois – whether in person or by electronic communication;[4] (2) in determining whether to issue an order of protection, one factor a court must consider is the respondent's past abusive conduct, no matter how historically far back that abuse occurred;[5] and, (3) a petitioner's acceptance of financial assistance from the respondent is no bar to the issuance of an order of protection on the petitioner's behalf.[6]

History of harassment and threats.

In the A.A. case, the transgender petitioner alleged that their mother harassed them, over a period of approximately seven years, solely because they are transgender and associate with other LGBTQ individuals.[7]

A.A. testified that, in 2013, they left the family home in New Jersey to attend college in California. Although A.A. pleaded with their mother to allow them to live independently, the mother moved to California to live with A.A. While living with A.A., the mother [was closely monitoring their emails and text messages. She] told A.A. that, when A.A. was not home, she just assumed A.A. was "off doing LGBT behaviors." Whenever A.A. failed to respond to her daily barrage of emails and text messages, the mother would send them single-character text messages, as many as "100 times in a row."[8]

From March 2014 through May 2015, the mother's numerous texts and chat messages became more hostile and threatening. The chat messages included statements such as "lay off lgbtq or else"; "young man go home to your mama she make you a real girl or I beat the crap out of you for leaving your mama in hell"; "[you're] mutating your body and becoming a major freak"; "you are at Caltech for education and your degree …, not to …be a kept woman in LGBT hell by the KKK of lgbtqs [at] Caltech"; and, "sure, lgbtq away to death." At the hearing, A.A. testified that the messages caused them "significant stress, including depression, anxiety" and "difficulty engaging with school." Screenshots of the messages were

admitted into evidence.[9]

In spring of 2016, A.A.'s relocated to on-campus student housing without providing contact information to their mother. The mother nevertheless investigated their whereabouts and persisted in sending them frequent emails, text messages, and voicemails. Near the end of 2016, the mother somehow learned that A.A. had obtained a prescription for hormone replacement therapy, and she warned them of the dire consequences of such therapy. At that time, A.A. made clear to their mother that they "had no desire for further contact or to live with" her. Despite the petitioner's express prohibition, the mother continued to intrude on A.A.'s on-campus life. When A.A. filed paperwork for a legal change of name and gender, their mother stated in emails to A.A. that people would discover the change and go to A.A.'s home to kill them.[10]

Moving to Chicago to pursue a master's degree at the University of Chicago, A.A. kept their new address a secret and refused the mother's offers of financial assistance. Nevertheless, the mother learned where A.A. was living, and arranged for debit and credit cards in A.A.'s pre-transition birth name. A.A. never used the bank cards.[11] (The appellate court recognized that the use of a former, pre-pre-transition name [commonly referred to as one's "dead name"] is disrespectful and causes hurt.)[12]

In the spring of 2020, for three months following the outbreak of the Covid-19 epidemic, A.A. stayed rent-free at their family home in New Jersey. Upon leaving the home, A.A again asked the mother to have no further contact with them. Despite this repeated prohibition, the mother continued to send emails and text messages. The following year, shortly before the filing of the petition, the mother managed to discover where A.A. was living while pursuing a doctorate degree at Northwestern.[13] A.A. testified that, without an order of protection in place, their mother would continue to harass them.

The trial court's findings and order.

On these facts, the trial court found the existence of abuse and issued an order of protection that required the mother to stay away from and not threaten or abuse A.A. for six months. The trial court declined to issue a longer, two-year order of protection, because it believed the strongest evidence of abuse related to events in 2014 and 2015, and "it was possible that [the mother] could have a loving relationship with A.A. in the future."[14]

By reason of the "public interest" exception to the mootness doctrine, the appellate court had jurisdiction to hear this appeal from an expired order of protection.

