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Trial Practice Considerations

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I. [7.1] SCOPE OF CHAPTER

Trials under the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq.,* can be broken down into the following categories:

a. declaration of invalidity of marriage;

b. dissolution of marriage;

c. legal separation;

d. custody independent or part of larger case;

e. support and attorneys' fees in a successful legal separation action;

f. domestic violence hearings.

In addition, both defaulted and settled dissolution and legal separation actions may be concluded through an uncontested or "prove-up" hearing.

The purpose of this chapter is to discuss common trial practice considerations as they relate to the above matters. The organization and format of this chapter are designed to facilitate use in the courtroom and to enable the attorney to find and deliver citations quickly on a wide variety of issues.

II. [7.2] THE MODIFIED NO-FAULT SYSTEM — DISSOLUTION AND LEGAL SEPARATION

In addition to the no-fault ground of irreconcilable differences, Illinois courts now recognize 11 fault grounds for which a dissolution of marriage may be granted. Establishing any of these grounds requires positive evidence of the respondent's particular fault as well as the petitioner's lack of provocation. Even if the court is convinced beyond doubt that the marriage is forever destroyed, it cannot enter a judgment for dissolution on one of the fault grounds without proof of that particular ground. This principle may be crucial when the respondent refuses to waive the two-year separation requirement for no-fault. *See Lowrance v. Lowrance,* 31 Ill.App.3d 682, 335 N.E.2d 140 (2d Dist. 1975); *Rosenbaum v. Rosenbaum,* 38 Ill.App.3d 1, 349 N.E.2d 73 (1st Dist. 1976).

The sole ground on which a judgment of legal separation may be based is that the spouses are living separate and apart without fault by the petitioner.

III. PROOFS REQUIRED FOR DISSOLUTION OF MARRIAGE

A. Jurisdiction

1. [7.3] Subject Matter Jurisdiction

IMDMA §401 requires that for the court to have the power to enter a judgment for dissolution or legal separation, at the time the action is commenced, one party, either the petitioner or the respondent, must be a resident of Illinois. Residence for a member of the armed services is satisfied if the person is stationed in this state. The residence or military presence must be maintained for 90 days immediately preceding the date on which the court makes the findings that support the judgment or for the 90 days immediately preceding the filing of the action. The date on which the court makes the necessary findings regarding jurisdiction, grounds, and other pleaded matters is essentially the date of the judgment for dissolution of marriage. However, it is conceivable that a court could make findings without entering a written judgment, in which case the oral court order would not be final or enforceable until it is written or recorded. See S.Ct. Rule 272. Proof of the necessary period of residence is mandatory. *In re Marriage of Passiales,* 144 Ill.App.3d 629, 494 N.E.2d 541, 98 Ill.Dec. 419 (1st Dist. 1986). Effective January 1, 2002, 735 ILCS 5/2-301 provides that a party may combine a motion objecting to personal jurisdiction with other motions or make the motion as part of a motion to dismiss or to quash service of process.

a. [7.4] Establishing Residence

The term "residence" is not synonymous with "domicile"; it means a "permanent abode," the place considered to be one's permanent home. *In re Marriage of Passiales,* 144 Ill.App.3d 629, 494 N.E.2d 541, 546, 98 Ill.Dec. 419 (1st Dist. 1986). The most significant factor in determining residence is the person's intent to make the place a permanent home. *Rosenshine v. Rosenshine,* 60 Ill.App.3d 514, 377 N.E.2d 132, 17 Ill.Dec. 942 (1st Dist. 1978).

b. [7.5] Burden of Proof

Once established, residence is presumed to continue. Therefore, the burden of proof is on the party claiming that residence has changed.

2. [7.6] Personal Jurisdiction

Judgments disposing of property outside the state or ordering payment of maintenance or child support are judgments in personam and require personal service of summons. *McClellan v. McClellan,* 125 Ill.App.2d 477, 261 N.E.2d 216 (4th Dist. 1970). Likewise, a court must have in personam jurisdiction to award attorney fees. *In re Marriage of Glusek,* 168 Ill.App.3d 987, 523 N.E.2d126, 119 Ill.Dec.658, 659 (1st Dist. 1988).

3. [7.7] Service of Process

The extent of the court's authority over the respondent depends on the respondent's place of residence and the method by which the person was served with process:

a. Personal jurisdiction over an Illinois resident is gained by personal service in or out of state. C.C.P. 2-208

b. Personal jurisdiction may be obtained by the commission of an act submitting to jurisdiction combined with personal service either in or out of the state, CCP §2-208 & §2-209(a), by personal service within the state in connection with any action arising within or

without Illinois, CCP §5/2-209(b) or on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States, CCP §5/2-209(c).

c. The specific acts enumerated within CCP §2-209(a) particular to family law matters are as follows:

> **Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person . . . to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts. . . .**
>
> **(2) The commission of a tortious act within this State. . . .**
>
> **(5) With respect to actions of dissolution of marriage . . . and legal separation, the maintenance in this State of a matrimonial domicile at the time this cause of action arose or the commission in this State of any act giving rise to the cause of action;**
>
> **(6) With respect to actions brought under the Illinois Parentage Act of 1984, as now or hereafter amended, the performance of an act of sexual intercourse within this State during the possible period of conception.**

For example, a husband's act of physical cruelty in Illinois where the parties lived six months prior to the filing of the action constitutes an act giving rise to the cause of action in the state. *Farah v. Farah,* 25 Ill.App.3d 481, 323 N.E.2d 361 (1st Dist. 1975).Likewise, a father who tried to avoid his parental support obligations by sending his child to be cared for by the child's grandparents in Illinois committed a tortious act and thereby submitted himself to the long-arm jurisdiction of the courts of Illinois. *In re Marriage of Highsmith,* 130 Ill.App.3d 725, 474 N.E.2d 915, 86 Ill.Dec. 1 (3d Dist. 1985). However, a wife's acts of telephoning and mailing slanderous information about the husband to his military superiors did not constitute a tortious act sufficient to give the court in personam jurisdiction over her. The defamatory statements were adequate to establish the ground of mental cruelty such that in rem jurisdiction existed to enable the court to dissolve the marriage. *In re Marriage of Brown,* 154 Ill.App.3d 179, 506 N.E.2d 727, 106 Ill.Dec. 927 (4th Dist. 1987).

Notwithstanding the provisions of CCC 2-209, there must still be minimum contacts with Illinois for a party to be subject to Illinois jurisdiction. A noncustodial parent's acquiescence to the children's being moved to Illinois from another state by the custodial parent does not constitute conduct sufficient to confer long-arm jurisdiction over the noncustodial parent because there do not exist minimum contacts sufficient to give notice that agreeing to the move makes the noncustodial parent subject to defending an Illinois suit. *In re Marriage of Howard,* 291 Ill.App.3d 675, 684 N.E.2d 178, 225 Ill.Dec. 703 (5th Dist. 1997); *In re Marriage of Cody,* 264 Ill.App.3d 160, 636 N.E.2d 1114, 1116 – 1117, 201 Ill.Dec. 682 (5th Dist. 1994).

4. [7.8] In Rem Jurisdiction Only

Service by publication or personal service outside the state on a nonresident who does not come within the provisions of the long-arm statute confers only limited jurisdiction over the

respondent. CCP §2-206 provides that in an action affecting property or status (*e.g.,* dissolution or legal separation) within the jurisdiction of the court, the plaintiff (petitioner) shall file with the clerk of the court in which the action is pending an affidavit showing that the defendant resides or has gone out of the state or on due inquiry cannot be found or is concealed within the state so that process cannot be served. See §7.154. The affidavit must state either the place of residence of the defendant, if known, or that the residence cannot be ascertained upon diligent inquiry. In such cases, the clerk will order publication of the cause of action to be made in some newspaper published in the county in which the action is pending. In cases such as dissolution of marriage actions in which the presence of property within the state is related to the cause of action over which jurisdiction is sought, the exercise of this in rem jurisdiction satisfies the minimum contacts test. *See Shaffer v. Heitner,* 433 U.S. 186, 53 L.Ed.2d 683, 975 S.Ct. 2569 (1977). CCP §2-207 states that notice by publication "may be given at any time after the commencement of the action, and shall be published at least once in each week for 3 successive weeks." Counsel for the petitioner should make sure within ten days of the first publication that a copy of the notice and petition has been mailed to the last-known address of the respondent. The certificate of the clerk filed with the case is sufficient evidence of this mailing. No default may be taken until at least 30 days after the first publication.

5. [7.8A] Standing of Guardian

A disabled adult's plenary guardian has standing to continue with a dissolution of marriage action provided the ward filed the dissolution of marriage action prior to the adjudication of the ward's disability. *In re Marriage of Burgess,* 189 Ill.2d 270, 725 N.E.2d 1266, 244 Ill.Dec. 379 (2000). After January 1, 2000, 755 ILCS 5/11a-17(a-5) expressly empowered guardians with the right to continue a divorce action.

B. [7.9] Venue

An action for dissolution may be filed in the county of residence of either the petitioner or the respondent, while an action for legal separation may be filed in the county in which the respondent resides or the parties last lived together as husband and wife. If the respondent cannot be found within the state, an action for legal separation may be brought in the county where the plaintiff resides. IMDMA §402(b).

C. Grounds for Dissolution of Marriage

1. No-Fault Ground

a. [7.10] Living Separate and Apart for Two Continuous Years

The petition must state the date on which the parties separated, that date being at least two continuous years before the date of the hearing on grounds. *In re Marriage of Kenik,* 181 Ill.App.3d 266, 536 N.E.2d 982, 129 Ill.Dec. 932 (1st Dist. 1989); *In re Marriage of Dowd,* 214 Ill.App.3d 156, 573 N.E.2d 312, 157 Ill.Dec. 894 (2d Dist. 1991). In *Kenik,* the court held that because living separate and apart is an element of the irretrievable breakdown of the marriage due to irreconcilable differences, it is a state that can be realized without physical distance between the parties. Consequently, the parties may live separate and apart in the same residence within the meaning of the statute as long as they live completely separate lives.

Good-faith efforts at reconciliations, including cohabitation while the parties are going for counseling or cohabitation pursuant to a written agreement to attempt reconciliation, will not end the separation period, and the time shall be included as part of the separation time.

b. [7.11] Irreconcilable Differences Causing Irretrievable Breakdown of the Marriage

Irreconcilable differences could be anything, including the refusal by the petitioning party to act as a spouse. The court must be satisfied that all efforts at reconciliation have failed and that future efforts would be impracticable and not in the best interests of the family. Since fault is not a defense, the petitioner may be the party that refuses to reconcile or makes future efforts at reconciliation impossible. *In re Marriage of Smoller,* 218 Ill.App.3d 340, 578 N.E.2d 256, 161 Ill.Dec. 129 (1st Dist. 1991).

c. [7.12] Waiver of Two-Year Separate and Apart Requirement

Once the parties have lived separate and apart for a continuous period of six months or more, they may obtain a dissolution of their marriage by agreeing to waive the two-year separation requirement. The mutual waiver must be in writing and filed with the clerk of the court. See §7.155. Proof of the six-month separation must be by the sworn testimony or affidavits of the spouses.

2. [7.13] Lack of Provocation for Fault Grounds

Proof establishing any one of the fault grounds must include testimony by the petitioner of his own non-provocative conduct immediately preceding the actions constituting the claimed fault. *Rosenbaum v. Rosenbaum,* 38 Ill.App.3d 1, 349 N.E.2d 73 (1st Dist. 1976), held that because lack of provocation is such an integral part of the mental cruelty grounds, the respondent need not plead provocation as an affirmative defense but still has the burden to attempt to show provocation. In rebuttal, the petitioner can then testify in defense of the specific provocative acts claimed by the respondent. *See Smith v. Smith,* 47 Ill.App.3d 583, 362 N.E.2d 123, 5 Ill.Dec. 810 (3d Dist. 1977).

3. Fault Grounds

a. [7.14] Impotence

Impotence is the incurable physical inability of a spouse to perform the act of sexual intercourse. Impotence does not refer to sterility and, as a ground for dissolution, must exist at the time of the marriage and continue through the time the action is brought. Living with an impotent spouse for many years can constitute a condonation of the situation and be a bar to a later-filed dissolution action. *See Grosvenor v. Grosvenor,* 194 Ill.App. 652 (1st Dist. 1915) (abst.); *Peipho v. Peipho,* 88 Ill. 438 (1878).

b. [7.15] Adultery

Adultery is the voluntary act of sexual intercourse by a party with a person other than that party's spouse.

(1) [7.16] Burden of proof

The petitioner's burden of proof is by the preponderance of the evidence. *Glassman v. Glassman,* 133 Ill.App.2d 608, 273 N.E.2d 252 (1st Dist. 1971) (abst.).

(2) [7.17] Circumstantial evidence

Adultery need not be proved by direct evidence; circumstantial evidence is sufficient. Evidence showing opportunity and a disposition of the spouse to be affectionate with a third party will sustain a finding of adultery, *e.g.,* a woman's living in the house of an unmarried man for whom she kept house for no compensation (*Malcomson v. Malcomson,* 5 Ill.App.2d 235, 124 N.E.2d 541 (3d Dist. 1955) (abst.)); persons who watched a wife's apartment, noting that during several evenings a man entered the apartment and stayed for a period of time (*Patterson v. Patterson,* 47 Ill.App.2d 133, 197 N.E.2d 724 (4th Dist. 1964) (abst.)); or love letters written by the respondent (*Lorenson v. Lorenson,* 155 Ill.App. 35 (3d Dist. 1910)). A love letter written by the respondent's alleged lover is not evidence against the spouse unless it is connected with a reply or act on the part of the spouse; merely possessing or keeping such a letter is insufficient. *Razor v. Razor,* 149 Ill. 621, 36 N.E. 963 (1894).

(3) [7.18] Corroboration

When adultery is denied by the respondent, cases hold that some corroboration in addition to the petitioner's testimony is necessary to establish this ground. *Majewski v. Majewski,* 328 Ill.App. 194, 65 N.E.2d 584 (2d Dist. 1946).

c. [7.19] Desertion

Desertion is the willful absence from the spouse and marital residence for at least one year without the petitioner's consent. The separation must be actual, and the parties cannot occupy the same residence even if they sleep in separate rooms. *See Lindeman v. Lindeman,* 337 Ill.App. 261, 85 N.E.2d 847 (1st Dist. 1949).

If the offending party makes a bona fide offer to return before the expiration of the one-year period and the petitioner refuses, then necessary continuity of the ground is destroyed. *Metoyer v. Metoyer,* 92 Ill.App.2d 32, 235 N.E.2d 882 (1st Dist. 1968) (abst.).

If the petitioner is the party who leaves the home, the petitioner must prove reasons for leaving that in themselves would be sufficient grounds to entitle a petitioner to a dissolution based on constructive desertion. *See Coolidge v. Coolidge,* 4 Ill.App.2d 205, 124 N.E.2d 1 (1st Dist. 1955).

If the respondent orders the petitioner out of the home and threatens police action or locks the petitioner out of the home, then the respondent, who remained in the marital home, would be the deserter. *See Jeffers v. Jeffers,* 9 Ill.App.2d 572, 133 N.E.2d 727 (2d Dist. 1956) (abst.). Although one spouse may willfully leave the marital home, if that party attempts to return and reconcile but is rejected, the spouse refusing to allow the other to return may be deemed the deserter. *Schaaf v. Schaaf,* 132 Ill.App.2d 115, 266 N.E.2d 349 (2d Dist. 1971).

One spouse's refusal to follow the other to a bona fide new residence could constitute desertion. Although the cases to date concern a wife's refusal to follow the husband, facts could

establish desertion based on the reverse scenario. *See Martin v. Martin,* 62 Ill.App.2d 105, 210 N.E.2d 590 (1st Dist. 1965); *Hildebrand v. Hildebrand,* 105 Ill.App.2d 261, 244 N.E.2d 866 (5th Dist. 1969) (abst.).

Refusing sexual relations does not constitute desertion. *Foster v. Foster,* 110 Ill.App.2d 128, 249 N.E.2d 114 (1st Dist. 1969).

d. [7.20] Habitual Drunkenness for Two Years

Habitual drunkenness is the inability to control the appetite for alcohol demonstrated by the irresistible habit of getting drunk, drinking to excess, or frequent indulgences. Occasional acts of drunkenness are not sufficient, but it is not necessary to prove that a person is continually in an intoxicated state. *See Shorthose v. Shorthose,* 319 Ill.App. 355, 49 N.E.2d 280 (3d Dist. 1943). Intoxication one to three times a week is sufficient. *Grikietis v. Grikietis,* 319 Ill.App. 216, 48 N.E.2d 775 (1st Dist. 1943). Condonation will not be presumed from continued cohabitation. *See Dorian v. Dorian,* 298 Ill. 24, 131 N.E. 129 (1921). If the respondent was a habitual drunkard at the time of the marriage even though he promised to reform, the petitioner has no cause of action for habitual drunkenness after the marriage. *See Levy v. Levy,* 16 Ill.App. 358 (1st Dist. 1885).

e. [7.21] Gross and Confirmed Habits Caused by the Excessive Use of Addictive Drugs for Two Years

There are no reported decisions by Illinois courts of review discussing the ground of gross and confirmed habits that are caused by excessive use of addictive drugs for at least two years, when drug use is the dominant or controlling purpose for the respondent's life. The gross and confirmed habits referred to could probably be elements of a mental cruelty charge discussed below.

f. [7.22] Attempts on the Life of the Spouse by Poison or Other Means Showing Malice

Although there are no reported decisions by Illinois courts of review affirming or reversing a dissolution granted on attempts on the life of the spouse by poison or other means showing malice, two cases do discuss this statutory ground for divorce. In *Iverson v. Iverson,* 38 Ill.App.3d 308, 347 N.E.2d 6 (2d Dist. 1976), one of the reasons the appellate court reversed the trial court's dismissal of the husband's complaint for divorce was that, although competent testimony was introduced that the defendant had made two attempts on the plaintiff's life, the trial court did not consider and rule on that ground but instead dismissed his complaint for the stated reason that the husband had not proved lack of provocation for his alternative ground of mental cruelty. In *In re Marriage of Davenport,* 92 Ill.App.3d 675, 416 N.E.2d 88, 48 Ill.Dec. 193 (4th Dist. 1981), the petitioner listed as one of his examples of mental cruelty an incident in which the wife poured and ignited kerosene on the bed where the husband was lying at the time. Apparently, if the petitioner cannot prove that the specific intent behind the malicious act was an intentional attempt on the life of the spouse, such incidents may serve as the basis of a mental cruelty charge.

g. [7.23] Extreme and Repeated Physical Cruelty

Extreme and repeated physical cruelty can be defined as repeated physical acts of violence and infliction of bodily harm or suffering. Cruelty is relative to the status of the particular parties.

What might be slight acts of violence to one married couple may be seriously violent or harmful acts to another. *See Levy v. Levy,* 388 Ill. 179, 57 N.E.2d 366 (1944). Slight acts of violence that do not cause bodily harm or suffering or raise a reasonable apprehension of great bodily harm are not physical cruelty. *See Amberson v. Amberson,* 349 Ill. 249, 181 N.E. 825 (1932). There must be two separate acts committed on separate occasions (*Daniels v. Daniels,* 9 Ill.App.3d 519, 292 N.E.2d 456 (1st Dist. 1972) (abst.)), but the two acts may be on the same day. *See Campbell v. Campbell,* 27 Ill.App. 309 (1st Dist. 1888). Corroboration is no longer necessary in contested cases. *Tandy v. Tandy,* 42 Ill.App.3d 87, 355 N.E.2d 585 (1st Dist. 1976).

h. [7.24] Extreme and Repeated Mental Cruelty

Of all the grounds, extreme and repeated mental cruelty is the most fluid and hard to define because it includes all the wrongs and injuries between the parties that do not fit into any of the other categories. Certain factors are considered:

1. Context. Whether certain acts will constitute mental cruelty depends on the total factual background surrounding the conduct in question, including the emotional and personal makeup of the parties and the possible provoking circumstances. *In re Marriage of Semmler,* 90 Ill.App.3d 649, 413 N.E.2d 502, 46 Ill.Dec. 62 (2d Dist. 1980).

2. Conduct of the respondent. Decisions defining mental cruelty have employed a variety of phraseology, making it impossible to set forth all conditions in an acceptable form. However, the ultimate test is the effect of such conduct on the petitioner or the marriage. In the following cases, a finding of mental cruelty was affirmed based on the specific listing of examples of conduct of respondents:

a. *Hayes v. Hayes,* 117 Ill.App.2d 211, 254 N.E.2d 288 (5th Dist. 1969) — threats; flying into rages; looking as if he hated wife; kicking furniture; stomping; hitting a door; cursing if his wife spoke.

b. *Jackson v. Jackson,* 24 Ill.App.3d 810, 321 N.E.2d 506 (3d Dist. 1974) — refusal to explain absences from home; domination of financial affairs; domination of marital affairs; continued non-adulterous relationships outside the home.

c. *Loveless v. Loveless,* 128 Ill.App.2d 297, 261 N.E.2d 732 (4th Dist. 1970) — cursing at spouse and in front of the children; throwing things at spouse; having temper tantrums; attempting to damage furniture; breaking windows; showing little affection for the children, saying she did not want to care for them, and causing them to be upset.

d. *Simonson v. Simonson,* 128 Ill.App.2d 39, 262 N.E.2d 326 (1st Dist. 1970) — criticizing spouse in public and private; boasting about premarital relations; unfavorably comparing spouse with his premarital partners; calling spouse "nuts" and advising others that she was "nuts"; repeatedly telling wife to go back to foreign country of her origin; constantly remaining out late at night; putting pornography in wife's presence.

e. *Woodshank v. Woodshank,* 2 Ill.App.3d 596, 274 N.E.2d 694 (3d Dist. 1971) — daily arguments for a two-month period; husband yelled; husband got red in face; husband spit and foamed at mouth; husband knocked things down; husband used all manner of profanity.

f. *McGowan v. McGowan,* 15 Ill.App.3d 913, 305 N.E.2d 261 (1st Dist. 1973) — frigidity in sexual relations; jealousy; hiding information regarding abortions.

g. *Rey v. Rey,* 23 Ill.App.3d 274, 319 N.E.2d 105 (2d Dist. 1974) — threatening suicide; staying in bedroom five days a week; refusing to talk.

h. *Borg v. Borg,* 96 Ill.App.3d 282, 421 N.E.2d 214, 51 Ill.Dec. 706 (1st Dist. 1981) — wife responsible for husband's heart attack; wife's initiating heated argument during his recuperation, forcing him out of the house; wife's accusing him of being responsible for death of their son; wife's accusations of marital infidelity; wife's telling husband she wished he were dead; wife's embarrassing husband in front of friends and calling him vile names, at times in front of the children.

i. *In re Marriage of Wade,* 158 Ill.App.3d 255, 511 N.E.2d 156, 110 Ill.Dec. 321 (4th Dist. 1987) — wife failed to cook for husband or do his laundry, excluded him from family meals, withheld sex as a punitive measure, refused to make timely mortgage or utility payments, refused to forward his mail, made numerous unauthorized purchases on his charge accounts, refused to turn over the tax return checks, refused to allow the husband visitation with the children.

3. Type of effect necessary. The respondent's conduct must affect the petitioner in one of the following ways:

- embarrassment
- humiliation
- anguish
- endangerment of health
- endangerment of life
- making life miserable
- making life unendurable.

In re Marriage of Mitchell, 103 Ill.App.3d 242, 430 N.E.2d 716, 58 Ill.Dec. 684 (2d Dist. 1981).

4. Standard. The petitioner need not be the "reasonable person" because the test of "effect" is on the particular person complaining of the acts. The test is not whether the conduct would be cruel to a reasonable person but whether it had the required detrimental effect on that particular aggrieved spouse. What may be cruel to one type of personality may be laughed off by another. *See Akin v. Akin,* 125 Ill.App.2d 159, 260 N.E.2d 481 (4th Dist. 1970).

5. Necessity for medical evidence. No reported decision holds that medical evidence must be presented to support a mental cruelty case. In fact, one case has held that medical evidence of mental cruelty is not necessary in every case. *Morris v. Morris,* 70 Ill.App.3d 125, 388 N.E.2d 129, 26 Ill.Dec. 505 (1st Dist. 1979). Obviously, though, such evidence would be beneficial. In

Loveless v. Loveless, supra, the appellate court affirmed mental cruelty after the plaintiff proved he could not concentrate on his business affairs, took aspirin continually, was unable to make day-to-day decisions required in his business, and worried about the health and welfare of his children. There was no further testimony concerning medical treatment.

i. [7.25] Conviction of Felony or Infamous Crime

720 ILCS 5/2-7 defines a felony as "an offense for which a sentence to death or to a term of imprisonment in a penitentiary for one year or more" may be imposed. *Getz v. Getz,* 332 Ill.App. 364, 75 N.E.2d 530, 531 (3d Dist. 1947), defines an "infamous" crime as "murder, rape, kidnapping, willful and corrupt perjury or subornation of perjury, arson, burglary, robbery, sodomy, or other crime against nature, incest, forgery, counterfeiting, bigamy, or larceny, if the punishment for [its commission] is by imprisonment in the penitentiary," quoting *Ill.Rev.Stat.* (1945), c. 38, ¶587.

The proof suggested in such cases is the testimony of the petitioner and the submission of a certified copy of the conviction order. If the respondent requests to be present to defend, the court should grant the request for an order of habeas corpus ad testificandum. It has been held reversible error to deny the right to appear and testify even when the petitioner stipulated as to how the respondent would testify. *See VanVlissingen v. VanVlissingen,* 173 Ill.App. 124 (1st Dist. 1912).

Conviction of a felony or an infamous crime may also be particularly susceptible to a condonation defense if the wife visits the husband at the penitentiary and they live together on furloughs or after release.

j. [7.26] Infecting Spouse with Communicable Venereal Disease

No reported decisions by Illinois courts of review discuss infecting a spouse with a communicable venereal disease. If this ground for dissolution is used, the petitioner must present proof that the infection with a venereal disease was passed by the respondent.

Infection with a venereal disease, including genital herpes, is used instead to gain some financial advantage. For example, in *Schiffhauer v. Schiffhauer,* 485 So.2d 838 (Fla.App. 1986), a trial court ordered a husband who had infected his wife with genital herpes to bear all reasonable future medical costs she might incur as a result of the condition. In several other cases, such as *G. L. v. M. L.,* 228 N.J.Super. 566, 550 A.2d 525 (1988); *Doe v. Doe,* 136 Misc.2d 1015, 519 N.Y.S.2d 595 (1987); and *Maharam v. Maharam,* 123 A.D.2d 165, 510 N.Y.S.2d 104 (1986), one spouse used the presence of genital herpes as a foundation for a tort claim for damages.

k. [7.27] Having a Spouse Living at the Time of This Marriage (Bigamy)

On the ground of having a spouse living at the time of this marriage (bigamy), the following must be considered:

1. Elements. If either party at the time of the marriage is lawfully married to another, the latter marriage may be ended by dissolution. Actually, that second marriage is void. *Hunt v. Hunt,* 252 Ill.App. 490 (1st Dist. 1929). However, a judgment declaring a marriage void ab initio

on the basis of an undissolved prior marriage was construed to be nonretroactive so that the trial court continued to have jurisdiction to adjudicate property and custody rights. *In re Marriage of Plymale,* 172 Ill.App.3d 455, 526 N.E.2d 882, 122 Ill.Dec. 489 (2d Dist. 1988). This is the only ground for divorce that does not require a subsisting valid marriage. If, after the latter marriage, the former marriage is dissolved by a death or dissolution, the second, previously void, marriage becomes valid. See IMDMA §212(b).

2. Mistake no excuse. It is no excuse that the respondent believed he was divorced from the former spouse even when so advised by counsel since the party could have determined the actual adjudication from the clerk of the court. *See Gordon v. Gordon,* 141 Ill. 160, 30 N.E. 446 (1892).

3. Presumptions. A spouse who disappears and is not heard from for seven years is presumed dead. *Stevenson v. Montgomery,* 263 Ill. 93, 104 N.E. 1075 (1914). However, the presumption is not conclusive but may be rebutted. When the absence is for less than seven years, the absent spouse is presumed alive. When a subsequent marriage is shown, the law raises a strong presumption in favor of its legality, and the burden of overcoming the presumption is on the party denying the validity. If these presumptions conflict and there is no evidence supporting either, the presumption of the validity of the latter marriage has been held to be the stronger and will prevail over the presumption that the former spouse is still alive. *See Johnson v. Johnson,* 114 Ill. 611, 3 N.E. 232 (1885).

D. [7.28] Other Required Allegations in Petition

It is basic law that a cause of action must be alleged in a complaint or petition. Once the pleading is filed, it is the petitioner's or plaintiff's obligation to prove its allegations. IMDMA §403 requires that certain facts be set forth in a petition for dissolution or for legal separation; these facts must also be proved at the hearing. In addition to the previously discussed factual allegations of jurisdiction, grounds, and lack of provocation, evidence must be presented to establish the following:

1. age, occupation, and residence of each party and length of residence in the state;

2. date and place of registration of the marriage;

3. names, ages, and addresses of all living children of the marriage and whether the wife is pregnant;

4. any current arrangement as to support, custody, and visitation of the spouse; and

5. pursuant to requirements set forth in the UCCJA by every party in a custody proceeding in his first pleading or in an affidavit attached to that pleading, under oath:

    a. the child's present address, the places where the child has lived within the past five years, and names and present addresses of the persons with whom the child has lived for the past five years;

    b. whether the party has participated in any capacity in any other litigation concerning the custody of the same child in Illinois or any other state;

c. whether the party has information regarding any custody proceeding concerning the child pending in a court of Illinois or any other state; and

d. whether the party knows of any person not a party to the proceedings who has physical custody of the child or who claims to have custody or visitation rights with respect to the child.

6. That the party has no knowledge of any other action for dissolution pending in another jurisdiction.

IV. [7.29] PROOFS NECESSARY FOR LEGAL SEPARATION

An action for legal separation is purely a support action. It does not terminate the marriage, and it does not adjudicate property rights unless the parties agree for that to occur. The only thing it does is permit a "wronged" spouse to obtain support, if needed, from the "wrong-doing" spouse. The jurisdiction for legal separation is the same as for dissolution of marriage. According to IMDMA §402(b), an action for legal separation "shall be brought in the circuit court of the county in which the respondent resides or in which the parties last resided together as husband and wife" or in which the petitioner resides if the respondent cannot be found within the state.

As enacted in 1977, the original version of IMDMA §402 required the parties to live in separate residences at the time of filing the action. A 1982 amendment removed that specific language but provided instead that the remedy for reasonable support and maintenance existed "while they so live apart," which appears to indicate the continued necessity for maintaining separate residences at all times for which support is requested. *In re Marriage of Eltrevoog,* 92 Ill.2d 66, 440 N.E.2d 840, 64 Ill.Dec. 936 (1982).

Only the party without fault may seek a judgment of legal separation. *Id.*

Generally, property rights are not adjudicated in a legal separation action. *Anderson v. Anderson,* 28 Ill.App.3d 1029, 329 N.E.2d 523 (1st Dist. 1975). *But see In re Marriage of Leff,* 148 Ill.App.3d 792, 499 N.E.2d 1042, 102 Ill.Dec. 262 (2d Dist. 1986). However, a judgment of legal separation has a significant effect on property in that once the judgment is entered, all property acquired thereafter by either party is nonmarital, a factor that might affect a trial lawyer's litigation strategy. A wealthy party who cannot establish either his own blamelessness or fault on the part of the spouse and whose spouse will not cooperate in a six-month no-fault action may wish to consider forcing the spouse to obtain a judgment of legal separation until the parties have been separated for the requisite two years for no-fault.

One party's request for a legal separation does not preclude the other party from obtaining a judgment for dissolution if the prerequisites for dissolution have been satisfied. IMDMA §402(c). If the party requesting a dissolution has met the requirements of §401, the court must enter a judgment for dissolution, notwithstanding a pending legal separation proceeding.

V. COMMON DEFENSES TO DISSOLUTION OF MARRIAGE OR LEGAL SEPARATION ACTIONS

A. [7.30] Failure To Prove Case

Because the petitioner has the burden of proof, the respondent should not stipulate to or permit into evidence anything less than clearly admissible evidence. The petitioner may not be able to prove a necessary element of the case if the respondent's attorney is careful in raising objections at trial. The following is a checklist of common objections that the trial lawyer should understand and consider using at trial:

- irrelevant or immaterial testimony
- no proper foundation established
- opinion by expert without proper foundation or qualification
- conclusion of witness
- lack of authentication of exhibit
- best evidence rule violated
- parol evidence rule violated
- nonresponsive answer
- question exceeds scope of direct/cross-examination
- hearsay
- leading question (if during direct examination)
- elicitating narrative answers
- repetitious/asked and answered
- vague and unintelligible question
- compound question
- argumentative question
- assumes facts not in evidence
- mischaracterization of witness' prior testimony
- improper hypothetical question
- abusive and insulting questions

- ambiguous, indefinite, or uncertain questions
- question amounts to testimony
- requirement of personal knowledge — lack of foundation
- question invades a privilege (see cases in §§7.93 – 7.101)
- opinion by witness without proper disclosure pursuant to Illinois S.Ct. Rule 213(f).

B. [7.31] Showing Provocation

Provocation is discussed in §7.13 of this chapter.

C. [7.32] Accepted Lifestyle

A study of mental cruelty case law reveals that a showing of accepted lifestyle may be a defense. In mental cruelty cases, establishment of grounds depends on the effect of the conduct on the particular petitioner. As bad as the conduct may appear to one outside the marriage, it may be very normal in the marriage and may not have the required effect on that particular petitioner. *Christian v. Christian,* 69 Ill.App.3d 450, 387 N.E.2d 1254, 26 Ill.Dec. 326 (1st Dist. 1979); *In re Marriage of Nilsson,* 81 Ill.App.3d 580, 402 N.E.2d 284, 37 Ill.Dec. 394 (3d Dist. 1980).

D. [7.33] Recrimination

Although the defense of recrimination (*i.e.,* petitioner's subsequent fault barring an action for dissolution or legal separation) has been abolished by IMDMA §403(c), acts that may no longer be used in a recrimination defense may still be used to show provocation.

E. [7.34] Condonation

Although statutory and case law limitations have altered and weakened condonation as a defense, it is still available under limited circumstances.

1. [7.35] Definition

Condonation is the forgiveness of a matrimonial offense with the understanding that it will not be repeated and that the forgiven party will treat the other kindly. *In re Marriage of Rogers,* 74 Ill.App.3d 351, 392 N.E.2d 786, 30 Ill.Dec. 131 (3d Dist. 1979).

2. [7.36] Forgiveness After Suit

Condonation has been abolished as a defense for any alleged forgiveness occurring after the suit for dissolution or legal separation is filed and the court acquires jurisdiction over the respondent. IMDMA §403(c). Therefore, during the pendency of a case, the parties are free to attempt reconciliation without risking waiver of the grounds alleged in the petition for dissolution.

3. [7.37] Continued Cohabitation and Sexual Relations

Continuing to live in the same home and occasionally having sexual relations are not in themselves sufficient to prove condonation, especially in mental cruelty and habitual drunkenness cases if the wrong occurs over an extended period of time. *Deahl v. Deahl,* 13 Ill.App.3d 150, 300 N.E.2d 497 (1st Dist. 1973); *Dorian v. Dorian,* 298 Ill. 24, 131 N.E. 129 (1921).

4. [7.38] Reviving Cause of Action

Forgiveness constituting condonation includes a condition that the forgiven party will thereafter treat the innocent party with conjugal kindness. If the forgiven party breaches that condition by conduct that independently may not be a ground for dissolution, it will nevertheless revive the forgiven acts, which then will be actionable. *See Moore v. Moore,* 362 Ill. 177, 199 N.E. 98 (1935); *Ollman v. Ollman,* 396 Ill. 176, 71 N.E.2d 50 (1947).

5. [7.39] Collusion

If the respondent can prove to the court that the petitioner consented or assented to the conduct now complained of for the purpose of obtaining a dissolution of marriage, legal separation, or declaration of invalidity of marriage, no judgment may be entered on any of those causes of action. IMDMA §408.

F. [7.40] Insanity

If a respondent is proved to be insane at the time of the commission of the acts that constitute grounds, the cause of action is defeated. The respondent need not have been adjudicated insane at the time the acts were committed. *See Carlson v. Carlson,* 308 Ill.App. 675, 32 N.E.2d 365 (1st Dist. 1941) (abst.). However, the respondent's becoming insane after committing the acts complained of is not a defense to the cause of action. *Iago v. Iago,* 168 Ill. 339, 48 N.E. 30 (1897). When suit is filed against an insane respondent, a guardian ad litem must be appointed.