The six-month order of protection in A.A. had expired before the mother's appeal came up for review. Ordinarily, an appellate court lacks jurisdiction to rule on such matters. "In general, an appeal that challenges an order of protection that has expired is moot." *In re A.A.*, at ¶ 24 (quoting *Landmann v. Landmann*, 2019 IL App (5th) 180137, ¶ 11). In its decision, however, the appellate court explained that it retained jurisdiction, because its ruling on this matter would provide guidance for expected future cases of public interest, an exception to the mootness doctrine. The court recognized the higher aims of its decision on this appeal, as follows:

Protecting transgender individuals from abuse by family members is a matter of public interest, and unfortunately, it is likely that transgender individuals will face abuse from family members in the future. There appear to be no reported appellate decisions that address how the Act applies to transgender victims of domestic abuse, so it is necessary to provide guidance as to how courts should apply the Act in cases where transgender individuals are found to be victims of harassment.[15]

The parent's harassment of her adult transgender child constituted abuse under the Domestic Violence Act of 1986.

The appellate court succinctly stated the legal prerequisites to the issuance of an order of protection, attributable to harassment by a family member, as follows:

The Act provides that "any person abused by a family or household member" may file a petition for an order of protection. 750 ILCS 60/201(a)(i), (b)(i) (West 2020). A family or household member includes parents and "persons who share or formerly shared a common dwelling." *Id.* § 103(6). Abuse under the Act includes "harassment" (*id.* § 103(1)), which means "knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner" (*id.* § 103(7)). "If the court finds that petitioner has been abused by a family or household member *** an order of protection prohibiting the abuse, neglect, or exploitation shall issue." *Id.* § 214(a).[16]

Utilizing the "manifest weight of the evidence" standard of review, the appellate court concluded that the evidence sufficiently demonstrated that the mother's harassment of A.A. constituted abuse within the meaning of the Act:

We find that the trial court's decision to grant the order of protection was not against the manifest weight of the evidence. There is no dispute that A.A. and [A.A.'s mother] Nita are family members who lived together from fall 2013 to spring 2016 and again in the summer of 2020. See 750 ILCS 50/103(6) (West 2020). From 2014 through 2021, Nita sent A.A. harassing text messages, e-mails, and voicemails. The Third District has found that sending 27 unwanted text messages and 6 voicemails over the course of approximately two hours constitutes "stalking behavior" (*Coutant v. Durell,* 2021 IL App (3d) 210255, ¶¶ 75-78), so it is reasonable to conclude that Nita sending dozens of unwanted messages over several years, despite A.A. requesting her to stop, constituted stalking behavior as well. Nita also made unwanted in-person contact with A.A. in multiple cities, including Pasadena, San Bruno, Berkeley, and Chicago after A.A. had directed her to cease contact. As recently as late 2021, Nita communicated that she knew where A.A. lived in Evanston, Illinois, and that she had visited Evanston. Altogether, the evidence showed that Nita verbally harassed and stalked A.A. despite A.A. repeatedly telling Nita to stop.[17]

The appellate court further found that the evidence established that "transphobia motivated [the mother's] abusive behavior" throughout the relevant time period.[18]

The messages from 2014 and 2015 explicitly referred to A.A.'s transgender identity and their association with LGBTQ individuals and groups. At least two of those hostile messages included suggestions of violence, such as Nita's threat to "beat the crap" out of A.A. and her suggestion that A.A. should "lgbtq away to death." In 2016

and 2018, respectively, Nita criticized A.A.'s decision to undergo hormone therapy and to change their legal name and gender. In 2019, Nita gave A.A. bank cards issued under A.A.'s "deadname," which is the name given at birth to a transgender individual that the person no longer uses after transitioning. See Christiana Prater-Lee, *#Justice4Layleen: The Legal Implications of Polanco v. City of New York,* 47 Am. J.L. & Med. 144, 145 n.18 (2021). The use of a transgender person's deadname is disrespectful. *Id.* at 145. **Harassing A.A. to not express their identity as transgender is not a reasonable or necessary purpose, and A.A.'s uncontested testimony was that Nita's behavior caused emotional distress.** See 750 ILCS 60/103(1), (7) (West 2020). The evidence clearly established abuse as the Act defines it and supported the trial court's decision to issue an order of protection.[19]

Thus, in general, harassing an LGBTQ family member to have them refrain from identifying themselves as LGBTQ, and thereby causing them emotional distress, constitutes abuse under the Act.