VI. PROOFS NECESSARY FOR DECLARATION OF INVALIDITY OF MARRIAGE (FORMERLY KNOWN AS ANNULMENT)

A. [7.41] Jurisdiction and Venue

An action to declare a marriage invalid must be commenced in the county of the respondent's residence, the county in which the cause of action arose, or, if the respondent is a nonresident, in any county. Service of process shall be as provided in the Code of Civil Procedure.

B. Grounds

1. [7.42] Lack of Capacity To Consent

Lack of capacity may be established by several different kinds of conduct:

a. Mental incapacity or infirmity. The proof must show that the party had no capacity to consent because of a mental condition, which may be a result of insanity, retardation, or

incompetence accompanying increasing age. Proof must demonstrate that the party had insufficient mental capacity to understand the nature of marriage. Proof of adjudicated insanity is only prima facie evidence and can be rebutted. Incompetency to handle business affairs or care for oneself is not conclusive on the issue of mental capacity to understand the nature of marriage. *In re Marriage of Kutchins,* 136 Ill.App.3d 45, 482 N.E.2d 1005, 90 Ill.Dec. 722 (2d Dist. 1985). Each case must be proved on a case-by-case basis. *See Davis v. Tickell,* 230 Ill.App. 285 (4th Dist. 1923).

b. Influence of alcohol, drugs, or other incapacitating substances. Necessary proof must establish that the party or parties were deprived of their reason as a result of alcohol or drugs. *See O'Brien v. Eustice,* 298 Ill.App. 510, 19 N.E.2d 137 (1st Dist. 1939).

c. Induced by force or duress. A threatened prosecution for rape with the possibility of a life sentence made to an 18-year-old male by the father of a pregnant girl constituted duress and would sustain an annulment action by the male. *See Short v. Short,* 265 Ill.App. 133 (3d Dist. 1932). However, the prosecution of bastardy (paternity) proceedings did not constitute sufficient duress to support an annulment action when the man did not deny having sexual intercourse with the woman. *See Smith v. Saum,* 324 Ill.App. 299, 58 N.E.2d 248 (1st Dist. 1944).

d. Induced by fraud involving essentials of marriage. The misrepresentation must be of some existing fact, not a mere promise to do something in the future. However, a promise to consummate a marriage relates to the present, and if that proves false, the marriage is subject to annulment. *See Louis v. Louis,* 124 Ill.App.2d 325, 260 N.E.2d 469 (1st Dist. 1970).

Examples of misrepresentations held to be insufficient to support an action for annulment include untrue statements concerning the morality and chastity of either party (*Beckley v. Beckley,* 115 Ill.App. 27 (3d Dist. 1904); *Hull v. Hull,* 191 Ill.App. 307 (2d Dist. 1915)), and an untrue statement that a party's epilepsy had been cured. *Lyon v. Lyon,* 230 Ill. 366, 82 N.E. 850 (1907). However, a husband who agrees to marry a wife despite her acknowledged psychological inability to consummate the marriage has no cause of action for a declaration of invalidity on the ground of fraud in the essentials of the marriage. *In re Marriage of Naguit,* 104 Ill.App.3d 709, 433 N.E.2d 296, 60 Ill.Dec. 499 (5th Dist. 1982).

Examples of misrepresentations that will support an action for annulment include a pregnant woman's falsely telling the man he was the father of her child (*Arndt v. Arndt,* 336 Ill.App. 65, 82 N.E.2d 908 (1st Dist. 1948)); a man's falsely promising a woman that he wanted children and would consummate the marriage (*Louis v. Louis, supra*); a man's concealing from a woman at the time of the marriage that he was guilty of a felony and under indictment (*Vachata v. Vachata,* 58 Ill.App.2d 78, 207 N.E.2d 129 (5th Dist. 1965) (abst.)); and a woman's false representation that she was a widow instead of a divorcee, when made to a devout Catholic man whose religious convictions would have prevented his marriage to the woman if he had known her former husband was still living. *Wolfe v. Wolfe,* 76 Ill.2d 92, 389 N.E.2d 1143, 27 Ill.Dec. 735 (1979).

The petitioner's burden of proof to sustain fraud must be by clear and convincing evidence. See *id.*

2. [7.43] Lack of Physical Capacity To Consummate

Consummation must be by sexual intercourse. The lack of physical capacity to consummate is the physical inability to have sexual intercourse, not merely an emotional unwillingness. *In re Marriage of Naguit,* 104 Ill.App.3d 709, 433 N.E.2d 296, 60 Ill.Dec. 499 (5th Dist. 1982). Incapacity has nothing to do with sterility. The other party must not have known of the incapacity at the time of the marriage.

3. [7.44] Underage Without Necessary Consent

Counsel must establish proof that a party under the age of 18 married without parental, guardian, or judicial approval.

4. [7.45] Prohibited Marriage

The following marriages are prohibited:

a. a marriage entered into before the dissolution of an earlier marriage of one of the parties;

b. a marriage between an ancestor and a descendant or between a brother and a sister whether the relationship is by half or whole blood or by adoption;

c. a marriage between an uncle and a niece or between an aunt and a nephew whether the relationship is by half or whole blood;

d. a marriage between cousins of the first degree unless both parties are 50 years of age or older, or either party at the time of application for the marriage license presents for filing with the county clerk of the county in which the marriage is to be solemnized a certificate signed by a licensed physician stating that one of the parties to the proposed marriage is permanently and irreversibly sterile.

VII. DEFENSES TO ACTIONS FOR DECLARATION OF INVALIDITY OF MARRIAGE

A. [7.46] Failure To Prove Case

Failure to prove the case is discussed in §7.30 of this chapter.

B. [7.47] Consent or Collusion

See §7.39 of this chapter for a discussion of consent or collusion. This defense is not available to preserve a void (prohibited) marriage. Courts have held that the equitable principles of "clean hands," the rule of "pari delicto," and consent of the other party are not applicable defenses if the marriage is void since the state has become a third party. *See Jardine v. Jardine,* 291 Ill.App. 152, 9 N.E.2d 645 (1st Dist. 1937); *Hunt v. Hunt,* 252 Ill.App. 490 (1st Dist. 1929).

C. [7.48] Time Limitations

Strict time limitations govern the right to an action on the various grounds for declarations for invalidity:

1. Lack of capacity to consent. An action based on this ground, which includes all the various permutations discussed in §7.42 of this chapter, will be barred if not commenced by a party or the legal representative of a party within 90 days after learning of the condition. *See Payton v. Payne,* 90 Ill.App.3d 892, 414 N.E.2d 33, 46 Ill.Dec. 311 (1st Dist. 1980).

2. Lack of physical capacity to consummate marriage. A petitioner alleging this ground must file the action within one year after obtaining knowledge of the described condition.

3. Underaged party. The party, his parents, or his guardian must file the action before the time the underaged party reaches the age of consent. *See Long v. Long,* 15 Ill.App.2d 276, 145 N.E.2d 509 (2d Dist. 1957); IMDMA §302(a)(3).

D. [7.49] Removal of Impediment and Continued Cohabitation in a Prohibited Marriage

If the circumstance causing a marriage to be prohibited (void) is subsequently removed and the parties continue to live together, the marriage is valid and cannot be invalidated.

VIII. [7.50] PROCEDURAL ACTIONS OF TRIAL PRACTICE

The trial or hearing is the place where all credible evidence is brought together at one time and submitted to the court for determination. This may be done by testimony of witnesses, introduction of documents or tangible things into evidence, and submission of certain reports or admissions. Developing the evidence to be presented at trial requires careful preparation. Even though most dissolution of marriage cases are ultimately disposed of by default or by settlement, all hearings, including "prove-ups," must be conducted as prescribed by statutory law.

A. The Default Case

1. [7.51] Definition

A default case is one in which no response has been filed to the petitioner's initial petition for dissolution of marriage.

2. Jurisdiction

a. [7.52] Personal Service

If the respondent is an Illinois resident and has been personally served so that the court has acquired personal jurisdiction, the court has the authority to terminate the marital status, dispose of marital property, and award custody of children, child support, and maintenance to the petitioner. *See In re Marriage of Weishaupt,* 160 Ill.App.3d 563, 514 N.E.2d 788, 113 Ill.Dec. 6 (4th Dist. 1987). The same result applies when proper long-arm service is achieved. CCP §2-209(a)(5).

b. [7.53] Service by Publication or if Long-Arm Jurisdiction May Not Be Asserted

Although the court still may terminate the marital status, award custody to petitioner, and dispose of property located in the state, it may not award maintenance or child support or deal with out-of-state property if service has been achieved through publication. *In re Marriage of Parks,* 122 Ill.App.3d 905, 461 N.E.2d 681, 78 Ill.Dec. 97 (2d Dist. 1984).

3. [7.54] Notice

If a respondent who has been served either personally or by publication fails to appear and answer or otherwise plead, a default judgment may be entered without further notice to the respondent. If the respondent has appeared in person or by an attorney but has failed to answer or otherwise plead, the petitioner must serve the respondent or that party's attorney with notice of the motion to enter a default. In all other respects, the procedure for a default hearing is the same whether or not the respondent has appeared.

a. [7.55] Forms To Be Filed

Preparation for the default hearing requires completion and submission of the following forms, examples of which are found in the Appendix to this chapter. In Cook County, the forms are available from the Clerk of the Court in Room 802, Richard J. Daley Center. Other circuits may have their own preprinted forms. A typed form may be prepared by the petitioner's attorney following the formats demonstrated in the examples listed here:

1. For a motion to have a default dissolution case assigned to a judge and order of default, see §7.152.

2. For a motion and affidavit for service by publication, see §7.153. The required affidavit must contain the specific statements contained in the form even if on the petitioner's or attorney's information and belief since the affidavit is jurisdictional. CCP §2-206.

3. For an order of default, Service by Publication, see §7.154.

4. For an affidavit as to military service, see §7.159. If a member of the armed forces, the respondent is protected by the Soldiers' and Sailors' Civil Relief Act of 1940, 50 App. U.S.C. §§501 – 591, from having any rights prejudiced when the party cannot appear to make a defense because of military service. Before a default may be entered, the petitioner must file an affidavit that the respondent is not in military service.

5. For an appearance, stipulation, and waiver of rights under the Soldiers' and Sailors' Civil Relief Act, see §7.160. If in military service, the respondent may file an appearance and waiver, or the court, upon application, must appoint an attorney to represent the respondent.

6. Counsel who chooses to try to determine military status should send the respondent's name and social security number, if possible, to the appropriate office, which will furnish a certificate of military status. See Chapter 21 of this handbook.

7. All cases that include an award of child support require the filing of a Uniform Order for Support (see 7.164), a Notice to Withhold Income for Support (see §7.165) and a family support affidavit (see §7.166).

b. [7.56] Getting a Hearing Date

In Cook County, counsel must complete the form titled "Certificate and Agreement by Counsel" in order to get a hearing date. Once completed, the form should be presented at the computer scheduling terminal in Room 802 of the Richard J. Daley Center. The clerk will then schedule the motion for hearing before the prove up judge in the case of a preliminary calendar or before the individual calendar judge to which the case is assigned. See §7.162. Outside of Cook County, local rules should be consulted as the practice for handling default cases may vary.

c. [7.57] The Hearing

On the date set for hearing in counties such as Cook, which require the transcript of the proceedings to be filed before the judgment may become final, petitioner's counsel should check with the judge's clerk in the courtroom to be certain that the court file has been delivered and that the matter appears on the judge's call. If the case is a settled case and a settlement agreement is to be introduced into evidence, the court reporter should mark it "Petitioner's Exhibit No. 1 for Identification."

d. [7.58] Witnesses

Ordinarily, the only witness to testify at a default hearing is the petitioner; if a contested case has been resolved by settlement, the respondent may be an additional witness. However, petitioner's counsel may decide that the particular circumstances of the case require additional testimony, perhaps to corroborate crucial facts testified to by the petitioner. All potential witnesses should be interviewed well in advance of the hearing so that petitioner's counsel has an opportunity to inform them about the hearing procedures and to review what particular evidence each witness is expected to present. The attorney should review with each witness the particular questions that will be asked so that testimony does not become objectionable because of extraneous or inappropriate comments.

The proof presented at the hearing through testimony must support the material allegations of the petition. If an element of the cause of action is not supported by competent evidence, the judgment is subject to reversal. *Chatterton v. Chatterton,* 132 Ill.App. 31 (1st Dist. 1907). Examples of questions designed to establish for the record each of the necessary elements of a cause of action for dissolution of marriage are found in §7.151.

B. The Settled Case

1. [7.59] Definition

A settled case is one in which issue has been reached on the pleadings but evidence will be presented only in support of the petition or the counterpetition and the terms of settlement.

2. [7.60] Forms

The petitioner must file a stipulation that the case may be heard on the petition and response "as in cases of default." See §7.162. Cook County courts require the completion of a form titled "Stipulation and Agreement of Counsel" to schedule a settled case for prove-up. See §7.163. Both parties as well as the attorneys should sign the stipulation. The case proceeds to the same type of hearing as in a default case except the respondent may be present to give testimony corroborating acceptance of the settlement agreement. If the ground for dissolution is no-fault and the parties have agreed to a six-month separation period, a waiver of the two-year separation with affidavits must be filed. See forms in §§7.155 and 7.156. Although entering an order of withholding is required in all cases including an award of child support, the parties to a settled case may agree to provide for an alternative arrangement to waive the immediate service of the order on the obligor's employer provided they obtain court approval. See IMDMA §706.1(B); §§7.157 and 7.158.

IX. [7.61] PREPARATION FOR A CONTESTED TRIAL

If the respondent has filed an appearance and answer to the petition for dissolution of marriage and the issues in the case cannot be settled through negotiation, both parties must prepare for a contested trial.

A. The Bifurcated Trial

1. [7.62] Grounds Tried First

Contested trials are to be tried on a bifurcated basis with the grounds for dissolution to be tried first. In cases in which grounds are uncontested and proved-up as in cases of default, the trial on all other remaining issues shall proceed immediately if so ordered by the court or if the parties so stipulate. If the grounds are established through a contested trial, the court may allow additional time for the parties to settle the remaining issues before resuming the trial or may proceed immediately to take testimony on the remaining issues. IMDMA §403(e).

2. [7.63] Judgment on Grounds Entered Before the Trial Is Completed

Once the court finds grounds for dissolution or legal separation but continues the balance of the trial to hear the contested issues, the trial lawyer should consider certain options. IMDMA §401(b) provides that judgment shall not be entered unless, to the extent of its jurisdiction, "the court has considered, approved, reserved or made provision for child custody, the support of any child of the marriage entitled to support, the maintenance of either spouse and the disposition of property." Entering a judgment dissolving the marriage but reserving any of the remaining issues requires either an agreement of the parties or a motion by one party with a finding by the court that "appropriate circumstances" exist for the court to enter the bifurcated judgment. *See In re Marriage of Cohn,* 93 Ill.2d 190, 443 N.E.2d 541, 66 Ill.Dec. 615 (1982). To date, appellate courts have affirmed appropriate circumstances in limited factual situations. In the first case treating the issue, *In re Marriage of Kenik,* 181 Ill.App.3d 266, 536 N.E.2d 982, 129 Ill.Dec. 932 (1st Dist. 1989), one essentially simple case was dragged out for nearly three years by the noncooperation of the husband with the result that the wife became pregnant by a third party, and the soon-to-be-born child would have no medical insurance coverage unless the mother were married to the biological father. The Illinois Supreme Court spoke to the issue in the 1982 decision in *In re Marriage of Cohn,* 93 Ill.2d 190, 199, 66 Ill.Dec. 615, 443 N.E.2d 541, 545

(1982) identifying appropriate circumstances as (1) the lack of *in personum* jurisdiction, (2) if a party would be able to pay court ordered child support or maintenance, (3) the court has set aside a fund for child support, or (4) if children do not reside with either parent. In *In re Marriage of Blount,* 197 Ill.App.3d 816, 555 N.E.2d 114, 144 Ill.Dec. 217 (4th Dist. 1990), the court affirmed the entry of a bifurcated judgment finding the benefit to the emotional status of an elderly, very ill wife appropriate circumstances. *Copeland v. McLean* cited the decision in *Blount* in affirming the decision to grant a bifurcated judgment where a seriously ill wife wished to be divorced from her husband prior to her death so that she might dispose of her half of the marital assets according to her wishes. *Copeland v. McLean*, 327 Ill.App.3d 855, 763 N.E.2d 941, 261 Ill.Dec. 692, 700 (4th Dist. 2002).

Whether trial counsel should request or agree to such an entry or seek to hold up entry of judgment until completion of the entire trial depends on the circumstance in each case. In making such a decision, counsel should consider the following factors:

a. If judgment dissolving the marriage is entered and a party dies before the trial on the remaining issues is completed, the action will not abate. 750 ILCS 5/401(b). Instead, the trial would continue with the decedent's estate substituted as a party. IMDMA §401(b). If no judgment is entered, the entire dissolution action abates. *Brandon v. Caisse,* 145 Ill.App.3d 1070, 496 N.E.2d 755, 99 Ill.Dec. 894 (2d Dist. 1986). However, notwithstanding the holding in *Brandon*, the First District Appellate Court has held that while a dissolution proceeding abates with the death of one of the parties, a trial court properly retained jurisdiction to hear an issue of attorney fees and to enter allowance for them even after a death based upon facts where attorneys filed the petition for attorney fees and costs after their client died in an automobile accident. 136 Ill.App.3d 297, 483 N.E.2d 322, 91 Ill. Dec. 40, 41 (1st Dist. 1985). *Dague* presented facts where the still-living party to the dissolution action was susceptible to suit for the deceased party's attorney's fees notwithstanding that no judgment had entered at the time the action abated as a result of death. However, no appellate court has yet extended this holding to cases where the deceased party is the one from whom fees are sought, and *Dague* predates the current fee statute providing for courts to consider fee shifting from one party to the other at the contribution stage taking all 5/503 factors into account.

b. Accumulation of marital property continues until the judgment of dissolution is entered. *In re Marriage of Cohn, supra.*

c. If a judgment dissolving the marriage is entered, the motivation to complete the trial expeditiously may be lost, to the frustration of the client.

d. If custody is a hotly contested issue, entry of a bifurcated judgment may permit one party to convert a cohabitation situation into marriage and thereby improve that party's status in the custody dispute.

e. While an agreed entry of a bifurcated judgment would not be final for appeal purposes, a contested entry would be. *In re Marriage of Bogan,* 116 Ill.2d 72, 506 N.E.2d 1243, 107 Ill.Dec. 188 (1986).

f. What particular benefit would the client gain by having a judgment dissolving the marriage entered before the entire case is over? What particular detriment? Medical insurance coverage under the spouse's policy may cease.

g. What particular benefit would the opponent gain by having such a judgment entered before the entire case is over?

3. [7.64] Public Hearings

All trials and hearings except those regarding custody must be held in open court, not in camera. *See Suesemilch v. Suesemilch,* 43 Ill.App. 573 (1st Dist. 1892). Certain exceptions have developed, and some have been legislatively confirmed. The court has the right to regulate the orderly procedure of trial and to limit the number of spectators, including reporters. *Sheppard v. Maxwell,* 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966). The courts can also exclude spectators to protect witnesses and to prevent highly salacious, lewd, and vulgar testimony from being heard in public. 75 AM.JUR.2d *Trial* §§205 – 206 (1991).

4. [7.65] Custody Matters

The court is authorized to interview the child in chambers rather than in open court. IMDMA §604(a). Both counsel shall be present unless the parties otherwise agree, and a court reporter must be present to make a complete record of the interview that is incorporated as part of the record in the case. The court also has discretion to exclude the public from a custody hearing if public exposure may be detrimental to the child's best interests. IMDMA §606(c). Finally, a court that finds it necessary to protect the child's welfare may seal the record of any interview, report, investigation, or testimony in a custody proceeding and order that the record be kept secret. IMDMA §606(d); *In re Marriage of Flynn,* 27 Ariz.App. 653, 557 P.2d 1085 (1976). This decision is consistent with the court's inherent power to expunge juvenile records when necessary to protect minors from the disclosure of potential harmful information. *St. Louis v. Drolet,* 67 Ill.2d 43, 364 N.E.2d 61, 7 Ill.Dec. 74 (1977).

5. [7.66] Continuances

The provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 App. U.S.C. §501, *et seq.,* apply to people serving in military reserves. Accordingly, they may seek stays of proceedings based on their reserve duty pursuant to the Act. *In re Marriage of Brazas,* 278 Ill.App.3d 1, 662 N.E.2d 559, 214 Ill.Dec. 993 (2d Dist. 1996).

B. [7.67] Premarital Agreements

With the adoption of the Illinois Uniform Premarital Agreement Act (UPAA), 750 ILCS 10/1, *et seq.,* Illinois courts now have statutory guidelines for the content, amendment, revocation, and enforcement of premarital agreements signed on or after January 1, 1990.

The facts of a particular case may make it more desirable to adjudicate the enforceability of a contested premarital agreement before litigating the other issues of the case. For example, if the premarital agreement allocates any or all of the property owned by the parties to the parties as nonmarital property, the court would be bound to award that property as nonmarital property pursuant to IMDMA §503. An early adjudication of the agreement would then eliminate the need for certain discovery and expert testimony at trial.

Filing a motion for declaratory judgment pursuant to CCP §2-701 is an appropriate method for seeking the construction of terms or a declaration of the parties' rights under a prenuptial agreement. *In re Marriage of Byrne,* 179 Ill.App.3d 944, 535 N.E.2d 14, 128 Ill.Dec. 800 (1st Dist. 1989). In drafting a motion for declaratory judgment, counsel should be sure to include the following allegations:

1. An actual controversy exists regarding the construction or enforceability of the agreement.

2. An adjudication of the parties' disagreement over the agreement will terminate the controversy or some part thereof giving rise to the divorce proceeding.

In deciding whether to try issues involving premarital agreements before or in conjunction with other issues in an action for dissolution of marriage, counsel should consider the following provisions of the UPAA:

1. A premarital agreement is defined as an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage. However, if a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement will be enforceable, but only to the extent necessary to avoid an inequitable result.

2. Property is defined as an interest, whether present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

3. A premarital agreement must be in writing and signed by both parties but is enforceable without consideration.

4. The parties to a premarital agreement may contract regarding the following:

a. the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

b. the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

c. the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

d. the modification or elimination of spousal support;

e. the making of a will, trust, or other arrangement to carry out the provisions of the agreement;

f. the ownership rights in and disposition of the death benefit from a life insurance policy;

g. the choice of law governing the construction of the agreement; and

h. any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

5. After marriage, the parties to a premarital agreement can amend or revoke the agreement only by a written agreement signed by both parties. As with the original agreement, the amended agreement or the revocation of the agreement is enforceable without consideration.

6. A premarital agreement will not be enforceable if the party against whom enforcement is sought proves that the party did not execute the agreement voluntarily or that the agreement was unconscionable when executed and before execution the party was not given fair and reasonable disclosure of the property or financial obligations of the other party, did not voluntarily and expressly waive its right to disclosure in writing, and did not have or reasonably could not have had adequate knowledge of the property or financial obligations of the other party.

7. Although a premarital agreement can modify or eliminate spousal support, a court may require one party to provide support to the other party to the extent it is necessary to avoid undue hardship in light of circumstances not reasonably foreseeable at the time the parties executed the agreement.

8. The unconscionability of a premarital agreement shall be decided by the court as a matter of law.

9. Any statute of limitations that would apply to an action asserting a claim for relief under a premarital agreement is tolled during the parties' marriage. However, either party may assert equitable defenses for limiting the time for enforcement, including laches and estoppel.

10. The UPAA as adopted applies to premarital agreements executed on or after January 1, 1990.

C. Getting Evidence to the Trial

1. [7.68] Subpoena Duces Tecum

Service of a subpoena on a nonparty together with the payment of the statutory witness fee will give a greater assurance that necessary witnesses will be present at the trial and that necessary documents or tangible things that are within the witnesses' control will be brought to the trial.

2. [7.69] Notice on a Party To Appear and Produce

If the trial lawyer needs the testimony of the opposing party or the production of a document or tangible thing in the possession or control of the opposing party, the lawyer must make certain that the party is at the trial. A party is not required to attend its own civil trial unless required by the use of some official process. S.Ct. Rule 237(b) provides that trial counsel may secure the appearance at trial of the opposing party as well as the production of documents or tangible things in the opponent's possession. However, a party can be compelled to produce the originals of only those documents or tangible things previously produced during discovery.

3. [7.70] Request for Admission of Facts or Genuineness of Documents

S.Ct. Rule 216 authorizes a procedure that can force the opposition to admit the truthfulness of many material facts and the genuineness of important documents before trial commences, thus greatly reducing trial time and costs and eliminating the need for witnesses or other testimony concerning the issues to which the documents or facts relate. Because of the 28-day response term, this procedure should be initiated at least six weeks before trial:

a. Counsel should serve a written request for the admission by the opponent of the truth of any specified relevant fact or the genuineness of any relevant documents.

b. If the opponent does not respond within 28 days, thereafter each requested admission is considered admitted for the purposes of trial.

c. No admission results if, within 28 days, the party served (1) makes a sworn written denial or sets forth in detail why he cannot admit or deny or (2) files written objections to each requested admission on the grounds of privilege, relevancy, or impropriety. The court will promptly hear motions with respect to objections, and the objector must answer those portions to which objections were not made or that were denied.

d. Trial courts have wide discretion to allow a late filing of a request to admit facts to prevent injustice. *Sims v. City of Alton,* 172 Ill.App.3d 694, 526 N.E.2d 931, 934, 122 Ill.Dec. 538 (5th Dist. 1988).

e. A party who fails to move to strike a late-filed response to a request to admit facts or fails to object to the entry of an order allowing a late filing before the case reaches the appellate court will be precluded from raising the issue on appeal. *Vulcan Metal Products, Inc. v. Schultz,* 180 Ill.App.3d 67, 535 N.E.2d 933, 936, 129 Ill.Dec. 168 (3d Dist. 1989).

4. [7.71] Order for Physical or Mental Examination of the Parties or Child

S.Ct. Rule 215(a) authorizes a court "upon notice and on motion made within a reasonable time before the trial" to order a party to submit to a physical or mental examination if the physical or mental condition of a party or child is in controversy and is a contested matter. Pertinent questions may include whether both parties are able to work, whether the child needs special education or visitation arrangements, whether either parent's mental condition impairs the ability to care for the child, or whether the child's mental condition would be better served by one parent rather than the other. Under S.Ct. Rule 215, trial counsel are given two methods of developing expert medical evidence for presentation at trial:

a. Examination by physician selected by counsel. Trial lawyers, as a result of prior dealings, usually know physicians whom they trust and who they feel make good witnesses. If counsel believes that the opponent is faking or exaggerating an illness, counsel may request the opponent to submit to an examination by counsel's selected doctor. If the opponent objects to the physician, the court may ask the moving party for alternate suggestions. Costs, expenses, and lost wages shall all be paid by the moving party.

The examining physician shall mail written reports to both attorneys within 21 days after the examination but no later than 14 days before trial. If the attorney for the party examined is not

properly served with the report, then the physician cannot testify, the report cannot be introduced, and any X rays or test results cannot be used at trial.

b. Examination by court-selected impartial medical expert. S.Ct. Rule 215(d) authorizes a court, on its own motion or motion of a party made a reasonable time before trial, to order an impartial physical or mental examination of a party whose mental or physical condition is in issue if the court believes that such an examination will materially aid the proper disposition of the case. Neither counsel has any involvement in the selection of the physician. A copy of the physician's report shall be given to the court and counsel, and either party or the court may call the physician to testify. Testimony of an impartial medical expert may be given no greater weight than the testimony of a physician selected by counsel. *Wong v. Richards,* 10 Ill.App.3d 514, 294 N.E.2d 784 (4th Dist. 1973).

However, a Rule 215(a) examination is not to be used as a custody evaluation per se. *In re Marriage of Divelbiss*, 308 Ill.App.3d, 198 719 N.E.2d 375, 241 Ill.Dec. 514 (2000). Instead, Public Act 91-746, which became effective June 2, 2000, added §604.5 to the Illinois Marriage and Dissolution of Marriage Act. This section allows for the appointment of custody evaluators at the request of a party, a parent, the child's custodian, the attorney for the child, the child's guardian ad litem, or the child's representative.

S.Ct. Rule 215(c) provides that the personally selected examining physician shall send copies of the written report to both attorneys within 21 days after the completion of the examination and no less than 14 days before trial. Failure to comply with these timing requirements may result in the court's refusal to allow the expert to testify. *Harris v. Minardi,* 74 Ill.App.2d 262, 220 N.E.2d 39 (2d Dist. 1966). No copy is to be sent to the court, and, therefore, the court may not read the report unless it is admitted into evidence at trial. Although a copy of the Rule 215(d) report by the impartial medical expert is to be sent to the court as well as to the attorneys for both parties, no reported cases address the issue of whether the court may read the report sent to it pursuant to Rule 215(d). A judge acting as trier of fact should be limited by the same factors that limit jury consideration of evidence; if a jury could not read a report unless it was admitted into evidence, a judge in a nonjury trial should be bound by the same restriction.

A notable exception is the custody case in which IMDMA §604(b) specifically authorizes the court to seek and obtain written advice from professional personnel. Any reports made by such professional personnel consulted by the court must also be made available to counsel, who then may examine the witness at the trial. It could be persuasively argued that the court, in designating a physician pursuant to Rule 215(d), may also consider that physician to be a professional under IMDMA §604(b) and therefore be permitted to read the report as written advice. No case law to date addresses this argument.

5. Court-Appointed Investigation — Custody

a. [7.72] Investigation Without Cost

In custody disputes, it is often desirable to have some impartial investigative service study the parties' respective situations to aid the court in determining which parent would be the better custodian of the child. IMDMA §605(a) authorizes the court to order an investigation and report by the Illinois Department of Children and Family Services. However, the use of the word "may" in the statutes indicates that if there is a more appropriate alternative, the court has the discretion

to use it. Cook County Circuit Court Rule 13.4(f) also authorizes such an investigation and report by Supportive Services of Cook County, and the court may order an IMDMA §604(b) evaluation of the parties by the Psychiatric Institute of Cook County.

If such an investigation is ordered, the investigator may consult any person who has information about the child and may refer the child to professional personnel for diagnosis. The investigator may further consult with and obtain information from medical, psychiatric, or other expert professionals who have served the child in the past. The investigator shall then prepare a written report and mail it to the attorneys for the parties at least ten days before a custody hearing.

b. [7.73] Use of Report

The court may examine and consider an investigator's report prepared pursuant to IMDMA §605. The attorneys are permitted to see the investigator's entire file, including the underlying data on which the report is based. The attorneys may call the investigator as a witness during the trial or hearing as if the investigator were under cross-examination.

6. [7.74] Request for Taking Blood Tests

Occasionally an issue of paternity will arise during a suit for dissolution or legal separation. Counsel may feel that a blood test is necessary to attempt to prove or disprove paternity. Under the Illinois Parentage Act of 1984, 750 ILCS 45/1, *et seq.*, upon request of either party, the court shall "order the mother, child and alleged father to submit to deoxyribonucleic acid (DNA) tests to determine inherited characteristics." 750 ILCS 45/11. Such tests under the Parentage Act are mandatory, and a party may not refuse to submit to a blood test if ordered by the court upon request by the opposite party. The court may resolve questions of paternity against a party who refuses to submit to blood tests.

While the court-appointed expert shall determine the type of tests to be conducted as well as the testing procedures, any interested party for good cause shown in advance of the scheduled tests may request a hearing to object to the type of tests, the number and qualifications of the experts, or the testing procedures. The number of experts is not specified, nor is the designation of whose witness the expert is to be. Results of blood tests conducted by experts chosen by the state's attorney's office instead of by the court are admissible absent a showing of prejudice. *People ex rel. Tillery v. Ginsberg,* 141 Ill.App.3d 634, 490 N.E.2d 1044, 96 Ill.Dec. 8 (2d Dist. 1986). The expert or experts shall prepare a written report of the test results. Expert opinion interpreting the test results shall be admissible as evidence.

If the expert opinion or the test results exclude paternity by the alleged father, he is not granted a directed finding but rather is presumed not to be the father; successful rebuttal of this presumption must be by clear and convincing evidence. Disagreement among experts as to the results of the blood tests shall not of itself render their opinions inadmissible.

A party may obtain tests of his own blood independent of those ordered by the court. A party may also present expert testimony interpreting these independent tests or any other blood tests ordered under this section.

The court may order a party or child to submit to a blood test even if neither party so requests. 750 ILCS 45/11(h).

7. Interview of Child

a. [7.75] Requiring Appearance

If trial counsel believes that the client's case will be benefited by the court's interviewing a child in chambers, counsel must make sure the child is present at trial. If the client is the child's custodian, securing the child's attendance in court is a simple matter. If the client is a non-custodian, the child's attendance can best be assured by a motion to require the appearance of the child at trial and by an order of the court. Some lawyers use subpoenas and serve the custodian as guardian of the child. Others have used notices to appear and produce pursuant to S.Ct. Rule 237. Use of the service of a notice or subpoena may result in the custodian's appearing without the child, and valuable trial time is wasted arguing whether the child should be required to appear or whether the notice or subpoena should be quashed. By seeking an order in advance of the trial, counsel has a greater degree of certainty that the child will appear, and trial time will not be wasted.

b. [7.76] Conducting the Interview

The court has the discretion to interview the child concerning custody and visitation matters. Usually, the parents are not present; however, a court reporter is required to be present to make a record of the interview. Counsel for both parties shall also be present unless the parties agree otherwise. IMDMA §604(a). Judges have found in-chamber conferences help the court to sense the child's feelings and relationships with the respective parents and to grasp the nature of a child's problems. Evidence taken from a child in an in-depth interview is limited to issues involving custody only and does not touch on other aspects of the case. *See Seniuta v. Seniuta,* 31 Ill.App.3d 408, 334 N.E.2d 261 (1st Dist. 1975). This extends to evidence pertaining to visitation as well. *Regan v. Regan*, 368 N.E.2d 552, 555, 53 Ill.App.3d 50, 54, 11 Ill.Dec. 1, 4 (1st Dist. 1977). The court is not required to interview a child in chambers but may learn of the child's feelings from the child's guardian ad litem. An attorney for the child, a guardian ad litem, or a child's representative may also be present when the court interviews the child. 750 ILCS 5/506.

8. [7.77] Representing the Child

Effective January 1, 1998, IMDMA §506 empowers a court to appoint an attorney to represent not only the interests of a minor or dependent child but to represent the best interests of such a child. The prior version of the statute restricted an attorney for the child to the role of representing the child's interests only. The amendment further allows the court to make such an appointment with respect to the child's property in addition to the child's support, custody, and visitation.

Public Act 91-410, effective January 1, 2000, amended 750 ILCS 5/506 pertaining to the representation of a child. Specifically, the Act provides for the appointment of a child's representative in addition to an attorney to represent the child and a guardian ad litem. The new designation, child's representative, charges the appointed individual to advocate what the representative finds to be in the best interest of the child after reviewing the facts and circumstances of the case. The Act vests the individual with the same power and authority to take part in the conduct of litigation that an attorney for a party has in addition to all of the powers of investigation and recommendation that a guardian ad

litem exercises. The child's representative shall consider, but is not bound by, the expressed wishes of the child, and child's representatives must be trained in accord with the rules promulgated by the chief judge of the circuit where the representative is appointed. The child's representative is bound by the confidentiality strictures of the Rules of Professional Conduct and may not be called as a witness. The appointment of an attorney to act as either attorney for the child, guardian ad litem, or child's representative does not preclude the court from appointing an additional attorney or attorneys to serve in a different capacity either on the court's own motion or that of a party for good cause shown after making specific findings as to reasons for an additional appointment. 750 ILCS 5/506.

D. [7.78] Limitation on the Court To Alter Agreements

Except for provisions for child support, custody, and visitation, the terms of the separation agreement are binding on the trial court unless it finds, after considering the economic circumstances of the parties and other relevant evidence, that the agreement is unconscionable. The court may no longer reject maintenance and property provisions on the ground that they are unfair; they must be unconscionable.

The term "unconscionable," first used in the Uniform Commercial Code (UCC), 810 ILCS 5/1-101, *et seq.,* and defined by UCC cases, is interpreted as necessitating much worse circumstances than those that may be defined as making something unfair or unreasonable. If the agreement is found to be unconscionable, the court may request the parties to submit a revised agreement or may conduct a hearing and make its own orders for the disposition of property, maintenance, child support, and other matters. Misrepresentation, duress, and coercion by both a party's own attorney and the trial court also may be cause to vacate as unconscionable the marital settlement agreement portion of the judgment for dissolution. *In re Marriage of Moran,* 136 Ill.App.3d 331, 483 N.E.2d 580, 91 Ill.Dec. 234 (1st Dist. 1985).