Once personal jurisdiction has been established, the court may consider alleged acts of abuse that have occurred outside Illinois.

The mother in A.A. was served in open court and did not contest personal jurisdiction. Nevertheless, she contended that "the trial court lacked jurisdiction because the alleged abuse occurred primarily outside of Illinois."[20] In response, the appellate court held that, once personal jurisdiction has been established, there are no territorial limits to the subject matter of the Act.[21] In addition, going as far as characterizing Illinois as "a haven for victims of domestic violence," the A.A. court set forth public policy reasons to reject the mother's arguments in favor of such limits:

Nita's interpretation of the Act as being limited to abuse that occurred in Illinois would leave a victim of abuse that occurred in another state unable to obtain an order of protection upon moving to Illinois, even if the abuser followed the victim to Illinois. Such a limitation would render Illinois ineffective as a haven for victims of domestic violence, which is contrary to the purpose of the Act. See *id*. § 102(3)-(4) (purposes of the Act include not "allowing abusers to escape effective prosecution").[22]

Accordingly, the appellate court found that the trial court had jurisdiction to hear A.A.'s petition for an order of protection against their mother, based on acts that occurred outside the state.

Past abuse – even abuse that occurred many years earlier – is relevant in determining whether to issue an order of protection.

The parent in the A.A. case argued that "the messages from 2014 and 2015 [examples of which are set forth in this article] were too far in the past for the trial court to properly consider them."[23] Approaching this as a relevance argument, the appellate court adopted the reasoning of another recent First District case, *Richardson, v. Booker*, 2022 IL App (1st) 211055, and rejected the mother's argument:

Richardson holds that evidence of past abuse is relevant to a trial court's determination as to whether abuse occurred regardless of whether the prior abuse occurred 40 years ago or 5 years ago. [2022 IL App (1st) 211055], ¶59. That is because the Act itself "expressly directs courts to consider instances of past abuse" without limitation as to time. *Id.,* ¶ 56 (citing 750 ILCS 60/214(c)(1)(i) (West 2020)).[24]

The reasoning of the *Richardson* opinion "clearly support[ed] the trial court's conclusion that Nita's abuse of A.A. in 2014 and 2015 via Gmail chat message was relevant and admissible at the order of protection hearing in 2022."[25]

Accepting financial assistance from an alleged abuser does not preclude the victim from obtaining an order of protection.

In a final public policy ruling, the A.A. court forcefully rejected the mother's argument that her child's acceptance of housing and financial assistance over the period of the alleged abuse precluded them from seeking protection under the Act.

This argument is meritless. Merely because one adult gives another adult financial support does not absolve the adult with more resources from violating the Act. **A parent providing financial support for her child, particularly in young adulthood, does not give that parent license to abuse the child.** Nita cannot and did not "buy" the right to abuse A.A.[26]

In the court's view, a victim who accepts financial support from an abuser is still a victim and can, despite benefiting from the financial support, utilize the protections of the Act.

Until another ruling by an appellate court or the Illinois Supreme Court on the subject, the decision in *In re A. A.* is now the leading authority available to transgender individuals seeking relief under the Illinois Domestic Violence Act.■