E. [7.79] Conversion of Unsuccessful Dissolution Action to Custody Trial

In the event the court finds that it cannot enter a judgment for dissolution but counsel's client feels that circumstances require an order concerning custody of the child, statutory relief is now available.

1. [7.80] Temporary Custody Order

Upon the dismissal of an action for dissolution of marriage or legal separation, any custody order is vacated unless the court finds on motion of a party and after a hearing that it would be in the best interests of the child that a custody judgment be issued. IMDMA §603(b).

2. [7.81] Two-Step Hearing

The statute requires that the court hold a hearing to determine whether it would be in the best interests of the child to have a custody judgment. Only if the court so finds does it continue with the hearing to determine the proper custody award using the standards set forth in IMDMA §602.

F. [7.82] Stays in the Event of Appeal

After the conclusion of a case, either party may be so unsatisfied with the results that one or both file a notice of appeal and a motion to stay the effect of the judgment while the appeal is

pending. The effect of an appeal on a child support or maintenance award is specifically addressed in two sections of the IMDMA.

IMDMA §413 provides that an order directing payment of money for support or maintenance of a spouse or minor children shall not be suspended or the execution thereof stayed pending an appeal.

IMDMA §504(c) provides that the court may grant and enforce the payment of equitable maintenance during the pendency of an appeal brought against the party receiving such equitable maintenance as the court deems reasonable and proper.

An appropriate case would be one in which no maintenance was awarded because the division of marital property, which has been stayed pending the husband's appeal, would have generated sufficient income for the wife. *In re Marriage of DiAngelo,* 159 Ill.App.3d 293, 512 N.E.2d 783, 111 Ill.Dec. 394 (2d Dist. 1987).

1. [7.83] Power To Govern Appellate Procedure

S.Ct. Rule 1 expressly provides that the Supreme Court rules govern all appeals and thereby supersede statutory provisions inconsistent with the rules. In *People ex rel. Stamos v. Jones,* 40 Ill.2d 62, 237 N.E.2d 495 (1968), the Supreme Court struck down a legislative provision prohibiting a stay of a criminal sentence pending appeal, holding that the legislative prohibition infringed on the power of the judiciary. Although S.Ct. Rule 305 provides for the stay of the enforcement of a judgment during the pendency of an appeal with posting of appropriate bond, IMDMA §413 prohibits a stay on child support or maintenance. So far, this conflict has not been challenged.

2. [7.84] Appealability

The entire question of the appealability of orders in dissolution of marriage cases was discussed in *In re Marriage of Leopando,* 96 Ill.2d 114, 449 N.E.2d 137, 70 Ill.Dec. 263 (1983). The effect of *Leopando,* which held that the various issues raised in a dissolution of marriage action are not separate claims, is to foreclose appeal of any part of a dissolution case before judgment is final on all issues. This general rule and the limited number of exceptions that have developed are discussed more fully in Chapter 24 of this handbook.

G. [7.85] Partition Action

Although IMDMA §503 gives the court almost unlimited power to divide and award property in a dissolution judgment, the court has no corresponding authority to adjudicate property rights in an action for legal separation.

1. [7.86] Partition Action Combined with Legal Separation Action

A party seeking a legal separation can request a division of the real property of the parties by filing a separate count for partition along with the petition for legal separation. The court must follow all formalities of the statute governing partition actions. CCP §17-101, *et seq.*

2. [7.87] Partition Limited to Real Estate

The partition statute deals with real estate, and therefore a beneficiary of a land trust is not entitled to sue for partition. *See Regas v. Danigeles,* 54 Ill.App.2d 271, 203 N.E.2d 730 (1st Dist. 1964).

3. [7.88] Partition Credits

Credit for payment of taxes, insurance, and use and occupancy may be awarded. During a separation, before filing a dissolution or legal separation action or obtaining a judgment, one party may pay the taxes and insurance on a jointly owned home in order to protect and preserve the property even if the payor spouse does not occupy the property. In a partition action, courts have held that a husband paying the taxes and insurance on a property while separated and estranged from his wife has not been making a gift to her and is therefore entitled to credit or contribution from the wife of one half of the payments, plus interest, made by him subsequent to their separation. Also, the right to exclusive possession made voluntarily and without court order or other judicial involvement has a value as between co-owners, and the excluded co-owner may be given a credit contribution for this value. *See Kratzer v. Kratzer,* 130 Ill.App.2d 762, 266 N.E.2d 419 (4th Dist. 1971); *Rosenbaum v. Rosenbaum,* 38 Ill.App.3d 1, 349 N.E.2d 73 (1st Dist. 1976).

4. [7.89] Effect of Prior Order of Possession

A judgment for dissolution awarding sole possession of property to one joint owner and enjoining the other from conveying, encumbering, or otherwise dealing with this interest until the youngest child reaches a specified age is a bar to an action for partition by the excluded spouse during the specified period. *See Pope v. Pope,* 7 Ill.App.3d 935, 289 N.E.2d 9 (1st Dist. 1972); *In re Marriage of Kush,* 106 Ill.App.3d 233, 435 N.E.2d 921, 62 Ill.Dec. 123 (3d Dist. 1982).

5. [7.90] Partition and Homestead Exemption

When one spouse sues to partition the marital residence owned equally as joint tenants and the action itself is not precluded by the court's authority to divide property under IMDMA §503, the defendant spouse is not entitled to a setoff of the homestead exemption before division of property or proceeds of sale. *Phillips v. Phillips,* 56 Ill.App.3d 276, 372 N.E.2d 98, 14 Ill.Dec. 293 (4th Dist. 1977); *Berg v. Berg,* 45 Ill.App.3d 422, 359 N.E.2d 892, 4 Ill.Dec. 59 (2d Dist. 1977).

H. [7.91] Prevention of a Foreclosure Action

If a lender files and successfully prosecutes a foreclosure action against real property during the pendency of an action for dissolution of marriage, the court will lose the ability to do anything other than equitably divide any remaining sale proceeds. In some cases, particularly when the parties have small children, a lawyer may ask that the court liquidate or direct the use of other assets to satisfy the mortgage obligation so that the court can postpone a sale of the marital residence to allow the children to remain in the home. In other cases, the foreclosure results from one spouse's unilateral decision to pressure the other spouse by refusing to make mortgage payments, and a lawyer will want to intercede in the foreclosure action to allow time to

seek relief in the divorce case. By joining the lender as a third-party defendant to the dissolution proceeding and seeking an injunction to prevent the lender from initiating a separate foreclosure suit, the lawyer can better protect a client's interests in real property that is part of the marital estate. *In re Marriage of Schweihs,* 222 Ill.App.3d 887, 584 N.E.2d 472, 165 Ill.Dec. 293 (1st Dist. 1991).

X. [7.92] COMMON EVIDENTIARY CONSIDERATIONS

A number of evidentiary problems confront the trial lawyer in the trial of a matrimonial action. The following sections explore some of the most common.

A. [7.93] Privileged Communication

Frequently, there will be a witness who possesses valuable information that would prove material facts or corroborate testimony concerning facts already in evidence. When assessing the ability to present this evidence or to prevent opposing counsel from bringing out these facts, the trial lawyer should examine the relationship between a party and the proposed witness to see if their communications may be cloaked by some sort of privilege provided for by law. Objecting to testimony based on privilege should not raise an adverse inference that the testimony would be unfavorable. See Robert S. Hunter, TRIAL HANDBOOK FOR ILLINOIS LAWYERS §32.1, *et seq.* (7th ed. 1997).

1. [7.94] Attorney-Client Privilege

The attorney-client privilege protects confidential communications between attorneys and their clients, and S.Ct. Rule 201(b)(2) specifically exempts such communications from discovery. However, in *Waste Management, Inc. v. International Surplus Lines Insurance Co.,* 203 Ill.App.3d 172, 560 N.E.2d 1093, 148 Ill.Dec. 496 (1st Dist. 1990), *aff'd in part, rev'd in part,* 144 Ill.2d 178 (1991), the appellate court pointed out that courts in other jurisdictions have held that if a party puts allegedly privileged communications at issue, that party cannot claim a privilege with respect to those communications. On appeal, the Supreme Court found that the attorney-client privilege had no application and did not reach the issue but did address a similar claim regarding attorney work product. In addressing the work product claim, the Supreme Court found that because work product had become the subject of litigation, the party seeking to assert the work product rule as a bar to discovery could not use the rule as a sword rather than, as intended, a shield. On that basis, counsel might use the Supreme Court's logic to argue credibly that if a party places a privileged communication at issue, that party should not be able to use the attorney-client privilege as both a sword and a shield. Cases subsequent to the decision suggest support for application of the "at issue" exception to the privilege. In *Medical Waste Technologies L.L.C. v. Alexian Bros. Medical Center, Inc.,* 1998 WL 387705, *1 (N.D.Ill 1998), the court stated, "Although the Illinois Supreme Court has never directly supported an application of the "at issue" waiver, this district has previously held that an Illinois state court would indeed recognize such a waiver." *Id.* Similarly, in *Pyramid Controls, Inc. v. Seimens Industrial Automations, Inc.,* the court noted that "the great weight of authority holds that the attorney-client privilege is waived when a litigant place[s] information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party." 176 F.R.D. 269 (N.D.Ill. 1997), *citing Conkling v. Turner,* 883 F.2d 431, 434 (5th Cir. 1989). *Pyramid* also

recognized that both the Seventh Circuit and the Northern District of Illinois accept the "at issue" waiver." *Id., citing Lorenz,* 815 F.2d 1095, 1097 (1987); *A.O. Smith Corp.*, 1991 WL 192200, *4 (N.D.Ill. 1991). Even if the attorney-client privilege is waived by putting the matter at issue, the waiver only applies to the communications "concerning a particular legal or factual issue." *Pyramid*, 176 F.R.D. at 275.

2. [7.95] Husband-Wife Privilege

In general, communications between husband and wife are privileged. CCP §8-801. However, the privilege does not exist when there is an action between the husband and the wife or when the custody or support of their children is in issue. Therefore, since they are married, neither party to the dissolution action may claim that a communication between them is confidential.

3. [7.96] Public Accountant Privilege

Although 225 ILCS 450/27 grants a privilege to accountants concerning confidential communications between public accountants and their clients, case law undermines this privilege, which is very unusual because the privilege belongs to the accountant, not the client. The Supreme Court in *In re October 1985 Grand Jury No. 746,* 124 Ill.2d 466, 530 N.E.2d 453, 125 Ill.Dec. 295 (1988), held that information given to an accountant to prepare a client's tax returns and the accountant's work papers used to prepare the returns were not confidential for purposes of the accountant-client privilege. The First District Appellate Court refused to extend this rationale to information given to a public accountant engaged to perform an audit for a client, reasoning that a client does have an expectation of privacy when records are provided to an accountant because there is no expectation that the information will be disclosed. *FMC Corp. v. Liberty Mutual Insurance Co.,* 236 Ill.App.3d 355, 603 N.E.2d 716, 177 Ill.Dec. 646 (1st Dist. 1992). The exception was also not extended to documents that were not financial. *Pepsico, Inc. v. Baird, Kurtz & Dobsch, LLP,* 305 F.3d 813, 816, 59 Fed.R.Evid.Serv. 523, 523 (8th Cir. 2002).

The Seventh Circuit, applying Illinois law, further limited the privilege by interpreting the Illinois statute to apply only to Illinois accountants registered under the Illinois Public Accounting Act, 225 ILCS 450/0.01, *et seq.,* who perform work in Illinois related to an Illinois client. *Armour International Co. v. Worldwide Cosmetics, Inc.,* 689 F.2d 134 (7th Cir. 1982).

4. [7.97] Physician-Patient Privilege

The physical health of a party may be an important factor in the trial of a contested matrimonial action. Frequently, an attorney who attempts to question the personal physician of the opposing party is faced with the objection that the communications are confidential pursuant to CCP §8-802. Generally, the physician-patient privilege cannot be used in a civil trial that has been brought by or against a patient when the patient's physical or mental condition is in issue. The nature of many of the fault grounds for dissolution of marriage, such as mental cruelty, physical cruelty, impotency, attempt to take life, etc., calls the party's physical or mental condition into the issue. Also, IMDMA §602(a)(5) requires the court to consider the mental and physical health of all individuals involved in a custody case. However, §10 of the Mental Health and Developmental Disabilities Confidentiality Act (Confidentiality Act), 740 ILCS 110/1, *et seq.,* specifically excepts actions brought for dissolution of marriage from those that waive the

privilege for bringing the parties' mental health into issue. The privilege is waived only if the party or a witness on the party's behalf has already testified concerning the particular treatment, condition, or records.

The Illinois Supreme Court found that dentists are "surgeons" within the meaning of the physician-patient privilege. *People ex rel Department of Professional Education v. Manos, D.D.S.*, 202 Ill.2d 563, 782 N.E.2d 237, 270 Ill.Dec.43, 52 (2002).

5. [7.98] Psychiatrist-Patient Privilege

A psychiatrist, a patient, or their authorized representatives have the privilege to refuse to disclose communications relating to the diagnosis or treatment of a patient's mental condition. The psychiatrist-patient privilege covers not only those communications between the patient and the psychiatrist but also those between members of the patient's family and the psychiatrist. Confidentiality Act §10.

Records of the identity, diagnosis, prognosis, or treatment of any client maintained in connection with the performance of any alcoholism or other drug abuse or dependency prevention or treatment service authorized or assisted by any department or agency of the State of Illinois are confidential and may be disclosed only with the prior written consent of the patient or if authorized by an appropriate court order, and then only under such circumstances and for such purposes as permitted by the Illinois Department of Human Services. 20 ILCS 301/30-5(bb). The fact that the patient is involved in a civil proceeding with the patient's mental health in issue does not waive the privilege since actions brought or defended under the IMDMA are specifically excepted from those civil actions that would avoid the privilege. However, if the patient or the psychiatrist on behalf of the patient first testifies to those communications, the privilege is waived. Confidentiality Act §10. If an action is filed under the Abused and Neglected Child Reporting Act, 325 ILCS 5/1, *et seq.*, the privilege does not apply even if an action under the IMDMA is also pending.

6. [7.99] Clergy-Penitent Privilege

CCP §8-803 permits clergy, priests, ministers, rabbis, or practitioners of any religious denomination not to be compelled to disclose in any court a confession or admission made to that person in a professional capacity nor divulge any information obtained in a professional capacity as a spiritual advisor.

7. [7.100] Reporter's Privilege

CCP §§8-901 through 8-909 prohibit a court from compelling a reporter to disclose the source of any information obtained during the course of employment. An application may be filed with the court to require the reporter to divulge the information sought. It would be necessary to show the relevancy of the information to the pending court proceedings, the specific public interest that would be adversely affected if the information was not disclosed, and the impossibility of establishing by other means that which, it is alleged, the privileged information would tend to prove.

8. [7.101] Hospital Privilege Relating to Records for Drug and Alcohol Abuse

If a party was a patient hospitalized in a drug or alcohol abuse program that is assisted directly or indirectly by any department or agency of the United States, those hospital records are confidential and cannot be disclosed without order pursuant to 42 U.S.C. §290dd-2. Those hospital records may contain necessary proof to establish the attorney's case. The procedure for obtaining disclosure of the records is to (a) obtain the patient's prior written consent or (b) obtain a court order by a court of competent jurisdiction.

The court must find (a) that there is good cause for the disclosure, and (b) that the court has assessed the public interest and the need for disclosure against the injury to the patient and to the patient-physician relationship. The court, on determining there should be a disclosure, must impose appropriate safeguards against further unauthorized disclosure.

9. [7.102] Waiver of Privilege

Any of the privileges discussed may be waived either specifically or by conduct of the party. Waiver may occur by the party's ceasing to treat the information as confidential, testifying concerning part of the privileged material, or simply not raising the objection in the first instance.

10. [7.103] Police Investigatory Privilege

Illinois recognizes a qualified police investigatory privilege to protect information used by law enforcement agencies to perform their duties. *In re Marriage of Daniels,* 240 Ill.App.3d 314, 607 N.E.2d 1255, 180 Ill.Dec. 742 (1st Dist. 1992). The privilege stems partly from legislation providing limited protection to Illinois state police records and partly from case law and originates from the public's interest in protecting the integrity of law enforcement techniques, protecting witnesses and informants, and guarding against interference with ongoing investigations. However, the *Daniels* court recognized that this privilege may conflict with a court's need for information when a party has reason to believe the police have information bearing on a child's best interests and held that it would not violate the privilege to allow the court to receive as much information as possible without endangering informants involved in the criminal investigation.

11. [7.104] AIDS Confidentiality Act

The Illinois legislature enacted the AIDS Confidentiality Act, 410 ILCS 305/1, *et seq.,* to protect the confidentiality of tests designed to reveal HIV infection to encourage members of the public to seek HIV testing to protect the public health. A spouse does not place his or her health at issue and waive the protection of the AIDS Confidentiality Act by filing a divorce petition. *In re Marriage of Bonneau,* 294Ill.App.3d720 691 N.E.2d 123, 229 Ill.Dec. 187 (2d Dist. 1998). However, if the spouse seeking the information files a petition for dissolution alleging that the spouse trying to protect the information infected the other spouse with HIV, the information is at issue. *Id.*

B. [7.105] Wiretaps or Eavesdropping on Telephone

Trial counsel in a matrimonial action is frequently faced with the fact that either the client or the opposition has recorded or caused to be recorded telephone conversations that may be incriminating or damaging to the party's case. While appellate decisions from various other jurisdictions are in conflict as to whether such evidence would be admissible in a civil

proceeding, Illinois law, by statute, makes it clear that evidence obtained from eavesdropping is not admissible.

1. [7.106] Definition

720 ILCS 5/14-1 and 5/14-2 define "eavesdropping" as the use of an eavesdropping device, which is "any device capable of being used to hear or record oral conversation," "to hear or record all or any part of" a conversation without either the consent of all parties to the conversation or the consent of one party along with judicial approval pursuant to 725 ILCS 5/108A-1, *et seq.* A telephone itself is not an eavesdropping device within the meaning of 720 ILCS 5/14-1 because an eavesdropping device is one that can hear or record conversations but not transmit them. *People v. Bennett,* 120 Ill.App.3d 144, 457 N.E.2d 986, 75 Ill.Dec. 544 (5th Dist. 1983). A prerequisite for criminal liability or exclusion of evidence under the eavesdropping statute is that the device used can hear or record conversations but not transmit them, but a policeman who put his hand over the mouthpiece of a regular telephone did not thereby convert it into an illegal eavesdropping device. *People v. Shinkle,* 128 Ill.2d 480, 489 (1989).

The evolution of the expectation of privacy concept in eavesdropping cases began with a holding that -because the purpose of the eavesdropping statute is to protect an individual from the interception of communication intended to be private, no violation of the statute occurs when a person surreptitiously records a conversation that is taking place in his immediate presence. Since the people conversing have no expectation of privacy, there can be no interception of a private communication and therefore no eavesdropping. *People v. Beardsley,* 115 Ill.2d 47, 503 N.E.2d 346, 104 Ill.Dec. 789 (1986); *Bender v. Board of Fire & Police Commissioners of the Village of Dolton,* 183 Ill.App.3d 562, 539 N.E.2d 234, 131 Ill.Dec. 881 (1st Dist. 1989); *People v. Regains,* 187 Ill.App.3d 713, 543 N.E.2d 1090, 135 Ill.Dec. 522 (3d Dist. 1989).

A 1992 Illinois Supreme Court decision foreshadowed that *Beardsley* might be subject to attack for its use of the federal definition of an individual's expectation of privacy rather than the greater protection provided in the Illinois Constitution. *In re May 1991 Will County Grand Jury,* 152 Ill.2d 381, 604 N.E.2d 929, 178 Ill.Dec. 406 (1992). Article I, §6, of the Illinois Constitution, referenced in the opinion, explicitly states that individuals have a right to be secure against "invasions of privacy or interceptions of communications by eavesdropping devices or other means." However, the section alone does not answer the question of whether the higher constitutional protection would require a redefinition of eavesdropping to include the taping of a conversation by a participant in the conversation. After all, if a person expected confidentiality and the other party to the conversation took verbatim notes and disseminated them to others, there would be no crime and no right of action. Public Act 88-677, effective December 15, 1999, added a new subsection defining a "conversation" as any oral communication between two or more persons regardless of whether one or more of the parties intended the communication to be private under circumstances justifying that expectation. 720 ILCS 5/14-1(d). As such, the *Beardsley* exception has been eliminated by statute.

Interestingly, though the legislature eliminated the "expectation of privacy" exception created by *Beardsley*, the "expectation of privacy" concept remains alive and well in the portion of the statute added by Public Act 91-657, which became effective January 1, 2000. This Act added a segment to the statute regarding electronic communications and defined "electronic communication" as any signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or part by a

wire, radio, page, computer, electromagnetic, photoelectronic, or photo-optical system, when the sending and receiving parties intend the electronic communication to be private and the interception, recording, or transcription of the electronic communication is accomplished by a device in a surreptitious manner contrary to the provisions in this section. The electronic communication does not include any communication from a tracking device. Now that electronic mail, pagers, and Internet communications have become commonly accepted means of communication, it is likely the courts will next be confronted with cases in which they are required to deal with the question of whether both the sending and receiving parties intended an electronic communication to be private. 720 ILCS 5/14-1(e).

2. [7.107] Admissibility

Any evidence obtained through eavesdropping is not admissible in any civil proceedings. This would prohibit the use of such evidence in any action under the IMDMA. A tape made by an individual of his or her own voice does not constitute a "conversation" as defined by the eavesdropping statute. Therefore, a tape with the voice of one individual that does not contain a conversation between two or more individuals is admissible. *In re Marriage of Almquist,* 299 Ill.App.3d 732, 704 N.E.2d 68, 234 Ill.Dec. 910 (3d Dist. 1998). However, a Court called upon to adjudicate a question of eavesdropping is required to apply the version of the statute in effect at the time of the alleged eavesdropping. *People v. Nunez*, 325 Ill.App.3d 35, 756, N.E.2d 941, 258 Ill.Dec.667, 678 (2nd Dist. 2001).

3. [7.108] Attorney Immunity

The Federal District Court for the Northern District of Illinois held that an attorney has absolute immunity from liability under the Illinois eavesdropping statute, 720 ILCS 5/14-1, *et seq. Scheib v. Grant,* 814 F.Supp. 736 (N.D.Ill. 1993). The immunity stems from the public policy consideration that attorneys must be able to represent their clients vigorously without fear of being sued. This policy overrides the cause of action under the Illinois eavesdropping statute. *Scheib* reached federal court incident to a child custody and removal case in which the mother sued the father's attorneys and the attorney for the child under both Title III and the Illinois eavesdropping statute for listening to and attempting to use tape recordings of conversations between the mother and the child made by the father. The trial court granted the mother's motion to bar the father from introducing the tapes into evidence. This holding illustrates the federal court's conclusion that sufficient safeguards exist without subjecting attorneys to a fear of being sued, *i.e.,* suppression of evidence and disciplinary sanctions. Because the mother agreed not to sue the father, the federal court never reached the question of whether the mother could have sued the father, but a straightforward application of the plain language of the Illinois statute indicates that, absent some other overriding public policy consideration, the father was guilty of the crime of electronic eavesdropping.

C. [7.109] Illegally Obtained Evidence

On occasion, evidence may come into the hands of trial counsel as the result of a "raid" or an unlawful trespass or breaking and entering. To date, there has been no decision by a court of review in Illinois that has addressed the issue whether such illegally obtained evidence can be used or is admissible in a civil proceeding. The First District Appellate Court has held that the right to privacy or to be secure from unreasonable search and seizure is not violated when one's spouse obtains evidence by an unauthorized search. *In re Marriage of Bashwiner,* 107 Ill.App.3d 772, 438 N.E.2d 490, 63 Ill.Dec. 559 (1st Dist. 1982). The Fourth and Fourteenth Amendments do not require in civil cases that the exclusionary rule be extended to situations in which private

parties seek to introduce evidence obtained through unauthorized searches made by state officials. More importantly, nothing compels the rejection of logically relevant evidence obtained by a private person through an unauthorized search and seizure. *Honeycutt v. Aetna Insurance Co.,* 510 F.2d 340 (7th Cir. 1975).

Even if a party obtains evidence in violation of a court order, the trial court need not automatically exclude the evidence but may exercise its discretion and admit the evidence depending on the context of the case before the court. *In re Marriage of Cohen,* 189 Ill.App.3d 418, 545 N.E.2d 362, 136 Ill.Dec. 838 (1st Dist. 1989).

A party who seeks to exclude otherwise competent, relevant, and admissible evidence bears the burden of adducing facts clearly bringing the evidence within the rules of exclusion. *Mulhern v. Talk of the Town,* 138 Ill.App.3d 829, 486 N.E.2d 383, 386, 93 Ill.Dec. 282 (2d Dist. 1985). Further, even illegally obtained evidence will be admitted if the party who seeks its admission proves that the evidence would have been obtained without the unlawful conduct. *United States v. Williams,* 565 F.Supp. 353 (N.D.Ill. 1983), *aff'd,* 737 F.2d 594 (7th Cir. 1984). The United States Supreme Court later used the independent source exception to justify the inevitable discovery doctrine stating that since the evidence would have been discussed without any constitutional violations, it should be treated as if it had been obtained in that manner, *Nix v. Williams*, 467 U.S. 431, 443 (1984)

Following are some authorities that might be presented to the court depending on counsel's position on the illegally obtained evidence.

1. [7.110] Illegally Obtained Evidence Should Be Admissible

The rationale for permitting illegally obtained evidence to be admissible in a civil proceeding is that the United States Supreme Court in *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961), held that illegally obtained evidence could not be used if there was a governmental seizure and that the purpose of the Fourth Amendment of the United States Constitution is to protect private persons from unreasonable searches and seizures by government officials. Therefore, searches by private persons, although illegal, can be used in civil proceedings and are not excludible from being used in evidence because they are not covered by the Fourth Amendment of the U.S. Constitution. *See Sackler v. Sackler,* 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964); *Del Presto v. Del Presto,* 97 N.J.Super. 446, 235 A.2d 240 (1967). In the 1984 decision, *United States v. Land*, 468 US 897 (1984), the Supreme Court clarified that while the exclusionary rule is often seen as a corollary to the Fourth Amendment or required by the Fourth and Fifth Amendments, it is actually a mere judicial remedy and as a result, it is not required to be applied when evidence is obtained illegally. In another Federal case, *Roger v. Williams*, 633 A.2d 747 (1993), the court explicitly stated that the need to protect innocent children greatly outweighs any deterrent effective excluding illegally obtained evidence and affirmed a decision in the family Court of Delaware, admitting a wrongfully obtained video tape of the interior of the mother's home. *Id.* at 748.

In *White v. White*, 334 N.J.Super. 211, 220 (2001), the Court extended the holding in Del Presto to include illegal searches of computer files.

2. [7.111] Illegally Obtained Evidence Is Not Admissible

The rationale for excluding illegally obtained evidence is that the Fourth Amendment to the U.S. Constitution is applicable to the states by the Fourteenth Amendment and that the protection from illegal searches and seizures extends to persons in civil cases when property or papers were illegally seized. *See Williams v. Williams,* 8 Ohio Misc. 156, 221 N.E.2d 622, 37 Ohio Op.2d 224 (1966). Note that in *Nystrom v. Massachusetts*, Cas.Nis.Co., 147 Ariz. 208 (1986), the Court reached a contrary result finding that the exclusionary rule is inapplicable to civil cases because neither the United State Supreme Court nor any Court in the State of Arizona had ever applied the exclusionary rule in a civil case.

3. [7.112] Abuse of Discovery

S.Ct. Rule 219(d) provides that information obtained through abuse of discovery procedures may be suppressed. The rule states that "[i]f a party willfully obtains or attempts to obtain information by an improper discovery method, willfully obtains or attempts to obtain information to which that party is not entitled . . . the court may enter" sanctions pursuant to S.Ct. Rule 219(c). If the improperly or illegally obtained evidence can be characterized as being in violation of discovery rules of the Illinois Supreme Court, perhaps counsel would have a sound basis for excluding the illegally obtained evidence.

D. [7.113] The Fifth Amendment

Frequently, a party in a matrimonial case may have committed an action that is both material to the civil proceeding and a violation of state or federal criminal laws. A party's claim to the protection of the Fifth Amendment and refusal to answer because of possible self-incrimination have a definite effect on the case.

1. [7.114] Petitioner/Plaintiff Claiming Fifth Amendment Protection

Case law from Illinois and several other jurisdictions establishes that a plaintiff in a civil case who asserts the Fifth Amendment before trial, such as in a discovery deposition, will suffer the consequences of having the complaint dismissed. *Galante v. Steel City National Bank,* 66 Ill.App.3d 476, 384 N.E.2d 57, 23 Ill.Dec. 421 (1st Dist. 1978); *Stockham v. Stockham,* 168 So.2d 320 (Fla. 1964). *Cf. Christenson v. Christenson,* 281 Minn. 507, 162 N.W.2d 194 (1968); *Franklin v. Franklin,* 365 Mo. 442, 283 S.W.2d 483 (1955); *In re Tesch,* 66 Misc.2d 900, 322 N.Y.S.2d 538 (1971). In a 1979 Federal Court decision, the Court found that there was no privilege in the Federal Discovery Rule that authorizes a Court to impose sanctions on a party that resists discovery by asserting a valid claim of privilege. *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087 (1979). The Court also found that dismissing a complaint merely because a Plaintiff exercised their Fifth Amendment right was unconstitutionally impermissive based upon the right to maintain silence and the right to due process. Thereafter, in *Johnson v. United Parcel Services, Inc.*, 127 F.R.d. 464, 465 (1989), the *Wehling* reasoning was extended in a statement that the approach taken in *Galante* was not the Federal Court's favored approach but that the balancing approach discussed in *Wehling* was preferred. *Id.* at 465. Taking another approach, in *People ex rel Hartigan v. Kafca and Sons Building and Supply Co., Inc.* 252 Ill.App.3d 115, 119 (1st Dist. 1993), the Court favored deferring rather than dismissing civil actions where Fifth Amendment claims are made, when there is also a criminal action pending. The United States District Court for the Northern District of Illinois, later determined that the dismissal of the civil complaint as a result of asserting the Fifth Amendment right is impermissible. *Bootz v. Childs*, 627 Supp. 94 (1985).

2. [7.115] Respondent/Defendant Claiming Fifth Amendment Protection

The respondent who is defending and not seeking relief may invoke the privilege and not be forced to testify. In *Galante v. Steel City National Bank,* 66 Ill.App.3d 476, 384 N.E.2d 57, 23 Ill.Dec. 421 (1st Dist. 1978), the plaintiffs were allowed to claim the protections of the Fifth Amendment during a discovery deposition while acting in their capacity as counter-defendant defending against affirmative claims. The court was to scrutinize each question and determine whether the testimony sought would have, in fact, been incriminating. In a civil case, an adverse inference can be taken against the party who refuses to testify on the grounds of self-incrimination if other evidence exists to support the position held by his opponent. *Winterland Concessions Co. v. Sileo,* 528 F.Supp. 1201 (N.D.Ill. 1981), citing *Baxter v. Palmigiano,* 425 U.S. 308, 47 L.Ed.2d 810, 96 S.Ct. 1551 (1976).

E. [7.116] Trial and Opinion Witnesses

Changes to the Illinois Supreme Court rules on discovery that became effective January 1, 1996, eliminated former Illinois S.Ct. Rule 220, which governed the use of expert witnesses. However, the Supreme Court did not eliminate the ability to introduce expert witness opinions but instead created different categories of witnesses to prevent the surprise that resulted from the introduction of an expert opinion through an expert who was not hired to render an opinion solely for the purpose of the litigation. The most common example is that of a doctor who treated a patient and formed an expert opinion and who was called to testify as an occurrence witness and was not disclosed pursuant to Illinois S.Ct. Rule 220.

In the newest amendment effective July 1, 2002, the Court modified the provisions regarding the disclosure of trial witnesses treating all trial witness disclosures under Rule 213 (f). The Rule divides witnesses into three categories and specifies the required disclosure for each type of witness. The categories are as follows:

1. For lay witnesses (a person giving only fact or lay opinion testimony), identify the subjects on which the witness will testify, including, but not limited to, any lay opinions and the bases therefor.

2. For independent expert witnesses (a person giving expert testimony who is not the party, the party's current employee, or the party's retained expert), identify the subjects on which the witness will testify and the opinions expected to be elicited.

3. For controlled expert witnesses (a person giving expert testimony who is the party, the party's current employee, or the party's retained expert), identify:

    (i) The subject matter on which the witness is expected to testify;

    (ii) The conclusions and/or opinions of the witness and the bases therefor;

    (iii) The qualifications of each witness, including a Curriculum Vitae and/or resume, if any; and

(iv) Any written reports of the witness and attach a copy of the report.

1. [7.117] Definition of Experts

An "expert" is a person who because of education, training, or experience possesses knowledge of a specialized nature beyond that of the average person on a factual matter material to a claim or defense in pending litigation and who may be expected to render an opinion within his expertise at trial. The expert may be an employee of a party, a party, or an independent contractor. A consulting expert is a person who possesses the same qualifications as an expert witness and who has been retained or especially employed in anticipation of litigation or preparation for trial but who is not to be called at trial to render opinions within the person's area of expertise.

When a party disputes a proffered expert's qualifications, the trial court has broad discretion to determine whether the person has specialized knowledge or knowledge beyond that of a reasonable person, and any limitations on the expert's experience are properly considered as affecting the testimony's weight rather than its admissibility. *In re V. Z.,* 287 Ill.App.3d 552, 678 N.E.2d 1070, 223 Ill.Dec. 62 (1st Dist. 1997); *In re Marriage of Olson,* 223 Ill.App.3d 636, 585 N.E.2d 1082, 166 Ill.Dec. 60 (2d Dist. 1992).

2. Disclosure

a. [7.118] Opinion Witnesses

Illinois S.Ct. Rule 218 dealing with pretrial procedure requires the court to conduct a case management conference within 35 days after the parties are at issue and not later than 182 days after the complaint is filed. At the conference, counsel familiar with the case must appear. The issues to be addressed include the area of expertise and the number of opinion witnesses who will be called to testify at trial and deadlines for the disclosure of opinion witnesses and the completion of written discovery and depositions.

The court must then choose dates for the disclosure of opinion witnesses and the completion of discovery to ensure that discovery will be completed not later than 60 days before the trial court reasonably anticipates that trial will begin.

b. [7.119] Consultants

S.Ct. Rule 201(b)(3), regarding the scope of discovery, addresses consultants, which would include consulting experts. The rule defines a consultant as "a person retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial." *Id.* The identity, opinions, and work product of a consultant are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other means.

c. [7.120] Interrogatory Responses

S.Ct. Rule 213(f) obligates a party served with an appropriate interrogatory to provide the subject matter of the opinion witness' testimony, the conclusions and opinions of the opinion witness together with the bases for them, the qualifications of the opinion witness, and the report of the opinion witness. If an interrogatory answer may be obtained from documents in the possession or control of the party answering the interrogatory, it is sufficient to produce the documents, but the production must comply with the rules of S.Ct. Rule 214.

d. [7.121] Updating of Information

A party shall be required to seasonally supplement answers to interrogatories propounded under S.Ct. Rule 213(i) as additional information becomes known to the party or counsel.

3. [7.122] Basis of Expert Opinion

The opinion of an expert is to be based either on facts within the person's knowledge or on facts presented by means of a hypothetical question. Generally, testimony based on facts known to the expert comes from medical examinations, appraisals of real estate, evaluations of corporations, and other fact-gathering directed toward the particular participants, property, or other focus of the action. When the expert is to give an opinion based on facts that the expert knows, the usual practice is to have the person first testify to the facts on which the opinion is based and then give opinions concerning those facts. However, *Wilson v. Clark,* 84 Ill.2d 186, 417 N.E.2d 1322, 49 Ill.Dec. 308 (1981), permits giving the expert opinion before disclosing the facts on which it is based.

The expert may be asked a hypothetical question as the basis of an opinion. The hypothetical question contains a recital of the facts that have been admitted into evidence. Such a question must not ignore undisputed facts and cannot be based on inadmissible evidence or facts not presented. The expert witness may base an answer to the hypothetical question only on the facts presented in the question itself, not on the witness' personal knowledge of facts in the case. Hypotheticals may be particularly useful in custody cases when dealing with psychiatrists or psychologists who, although they have examined some or all of the parties, may not be aware of evidence that has been presented at trial and whose opinions would be helpful to counsel if the witness was permitted to assume those facts as true. The use of hypothetical questions with an expert witness may be helpful in attorneys' fees disputes.