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1. See, e.g., Sonia Renee Martin, "*A Child's Right to be Gay: Addressing the Emotional Maltreatment of Gay Youth*," 48 Hastings L.J. 167 (1996). For the connection between expulsion of LGBTQ teens from their homes and hundreds of thousands of homeless teenagers and adults, see, e.g., Alex Morris, "*The Foresaken: A Rising Number of Homeless Gay Teens Are Being Cast Out by Religious Families*," Rolling Stone, (Sept. 3, 2014); Center for American Progress, "*Gay and Transgender Youth Homelessness by the Numbers*," CAP 20 Article (June 21, 2010).
2. The Illinois Domestic Violence Act of 1986, 750 ILCS 60/101 -750 ILCS 60/401 (West 2023); *In re A.A. v. Nita A.,* 2023 IL App (1st) 230011, ¶¶ 25, 43, 49.
3. See 750 ILCS 60/102.
4. *In re A.A.*, ¶¶ 26-30.
5. *Id.*, ¶¶ 43-44.
6. *Id.*, ¶ 50.
7. *Id.*, ¶¶ 1, 3 note 1. The appellate court used the initials LGBTQ to refer to "lesbian, gay, bisexual, transgender, and queer … individuals." *Id.,* ¶5. When referring to A.A., the court conformed to A.A.'s use of the "they/them" pronouns. *Id.,* ¶3, n.1.
8. *Id.*, ¶ 4.
9. *Id..*, ¶ 5. For appellate court's discussion of issues relating to the authenticity and admission of the screen shots, see *id*., ¶¶ 39-42.
10. *Id.*, ¶¶ 6-8.
11. *Id.*, ¶¶ 10, 14.
12. *Id.*, ¶¶ 9, 49.
13. *Id.*, ¶ 12.
14. *Id.*, ¶ 15.
15. *Id.*, ¶ 25.
16. *Id.*, ¶ 21.
17. *Id.*, ¶ 48.
18. *Id.*, ¶ 49.
19. *Id.* (emphasis added).
20. *In re A.A*., ¶ 28-29.
21. *In re A.A*., ¶ 28.
22. *In re A.A*., ¶ 30 (emphasis added).
23. *In re A.A*., ¶ 44.
24. *In re A.A*., ¶ 44 (emphasis added). In another effort to exclude evidence of abuse that she considered "too far in the past," the mother urged that in cases under the Act, a civil statute which has no express limitations period, the court should enforce the "default" five-year statute of limitations. See 735 ILCS 5/13-205 ("all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued."). However, the mother had waived that argument by not raising it in the lower court until after the issuance of the order. Moreover, on appeal, she supplied no case law in support. *Id.*, ¶¶ 32-35.
25. *In re A.A*., ¶ 44.
26. *In re A.A*., ¶ 50.

Don't Be a 'Wimpy' Lawyer

BY RORY T. WEILER

Recently, a colleague posted on our Family Law Community seeking advice on how to collect fees from recalcitrant clients. Specifically, armed with a judgment against the former client, what are the best practices to secure payment? Should a collection agency be engaged? Perhaps the services of a collection lawyer? Some suggested attempting collection on one's own, utilizing the array of supplemental proceedings (citations to discover assets, non-wage garnishments, etc.), to save on the costs of engaging others to try to collect. Now in my 45th year of practice, I believe I've had more, or at least, my fair share, of deadbeat clients. Here are a few things I've learned along the way, some learned at greater expense than others. So, let's start at the very beginning, as we all know, a very good place to start.

Hiring the Client

The best way, albeit the most difficult thing to do to avoid accruing huge uncollectable receivables is to not take the case in the first place. The initial consult is your first and best opportunity to determine if you want to take the case, and that decision should be based upon two factors. Of course during that conversation, you are going to determine whether the client's demeanor, expectations, attitude, and factual posture is something you want to take on. Obviously, not everyone who sits down in your office is going to be a good fit for your practice, and most of us, after assessing the client's first impression (always as good as it will ever get), will decide if, on the hassle meter, the client will be tolerable within our own individual parameters of difficulty.

Secondly, and more to the point for this article, that initial consult is your best opportunity to determine whether, based upon the client and the information he or she provides, has the wherewithal to be able to pay the fees that are going to be incurred. If they don't, why become involved at all? Many times, that potential client walks in and before you've had a chance to sit down, slaps a check on your desk and pushes it toward you, advising that he knows your retainer is thus and so, and here it is. When that happens, I push it right back to the potential client and said, let's get to know each other so we can see if I'm a good fit for your case.

Was I being magnanimous? Sure, maybe, but over the years I've learned that borrowing a retainer isn't really all that difficult; most folks today can come up with some kind of retainer and are aware that they're going to have to pay one. But after gently exploring their financial situation, if it appears that the proffered check is all they have to give you, run, don't walk, away. I'm sure there's no scientific correlation, but in my experience, the potential client who feels the need to assure you that he has the economic wherewithal to hire you is usually the one who will never make another payment again. As I used to say, I can play golf and not get paid. Much like practicing family law, golf is also often frustrating, but at least I'm outdoors, and the company is generally better.