The expert's opinion may also be based on facts not in evidence or on data that would not be admissible. If experts in a particular field usually and reasonably rely on the particular type of data, that source may be relied on even if it is not in evidence. An example is the hospital record being used as part of the basis of an opinion of a physician even though those reports may not be in evidence. *Wilson v. Clark, supra,* which adopted Fed.R.Evid. 703. *In re Marriage of Hunter,* 223 Ill.App.3d 947, 585 N.E.2d 1264, 166 Ill.Dec. 242 (2d Dist. 1992).

The expert opinion may be given on direct examination without disclosing the facts underlying the opinion. Those facts may be brought out on cross-examination. *See Wilson v. Clark, supra,* which adopted Fed.R.Evid. 705.

F. [7.123] Opinions of Nonexperts

Although attorneys frequently object to a party or a nonexpert giving an opinion, nonexperts may properly testify to opinions on a large range of topics. Some examples of permissible nonexpert opinion follow:

1. whether someone appeared to be pleased or angry (*Spear v. Drainage Commissioners,* 113 Ill. 632 (1885));

2. whether someone was excited or calm (*Dimick v. Downs,* 82 Ill. 570 (1876));

3. that someone was in distress, pain, or suffering (*Chicago, Burlington & Quincy R.R. v. Martin,* 112 Ill. 16, 1 N.E. 111 (1884));

4. whether someone appeared to be sane or insane (31A AM.JUR.2d *Expert and Opinion Evidence* §§165 – 166 (1989));

5. the value of personal property such as household goods and wearing apparel (*Wrenn v. Warble Storage & Furniture Co.,* 236 Ill.App. 601 (1st Dist. 1925));

6. intoxication (*Hennessy v. Foley,* 154 Ill.App.3d 1039, 507 N.E.2d 1258, 107 Ill.Dec. 889 (5th Dist. 1987); *Vandeveer v. Preston,* 13 Ill.App.2d 29, 140 N.E.2d 521 (3d Dist. 1957));

7. the value of real estate (*Chicago & Western Indiana R.R. v. Heidenreich,* 254 Ill. 231, 98 N.E. 567 (1912)).

As with experts, the attorney must lay a foundation by having the nonexpert witness testify to familiarity with the subject of the testimony and the person's opportunity to observe and comment on what occurred.

G. [7.124] Proof of Valid Marriage

In an action under the IMDMA, counsel may attempt to prove that a marriage is invalid because a prior marriage was not terminated by death or dissolution. See IMDMA §212(a)(1). The latest marriage is presumed to be valid, and the burden of proof is on the party challenging its validity to show that the earlier marriage did not end by death or dissolution. *Potter v. Clapp,* 203 Ill. 592, 68 N.E. 81 (1903); *Johnson v. Johnson,* 114 Ill. 611, 3 N.E. 232 (1885).

H. [7.125] The Testimony of a Private Detective

Testimony of private detectives is to be closely scanned and regarded with suspicion. *Ovenu v. Ovenu,* 201 Ill.App. 607 (1st Dist. 1916). Effective cross-examination of the private detective should include the following:

1. that the detective was hired to prove that the respondent was committing wrong;

2. that the detective was paid money by the person who wanted to prove the respondent was doing wrong;

3. that on a number of occasions this paid witness has testified against other persons for doing the same wrongs complained of in this case; and

4. that there is a balance still to be paid after the detective testifies.

I. [7.126] Testimony of an Attorney

Rule 3.7 of the Illinois Rules of Professional Conduct prohibits a lawyer from accepting or continuing employment if the lawyer knows or reasonably should know that the lawyer might be called to testify as a witness on the client's behalf except as to certain limited categories of information. The rule also states that even if the lawyer anticipates being called to testify other than on the client's behalf, the representation can continue until the lawyer knows or reasonably should know that this testimony may be prejudicial to the client. However, the fact that one lawyer may be called as a witness does not preclude another member of that lawyer's firm from acting as an advocate in a trial. Although an attorney may be allowed to testify, any such testimony should be given little weight. *Jonas v. Meyers,* 410 Ill. 213, 101 N.E.2d 509 (1951); *In re Marriage of Lee,* 135 Ill.App.3d 509, 481 N.E.2d 1045, 90 Ill.Dec. 245 (1st Dist. 1985).

J. [7.127] Hearsay Objections

Hearsay evidence, which is not usually admissible, is objectionable because it deprives the opposing party of the right to observe and cross-examine the person who made the out-of-court statement.

1. [7.128] Definition

"Hearsay" is an out-of-court statement offered to prove the truth of the matter asserted in the statement. It is a common error to believe that a statement is hearsay and therefore not admissible solely because the party against whom the statement is offered was not present at the time the statement was made. See Michael H. Graham, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE §801.7 (6th ed. 1994); *Pederson v. Nixon,* 284 Ill. 421, 120 N.E. 323 (1918).

2. [7.129] Exceptions

Numerous exceptions to the hearsay rule have developed. The following are a few of the exceptions that are likely to be found in a trial of a matrimonial action.

a. [7.130] Spontaneous Declarations

A statement made in response to a happening may be admissible as a spontaneous declaration. In order for a statement to fall within this exception, there must have been an occurrence or event sufficiently startling to produce a spontaneous and unreflecting statement, absence of any time to fabricate, and a statement that relates to the circumstances of the occurrence. *People v. Merideth,* 152 Ill.App.3d 304, 503 N.E.2d 1132, 105 Ill.Dec. 126 (2d Dist. 1987).

b. [7.131] State of Mind or Mental State

When the state of mind or intent of a party is in issue, a declaration or statement of that intent is admissible if there is also proof of performance of an act to which the state or the intent relates. *Wilkinson v. Service,* 249 Ill. 146, 94 N.E. 50 (1911). In custody cases, statements of children repeating things said by a parent or other family member can, at times, be admissible as evidence of the child's state of mind rather than for the truth of the content of the statement. *In re Marriage of Sieck,* 78 Ill.App.3d 204, 396 N.E.2d 1214, 33 Ill.Dec. 490 (1st Dist. 1979).

c. [7.132] Admissions

Declarations against interest or admissions by a party are admissible in their entirety, including portions of statements that may not be against the party's interests. Michael H. Graham, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE §802 (6th ed. 1994, Supp. 1998).

d. [7.133] Facts or Data Relied on by Experts

Facts or data on which an expert bases an opinion, if of a type reasonably relied on by experts in a particular field when forming an opinion on the subject, need not be admissible in evidence. *Wilson v. Clark,* 84 Ill.2d 186, 417 N.E.2d 1322, 49 Ill.Dec. 308 (1981); *In re Marriage of Hunter,* 223 Ill.App.3d 947, 585 N.E.2d 1264, 166 Ill.Dec. 242 (2d Dist. 1992).

K. [7.134] Admissibility of Summaries of Complex or Voluminous Documents

Illinois courts recognize the admissibility of summaries when original records are too numerous and bulky to produce in court or when proof of a fact would require the inspection of numerous detailed statements. *People v. Crawford Distributing Co.,* 78 Ill.2d 70, 397 N.E.2d 1362, 34 Ill.Dec. 296 (1979); *In re Marriage of Westcott,* 163 Ill.App.3d 168, 516 N.E.2d 566, 114 Ill.Dec. 411 (1st Dist. 1987). See also Robert S. Hunter, TRIAL HANDBOOK FOR ILLINOIS LAWYERS §39.6 (7th ed. 1997); Michael H. Graham, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE §1006 (6th ed. 1994, Supp. 1998). Such a summary will be admitted even when only one individual could determine whether the material meets the criteria for inclusion in the summary. *F. L. Walz, Inc. v. Hobart Corp.,* 224 Ill.App.3d 727, 586 N.E.2d 1314, 167 Ill.Dec. 42 (3d Dist. 1992). When presenting such summaries, a lawyer should be sure to lay a foundation including the elements set forth below:

1. The summarized material itself is admissible.

2. The original records are available in court for inspection or were previously produced for inspection.

3. The summarized material consists of numerous documents, books, or records that cannot be examined conveniently in court.

4. The witness through whom the documents are introduced saw the original documents or copies of the documents in situations in which the lawyer lays a foundation regarding the unavailability of original documents.

5. The fact to be proved is the result of an examination of the whole collection of documents.

6. The result is capable of being ascertained by calculation.

L. [7.135] Admissibility of Computer-Generated Materials

Computer-generated materials break down into two categories, and the evidentiary foundation required depends on proper identification of the type of material sought to be introduced. The first category consists of computer-generated business records that are the sole source of information. The second category consists of computer-generated summaries or analyses made either from actual documents, whether business records or personal records, or from computer-generated business records. Irrespective of the category, the lawyer must lay a foundation for the computer equipment being used and should consider including facts regarding the computer system in any request to admit facts to prevent problems in advance of the trial.

1. [7.136] Computer-Generated Business Records

The Illinois Supreme Court in *Grand Liquor Co. v. Department of Revenue,* 67 Ill.2d 195, 367 N.E.2d 1238, 10 Ill.Dec. 472 (1977), recognized that computer-generated business records may be admissible under Illinois S.Ct. Rule 236 with proper foundation. The foundation for the admission of such records should include

a. that the electronic equipment is recognized as standard equipment (see Robert S. Hunter, TRIAL HANDBOOK FOR ILLINOIS LAWYERS §§39.7 – 39.8 (7th ed. 1997);

b. that the entries were made in the regular course of business at or reasonably near the time of the happening of the event recorded; and

c. that the sources of information and method and time of preparation indicate trustworthiness.

2. [7.137] Computer-Generated Summaries

Now that lawyers can create summaries of complex or voluminous documents using computerized litigation support tools, there is a new category of computer-generated records for which lawyers must be prepared to lay foundations. Although there is not yet explicit case law stating the foundation for the admission of such summaries, the lawyer should analyze the nature of the source documents being summarized and combine the foundation for this information with a foundation for the reliability of the computer equipment.

M. [7.138] Section 605(c) Reports

Section 605 of the IMDMA authorizes the court to order an investigation and report concerning custodial arrangements for children. Because the IMDMA contemplates court use of any such reports without the reports having been formally introduced as evidence, §605(c) renders any report submitted under §605 an exception to the hearsay rule. *Heldebrandt v. Heldebrandt,* 251 Ill.App.3d 950, 623 N.E.2d 780, 784, 191 Ill.Dec. 190 (4th Dist. 1993).

N. [7.139] Impeachment

Answers to interrogatories can be used in evidence to the same extent as a discovery deposition. Accordingly, an interrogatory answer may be used to impeach a party's inconsistent testimony at trial.

XI. [7.140] DOMESTIC VIOLENCE

The Illinois Domestic Violence Act, originally enacted in 1982, made available in matrimonial actions a strengthened order of protection in addition to the familiar injunctive relief. The new, completely rewritten Illinois Domestic Violence Act of 1986 (IDVA), 750 ILCS 60/101, *et seq.*, which expanded the scope and power of the order of protection, commences by acknowledging the criminal nature of domestic violence and the failure of the legal system to deal effectively with the seriousness of the problem. IDVA §102 requires the liberal construction of the IDVA in order to support and protect victims of domestic violence by clarifying the responsibilities of law enforcement officers and facilitating their ability to provide immediate assistance to victims of domestic violence. The IDVA also expands the civil and criminal remedies available to victims of domestic violence.

A. [7.141] Definitions of Domestic Violence

According to IDVA §103, the following terms have the following meanings:

1. "Physical abuse" includes sexual abuse and means the "knowing or reckless use of physical force, confinement or restraint; . . . knowing, repeated and unnecessary sleep deprivation; or . . . knowing or reckless conduct which creates an immediate risk of physical harm."

2. "Harassment" is knowing conduct that is not necessary to accomplish a purpose that is reasonable under the circumstances; that would cause a reasonable person emotional distress; and that does cause emotional distress to the petitioner. Unless the presumption is rebutted by a preponderance of the evidence, the following types of conduct shall be presumed to cause emotional distress:

(i) creating a disturbance at petitioner's place of employment or school;

(ii) repeatedly telephoning petitioner's place of employment, home or residence;

(iii) repeatedly following petitioner about in a public place or places;

(iv) repeatedly keeping petitioner under surveillance by remaining present outside his or her home, school, place of employment, vehicle or other place occupied by petitioner or by peering in petitioner's windows;

(v) improperly concealing a minor child from petitioner, repeatedly threatening to improperly remove a minor child of petitioner's from the jurisdiction or from the physical care of petitioner, repeatedly threatening to conceal a minor child from petitioner, or making a single such threat following an

actual or attempted improper removal or concealment, unless respondent was fleeing an incident or pattern of domestic violence; or

(vi) threatening physical force, confinement or restraint on one or more occasions.

3. "Interference with personal liberty" means committing or threatening "physical abuse, harassment, intimidation or willful deprivation so as to compel another to engage in conduct from which she or he has a right to abstain or to refrain from conduct in which she or he has a right to engage."

4. "Intimidation of a dependent" means subjection of a person "who is dependent because of age, health or disability to participation in or the witnessing of: physical force against another or physical confinement or restraint of another which constitutes physical abuse . . . regardless of whether the abused person is a family or household member."

5. "Willful deprivation" means

willfully denying a person who because of age, health or disability, requires medication, medical care, shelter, accessible shelter or services, food, therapeutic device, or other physical assistance, and thereby exposing that person to the risk of physical, mental or emotional harm, except with regard to medical care or treatment when the dependent person has expressed an intent to forgo such medical care or treatment. This paragraph does not create any new affirmative duty to provide support to dependent persons.

6. "Domestic violence" means abuse as defined in IDVA §103(1).

B. [7.142] Persons Protected by the IDVA

The persons protected under IDVA §201 are

(i) any person abused by a family or household member;

(ii) any high-risk adult with disabilities who is abused, neglected, or exploited by a family or household member;

(iii) any minor child or dependent adult in the care of such person; and

(iv) any person residing or employed at a private home or public shelter which is housing an abused family or household member.

The amended IDVA extends the definition of "family or household members" to include persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, and persons with disabilities and their personal assistants. However, the IDVA states that a casual acquaintanceship or ordinary fraternization between individuals in business or socially is not a dating relationship.

C. [7.143] Who May Bring Action

The IDVA formerly allowed a third person to file an action on an adult's behalf only in the case of an adult with disabilities. The IDVA now allows a third person to file on behalf of an adult abused by a family member or household member who because of age, health, disability, or inaccessibility cannot file the petition.

D. [7.144] Procedure

Actions for orders of protection may be commenced in the following ways, according to IDVA §202:

1. independently, by filing a petition for order of protection in any civil court unless a specific court is designated by local rule or order;

2. in conjunction with another civil proceeding involving the same parties, including but not limited to actions under the IMDMA, the Illinois Parentage Act of 1984, the Non-Support of Spouse and Children Act, RURESA, an action for nonsupport brought under Article 10 of the Illinois Public Aid Code, a proceeding for guardianship under the Probate Act of 1975, an action for involuntary commitment under the Mental Health and Developmental Disabilities Code, or any proceeding other than a delinquency petition under the Juvenile Court Act as long as a petitioner or the respondent is a party to or a subject of that proceeding;

3. in conjunction with a delinquency petition or criminal prosecution (see the particular requirements listed in IDVA §202).

An order of protection can survive the voluntary dismissal or withdrawal of a delinquency petition or criminal prosecution or a finding of not guilty in either type of proceeding if, in the state's attorney's discretion, it may be treated as an independent action and, if necessary and appropriate, it may be transferred to a different court or division. Further, none of these occurrences shall affect the validity of any previously issued order of protection.

E. [7.145] The Pleading

A petition for an order of protection must be in writing and be verified or accompanied by an affidavit and must allege that the petitioner has been abused by the respondent, who is a family or household member. The petition must also state whether there is any other pending action between the parties. During the pendency of this proceeding, either party has a continuing duty to inform the court of any subsequent proceeding for an order of protection in this or in any other state. If the petition states that disclosure of the petitioner's address would risk abuse of any member of the petitioner's family or household or reveal the confidential address of a shelter for domestic violence victims, that address may be omitted from all documents filed with the court. Necessary disclosure to determine jurisdiction or to consider any venue issue shall be made orally and in camera.

The relevant factors that a petitioner must establish by affidavit and subsequent testimony are the nature, frequency, severity, pattern, and consequences of past abuse, including the respondent's concealment of location in order to evade service of process or notice. Physical violence and the likelihood of danger of future abuse shall also be described. Other relevant facts

would include those that establish the danger that a minor child will be abused or neglected or improperly removed from the jurisdiction, improperly concealed within the state, or improperly separated from the child's primary caretaker. The accompanying affidavit should be detailed, delineating the incident or incidents of abuse, when and where they occurred, whether medical treatment was sought, extent of the injury or injuries, and the presence of any witnesses.

In actions for exclusive possession of the family home, the relevant factors include but are not limited to availability, costs, safety, adequacy, location, and other characteristics of alternate housing for each party and any minor child or dependent adult, the effect on the party's employment, and the effect on the relationship of the party and any minor child or dependent adult to family, school, church, and community.

Special forms for the petition are available from the circuit court. Special forms for the actual order, if issued, must be filled out and filed with the clerk of the circuit court, and a copy must be given to the police department. Typed versions of these forms may also be used.

As with injunctive relief, a full evidentiary hearing will be held.

If the petition for an order of protection does not disclose an address pursuant to the IDVA, the petitioner now has an affirmative duty to disclose an alternative address at which the respondent may serve notices of motion. A new relevant factor for the court to consider is the accessibility of adequate temporary housing, and the lawyer should include allegations on this point in affidavits and testimony.

F. [7.146] Remedies Available

The following remedies are available to the petitioner under the IDVA: prohibition of specific abuse, exclusive possession of a house (with a balance of hardships test), counseling, temporary legal custody of children with appropriate visitation, prohibition of removal or concealment of a child, an order demanding that the respondent appear in court, an order granting the physical care of a child to the petitioner, exclusive possession of personal property, an injunction forbidding the respondent to dispose of property, an order for support payments, an order of payment of specific losses, payment for shelter services, a "stay away" order covering specific persons or locations, denial of access to the petitioner's address or other records, and any other appropriate injunctive relief. Some remedies are restricted to certain orders. See §7.147. See also Chapter 13 of this handbook.