I understand that economic pressures sometimes lead to thinking, like Dean Martin in "Back to School," well it is a pretty big check. Every time you think about taking a client's case for the short money, remind yourself that in six months, when that retainer is long gone and you're looking at a five-figure receivable, that instead of working for your normal hourly rate, you gave Mr. Short Money a 90 percent discount. And he's not even family.

Managing the Business Relation With the Client

In today's technological environment, there's no reason not to bill on a monthly basis, and honestly, I don't know how any lawyer can remain solvent not doing so. Billing monthly is obviously roundly recommended by folks as a tool to keep the client informed as to your activity on his behalf and discourage client griping six months down the road about an email you reviewed or telephone call you had with opposing counsel. One of the benefits of the monthly billing pattern is that it requires you to keep time contemporaneously with the rendering of the services. This is also a good way for you to get paid for all your time, and helps you avoid losing billable time. Today's technology greatly helps that, and with programs like Smokeball, you don't have to input much to record all your time and generate a professional looking bill.

Monthly billing obviously also helps smooth out and stabilize your cash flow. While it's great to get big checks at the end of the case, it's much nicer to get a bunch of small ones regularly over the course of the year. I understand few people pay by check these days, and credit cards are the most common and advantageous form of bill payment. If you're not taking credit cards, you're probably not billing monthly. Do both. Now. You can even set up a link on your bill to a direct payment site. LawPay works wonders for us. Technology is a beautiful thing.

Firing the Client

Another advantage of monthly billing, apart from smoothing out and stabilizing cash flow, is to enable you to determine who is paying and who isn't. If a couple of months go by without any payments, and the bill is growing, and the client won't respond to your requests for payment that's enough red flags for you to say, ok, enough. Contact the client, let him know that you're turning the services spigot off until payment is made. If that entreaty doesn't generate payment, then it's time to file a motion to withdraw and get out of the case. Why continue to work for someone who has evidenced a clear intent not to pay you? So you can work diligently and end up being owed even more money that the client isn't going to pay? Many years ago, there was a commercial that intoned, "it's not what you earn, but what you keep." That should be your mantra. Clients that

don't pay are the same as clients that you don't represent. They don't generate income for you and your firm.

Unless you're facing a trial deadline (and you should never let it a case get set for trial without being paid what you're owed along with a healthy trial retainer), most judges will grant your motion to withdraw. In fact, I have yet run into a judge who said I had to work for free. We've all done enough pro bono work to be afforded the ability to pick and choose for whom we'll work for nothing.

Quite often, once you've asked for payment and received none, a motion to withdraw will get the client's attention and you'll get paid. Your bottom line is really this simple: if their bank or their family won't finance their divorce, why should you? Also, I recommend being very matter of fact about the fees your client owes you. I'd like to continue to help you, but my other clients are paying their bills. If I continue to represent you when you aren't paying, I'm not being fair to them.

People are well accustomed to being told "pay me," since it happens with literally everyone they deal with in their lives. And they will pay, more often than not.

Conclusion

Obviously, every case is different, and there may be assets escrowed, or a house with significant equity that you can rely on to ultimately get paid. In cases like this we make educated guesses about the hazards of continuing, and all of us has done so. Just be sure that if you're letting the client slide, that there's a reason to do so, because of the existence of an ability to be paid in time. Clients that can pay should. If they simply won't pay, then it's time to cull the herd. Lastly, be careful about promises of payment from retirement plans, since there are tax consequences involved in those arrangements that many clients don't contemplate when they make the promise. Also, there's no effective way to enforce a client's promise to pay you from a retirement account, and you can't even use a judgment to force payment from them. Better that they borrow the money from friends or family and promise to pay them.

The business of practicing law imposes upon lawyers many ethical and practical obligations to our clients. While we diligently focus on those obligations, the primary and oft times only real obligation the client has to the lawyer in return is to pay for the services rendered when requested. Sadly, people, especially people in the middle of the emotional and financial trauma of a divorce, will tell you anything they can think of to get you to work for them. Some of them even truly believe what they're telling you. While you're listening to them, remember that the "wimpy" theory of the practice of law—that is, I'll gladly pay you Tuesday for legal services today—will get you broke quick. Don't let it. Always remember, you can be doing something you really enjoy and not get paid.■

Marital Property in Illinois Public Pension Plans (PART I): Actuarial Valuation, QILDROs and the QILDRO Discount

This article discusses the difference in the actuarial valuation of the marital estate if "horse-trading" marital assets versus the actuarial value of the marital estate if divided by Qualified Illinois Domestic Relations Order ("QILDRO").

A brief review of statutes that cover QILDROs:

• Illinois Pension Code (40 ILCS 5/1-119) sets forth the statutes that control the division of Illinois Public Retirement Plans through QILDRO.

• ILCS 5/1-119(b)(1) provides in part an Illinois court of competent jurisdiction in a proceeding for dissolution of marriage…may order that all or any part of any (i) member's retirement benefit, (ii) member's refund payable to or on behalf of the member, or (iii) death benefit, or portion thereof, that would otherwise be payable to the member's death benefit beneficiaries or estate be instead paid by the retirement system to the alternate payee.

• ILCS 5/1-119(b)(4) provides in part the **QILDRO may not address any survivor's benefit**.

• ILCS 5/1-119(g)(1) provides in part that upon the death of the alternate payee under a QILDRO, the QILDRO shall expire and cease to be effective, and in the absence of another QILDRO, the **right to receive any affected benefit shall revert to the regular payee**.

The above statutes permit the former spouse to receive an interest in the monthly retirement while member and former spouse are both alive, a refund of member contributions or the small death benefit (defined as "any nonperiodic benefit payable upon the death of the member"), but specifically excludes the former spouse's right to receive any survivor benefit nor the ability to name a beneficiary if the former spouse should predecease the member.

Actuarial Valuation: When calculating the actuarial value of the marital estate in an IL public pension, it is customary to value the member's single life annuity and apply the Hunt formula (Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (Ill. App. Ct. 1979) to determine the marital share. For example, assume a member's TRS single life annuity of $2,000/mo is worth $486,000 in today's dollars (actuarial assumptions: parties both age 60, PubT_2010 mortality, MP-2021 improvement applied generationally, 5.2% FTSE discount, 3.0% COLA). If the court awards a former spouse 40% of the total pension, the former spouse's share would be worth $486,000 x 40% = $194,400 assuming the member lives to the actuarial projected life expectancy -as there are no joint and survivor benefits for former spouses under the Illinois Pension Code.

But as detailed above, this valuation has a grave potential to be an overvaluation as it is based on general probabilities rather than the reality of a single member and former spouse's life expectancy. Simply put, the parties nor their counsel have a crystal ball in regards to exactly how long the member and former spouse will live.

Pursuant to Anne P. Schmidt, Illinois Employee Benefits Attorney, an actuarial valuation has the ability to drive settlement in either direction. For the member they can be shocked with the amount of money that would be required to "buy" someone out of their pension based on interest rates and remaining projected life expectancy which the member may never achieve; and for the former spouse they could be leaving years "on the table" by accepting an undervaluation in hopes of reducing their risk and achieve a lump sum value today.

Pension valuations can also promote prudent conversations about the member's pension and the security both parties expect to derive from it. For example, in a gray divorce engaging a valuation will drive conversations about obtaining life insurance for the former spouse to protect against the risk of the member predeceasing the former spouse, and force productive conversations about retirement and cost of living as a retired person to prevent post decree litigation and budgeting issues.

Perhaps most importantly, a valuation can allow you to work with someone who understands the rights and features of Illinois Pensions and prepare you for the nuances of these non-ERISA plans. In my next article (Part II), I will dig into the forced reversion component of Illinois pensions as detailed in ILCS 5/1-119(g)(1) which adds another layer of how you might want to value these plans.

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