In granting a specific remedy, the court shall consider the following relevant factors:

1. the nature and pattern of past abuse and the likelihood of future abuse;

2. the danger that a minor will be abused, removed, or concealed;

3. the relative hardships from exclusive possession, including the availability, costs, and location of alternative housing, the effect of exclusive possession on employment, and the relationships of the party and the child to the family, school, church, and community. If the balance of hardships test precludes exclusive possession or restrictions on freedom of movement, the findings must justify a decision favoring the abusive party and must demonstrate that the hardships to the respondent outweigh those of the petitioner.

G. [7.147] Orders

Three types of orders are available to protect against abuse. All may be extended if necessity is determined in a full hearing.

1. An emergency 14-day-order. Often done on an ex parte basis, a request for an emergency 14-day order must demonstrate jurisdiction, that abuse by a family or household member has occurred, that one of the available remedies will alleviate the harm, and a finding concerning the nature and history of abuse or likelihood of future abuse, concealment of a child, and concealment of the respondent's location to avoid service of process. Remedies that necessitate using the balance of hardships test must be based on specific findings concerning the hardships. A 14-day order needs no prior service of process or notice if the petitioner can demonstrate that receipt of notice would have caused or threatened further harm before a court could enter an order of protection. No ex parte order may grant a remedy for counseling, support, or payment of losses.

2. The 30-day interim order requires all of the showings for the 14-day order and adds to those the following:

a. proof that the petitioner is diligently attempting service;

b. proof that the summons was served;

c. an appearance by the respondent.

Again, no counseling, support, or payment of losses may be ordered unless the respondent appears or was personally served.

3. A plenary order of protection requires all of the above showings plus a showing that

a. the respondent has received notice or service of process or has filed a general appearance;

b. the respondent has answered the petition or is in default.

A remedy may not be denied because the respondent may have cause for physical abuse (unless the actions qualify as justifiable force under the Criminal Code), the respondent was voluntarily intoxicated, the petitioner either did or did not act in self-defense or defense of another, or the petitioner did or did not leave the residence to avoid further abuse.

According to IDVA §221, the contents of the order of protection shall include

1. identification of the remedy granted;

2. any reasons for denying any other requested remedies;

3. the name of each petitioner found abused by the respondent and the name of each other person protected;

4. the date issued and the type of order;

5. the date and place of the next hearing;

6. the reason for entry of an emergency order of protection without prior notice;

7. notice that the respondent may petition to reopen an emergency order if no notice was received; and

8. a mandatory statement of civil and criminal liability for violation of the order.

Orders of protection are entered immediately, filed with the sheriff on the same day as issued, and served promptly. They may be enforced by the criminal court if violation of the order is a crime or by civil or criminal contempt if the respondent violates the order after having knowledge by service or by any other means. Penalties for violating an order of protection include imprisonment, fine and/or restitution, modification or revocation of bail bond, probation, or sentence of periodic imprisonment for the underlying criminal offense.

Mutual orders of protection or correlative separate orders undermine the purposes of the IDVA and are prohibited unless both parties have properly filed written pleadings, proved past abuse by the other party, and have otherwise satisfied all prerequisites for the type of order the remedy granted.

H. [7.148] Confidentiality

All confidential communications between domestic violence counselors and victims are privileged. The privilege is not waived because of the presence of a third person on behalf of either the victim or the counseling staff.

XII. [7.149] CONCLUSION OF THE TRIAL

By the time all the testimony is concluded and closing arguments have been delivered, counsel should have prepared a checklist in order to be certain that the court's decision covers all of the issues in a particular case. If the court omits a necessary subject matter, counsel should immediately ask the court to rule on the omitted issue. In addition, if a particular ruling is not clear or does not dispose of all included matters, counsel should ask for a clarification on those matters. Returning to court some days later in order to inquire about omitted matters requires an additional appearance by both counsel and may result in a less thoughtful decision from the court because the entire case is no longer in front of the court's mind. Those areas on which the court should rule and that should be included in counsel's checklist are at least the following:

a. jurisdiction;

b. grounds;

c. custody;

d. visitation, with as much specificity as possible regarding alternating holidays, vacation periods, and times of pickup and return of the children;

e. child support with express finding if the award is lower than that set forth in the guidelines (Merely saying that circumstances exist to warrant a lower award is insufficient. *In re Marriage of Morgan,* 219 Ill.App.3d 973, 579 N.E.2d 1214, 162 Ill.Dec. 400 (5th Dist. 1991); *In re Marriage of Wright,* 212 Ill.App.3d 392, 571 N.E.2d 197, 156 Ill.Dec. 610 (5th Dist. 1991));

f. the bases on which the child support is set;

g. medical provisions for the children;

h. insurance for the children;

i. educational expenses for the children;

j. maintenance for a spouse;

k. the bases on which the maintenance is set;

l. findings of nonmarital property;

m. findings of marital property;

n. division of marital property, with the reasons for the particular division to be as clearly expressed as possible, including security for future cash payments of property division;

o. amount and method of payment of attorneys' fees and costs;

p. right of wife to resume former name;

q. time for execution and delivery of documents;

r. arrearages under temporary orders;

s. apportionment of the debts and obligations of the parties;

t. duration of support obligations.

XIII. PATTERN QUESTIONS FOR THE DEFAULT AND SETTLED CASE HEARING

A. [7.150] In General

The proof offered must support the material allegations of the petition; if it does not, the judgment may be reversed. *Chatterton v. Chatterton,* 132 Ill.App. 31 (1st Dist. 1907). The attorney thus may desire corroborating testimony. Witnesses must be examined in open court. *Suesemilch v. Suesemilch,* 43 Ill.App. 573 (1st Dist. 1892). A witness heard by evidence

deposition is considered to be in open court. *See Hazard v. Hazard,* 205 Ill.App. 562 (1st Dist. 1917). In an appropriate case, the petitioner's testimony may also be presented by evidence deposition, and the petitioner need not be present. *See Kinsley v. Kinsley,* 388 Ill. 194, 57 N.E.2d 449 (1944).

B. [7.151] Petitioner's Testimony

When the case is called, petitioner's counsel should approach the bench with the petitioner and the witnesses, have all sworn by the clerk, have the petitioner take the stand, and have the witnesses be seated. After securing entry of any orders and the disposition of any motions necessary to complete the record, counsel may proceed. A suggested guide for conducting the hearing and taking testimony follows.

1. May it please the court, this is In re Marriage of [petitioner] and [respondent], Case No. ____. My name is _____, and I am representing the petitioner, _____, who is present today in open court.

2. Service was had [personally by summons] [by publication and the required certificate has been filed herein]. The respondent [has] [has not] filed an appearance [and response].

3. This matter is to be heard [as a default, and I now present an order of default and military affidavit] [by written stipulation, which I now ask leave to file instanter, that the matter be heard on the petition and response as in cases of default]. The grounds are _____. There [is] [is not] a [written] [oral] settlement agreement.

If a counterpetition or other pleading is to be withdrawn or dismissed voluntarily, the attorney should present to the court an order granting the dismissal or withdrawal and ask that the court enter it instanter. The court should be handed a written order so providing and should be requested to enter that order.

4. The petitioner should then be called and asked the following questions, which are permissibly leading in default and settled cases. Counsel should develop additional questions tailored to the specific facts of each case.

Subject matter jurisdiction over the cause of action:

COUNSEL. Please state your name.

Q. What is your present address?

Q. Are you the petitioner in this matter?

Q. What is your age and occupation?

Q. [Have you been a resident of Illinois for the 90 days immediately preceding today?] or [At the time of filing the petition for dissolution of marriage had you been a resident of Illinois for at least 90 days immediately prior to that day?]

Q. Are you married to the respondent, _____?

Q. What is the respondent's age and occupation?

Q. When and where were you married?

Q. Where was the marriage registered?

Q. Are there any children born or adopted of this marriage? [If "yes," then ask the name, birthdate, and age of each child.]

Q. Are the children in your custody presently?

Q. Do you consider yourself a fit and proper person to have the sole care, custody, control, and education of each child?

Q. Are you presently pregnant?

Grounds: Irreconcilable differences (no fault):

Q. When did you and your spouse separate? [Two years or six months, depending on whether the parties signed a waiver of the two-year separation requirement.]

Q. Have irreconcilable differences and difficulties caused the breakdown of your marriage?

Q. Is the breakdown irretrievable?

Q. Have you attempted reconciliation? [Was this with the help of a marriage counselor?]

Q. Were your reconciliation efforts successful?

Q. Would future attempts at reconciliation be impracticable and not in the best interests of the family?

Grounds: Physical cruelty:

Q. During your married life, how did you treat your husband? Were you a loving, faithful, and affectionate wife?

Q. How did he treat you?

Q. Directing your attention to on or about [date], as alleged in your petition, what, if anything, with respect to your marriage took place on that date?

Q. Where did this take place?

Q. What was the extent of your injuries?

Q. [If appropriate] Did you seek medical care?

Q. Were you in pain? Were you in fear for your safety?

Q. Did you do anything to cause or provoke this incident?

This line of questioning should be repeated for at least two incidents of physical cruelty.

Grounds: Mental cruelty:

Q. During the time that you were living with your husband, did you always act as a true and affectionate wife?

Q. Would you state the specific reasons that cause you to say that he was not a good husband?

Q. Did he ever complain about your housekeeping?

Q. Did he ever belittle you or call you names?

Q. Did he do this in public or in front of the children? Would you describe the circumstances?

Q. Was he jealous?

Q. How did this manifest itself?

Q. Did he ever show unreasonable anger against you? Would you describe the circumstances?

Q. Did he ever threaten you physically?

Q. Was he ever physically violent toward you?

Q. Were you able to maintain relationships with friends or family?

Q. What sort of social life did you have as a couple?

Q. Did he ever state he wanted to end the marriage?

Q. Did he ever tell you he no longer loved you?

Q. Did his conduct cause you any physical or emotional problems?

Q. Did you become nervous, upset, and lose [or gain] weight?

Q. As a result of all this, did you have to seek medical attention?

Q. With whom did you consult?

Q. Are you under treatment or medication that the doctor prescribed?

Q. Do you feel that your living together with your husband was making your life unbearable?

Q. Since living apart from your husband and being under Dr. _____'s care, has your condition improved?

Q. Over how long a period did the conduct of your husband to which you have testified take place?

Q. How frequently did these actions take place?

Q. Do you know of anything that you did or failed to do that caused or provoked his conduct?

Q. Did you finally come to the conclusion that you could no longer endure continuing with this marriage?

Grounds: Desertion:

Q. When was the last date you and your husband lived together?

Q. Was that in the marital residence?

Q. Did he leave you or did you leave him?

Q. Have you ever lived together since that date?

Q. Since the date your husband left, have you been living as a single woman without fault on your part?

Q. Do you know of anything you did or failed to do that would cause your husband to leave you?

Q. Have you ever said that your husband was not to return to the marital home?

Q. Have you indicated to your husband that if he would treat you more properly, the two of you could resume living together?

Q. As a result of your living separate and apart since the date of separation, do you feel the marriage is now dead?

Obviously, not all the above questions will be applicable to each case, and specific facts from each case should be included in additional pertinent questions. The purpose of the questions is to bring out facts to show the fault on the part of the respondent over an extended period as well as lack of provocation by the petitioner.

5. Counsel should ask questions concerning the essential terms of the marital settlement agreement. If there is to be no written marital settlement agreement included in the judgment, each and every provision should be specifically covered by testimony and thereafter included in the written judgment. Be very specific!

COUNSEL. I now show you a document entitled "Marital Settlement Agreement," dated _____ and marked "Petitioner's Exhibit No. 1" for identification and ask you if you recognize the signatures on the last page.

Q. Whose signatures appear on the document? Are you familiar with your husband's signature?

Q. Have you and your husband, pursuant to this agreement, attempted to settle between you questions of property rights, maintenance, support, custody, and all other issues?

The petitioner should testify concerning the major provisions of the settlement agreement. This may be done by leading questions, *e.g.,* "Under the terms of this agreement, your husband is to pay you the sum of $____ per month as maintenance until your remarriage; your cohabitation on a resident, continuing, conjugal basis; his death; or your death, whichever occurs first, is that correct?" Also, ask questions about the nature of the petitioner's employment, length of employment, type of job, net income, and state of health.

Q. Have you and I had several conferences at which we thoroughly discussed all the terms of this agreement?

Q. Did I explain to you its legal meaning and effect?

Q. Do you fully understand the agreement?

Q. Have you entered this agreement freely and willingly without pressure or coercion from anyone?

Q. Do you know and understand all of its terms?

Q. Are you satisfied with its terms?

Q. Do you desire the court, if it grants your petition to dissolve the marriage, to include this agreement in any such judgment that may be entered?

Q. [Where applicable] Do you understand that you are waiving maintenance, formerly known as alimony, and that you cannot in the future return to this court or any other court and seek maintenance? I now offer this agreement in evidence as "Petitioner's Exhibit No. 1." [If the agreement is oral, "Have you and your husband orally stipulated to the terms of this agreement?"]

If there is no agreement but the court has personal jurisdiction over the respondent, the petitioner may request maintenance, child support, and a property division. Questions should elicit testimony regarding the respondent's ability to make payments, the needs of the petitioner and the children, and the petitioner's claim to property.

Q. What is the respondent's net take-home pay per [week] [month]?

Q. Have you prepared an affidavit of your financial needs for maintenance and child support?

Q. How did you prepare this affidavit [analysis of expenses over prior year]?

COUNSEL. [elicit testimony on each category of expense]

Q. What is the total?

Q. Are you asking the court to divide this sum into $_____ for child support and $_____ for maintenance?

If the respondent cannot presently pay support, counsel should ask the court to reserve those issues for future determination. If no personal jurisdiction was acquired, counsel should again request that those issues be reserved.

The last questions cover remaining issues:

Q. Do you wish to resume your maiden name?

Q. What is that name?

Q. Are you asking the court to award you attorneys' fees?

Q. In what amount?

Q. Have you any means of paying your own fees?

Counsel should ask permission to file a fee petition and affidavit instanter with the court and state its major provisions for the record.

XIV. APPENDIX OF FORMS

A. [7.152] Certificate and Motion For Default Hearing

[Caption]

Certificate and Motion for Default

I, the undersigned [attorney for the] **Petitioner, certify that I examined the clerk's file, docket, and computer register maintained in this matter on _____, ____, and found that there is proof of service of process on the Respondent by** [substitute or personal service or by publication] **on _____, ____, and of mailing the required notice. At least 30 days has elapsed since service of summons or first publication and** [no appearance has been made or an appearance has been made but no response has been filed] **notice of this motion has been served on the Respondent. Where I have indicated** [substitute or personal] **service above, I also certify that I have given notice to the Respondent of my intention to request assignment for prove-up and to proceed to hearing. I therefore move that the Respondent be held in default and that this matter be set for hearing.**

I further certify that I am prepared to present to the judge on the date of hearing the following documents:

1. **a copy of the petition for dissolution and evidence that all court fees have been paid;**

2. **a copy of this certificate and motion for default;**

3. **a completed affidavit regarding the Respondent's military service as required by Title 50 App. U.S. Code §520;**

4. **a proposed judgment and, if an appearance has been filed, any marital settlement agreement and/or joint parenting agreement previously executed by the parties which may be appended;**

5. **in cases of personal service, an immediate order for withholding as provided in §706.1 of the Illinois Marriage and Dissolution of Marriage Act;**

6. **a completed family support affidavit as required by Domestic Relations Division General Order 89-D-1; and,**

7. **where appropriate, a completed application for child support services with the IV-D Agency.**

_____

Petitioner['s Attorney]

Name:
[Attorney for] **Petitioner**
Address:
City, State, ZIP:
Telephone:
Attorney No.:

Order of Default Assignment

IT IS HEREBY ORDERED THAT the Respondent is found in default and that this cause is assigned for default hearing before Judge _____ Calendar _____ on _____, ____, at ____ m.

DATED: **ENTER:**

_____

Judge **No.**

36 hours' notice must be given before motion is to be heard.

B. [7.153] Motion for Service by Publication and Affidavit for Service by Publication

IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS
COUNTY DEPARTMENT, DOMESTIC RELATIONS DIVISION

IN RE THE MARRIAGE OF:	)	
	)	
X,	)	
	)	
Petitioner,	)	
	)	**No. X**
and	)	
	)	
X,	)	
	)	
Respondent.	)	

MOTION FOR SERVICE BY PUBLICATION

NOW COMES the Petitioner, _____, by _____his/her counsel, SCHILLER, DU CANTO AND FLECK, and pursuant to Section 5/2-206 of the Illinois Code of Civil Procedure moves that an Order be entered directing the Clerk of the Circuit Court to cause publication to be made to notify the Respondent, _____, of the instant action. In support of _____his/her motion, the Petitioner states as follows:

1. The Petitioner commenced this action on _____ by filing _____his/her Petition for Dissolution of Marriage.

2. The Respondent's last known address is _____; however, efforts to contact Respondent at said address have failed and, upon diligent inquiry, Respondent's place of residence cannot be ascertained. See Petitioner's Affidavit attached hereto as Exhibit "A".

WHEREFORE, the Petitioner, _____, moves that an Order be entered directing the Clerk of the Circuit Court of Cook County to cause publication to be made in accord with Section 5/2-206 and 5/2-207 of the Illinois Code of Civil Procedure.

SCHILLER, DU CANTO AND FLECK
Attorneys for Petitioner

BY: _____
X

SCHILLER, DU CANTO AND FLECK
Attorney No. 26828
Attorneys for Petitioner
200 North LaSalle Street, Suite 2700
Chicago, Illinois 60601-1089
Telephone No. (312) 641-5560
Facsimile Telephone No. (312) 641-6361
Service By Facsimile Transmission will be accepted

IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS
COUNTY DEPARTMENT, DOMESTIC RELATIONS DIVISION

IN RE THE MARRIAGE OF:	)	
	)	
,	)	
	)	
Petitioner,	)	
	)	No.
and	)	
	)	
,	)	
	)	
Respondent.	)	

AFFIDAVIT FOR SERVICE BY (check one)
☐ PUBLICATION ☐ POSTING

Pursuant to 735 ILCS 5/2-206 – service by publication: affidavit; mailing certificate
Pursuant to 735 ILCS 5/9-107 (Constructive Service)

_____, on oath states as to

Defendant_____ that:

1. Defendant (check ONE of the following):
   ☐ resides outside the state;
   ☐ has gone out of the state;

☐ cannot be found after diligent inquiry;
☐ is concealed within the state; therefore, process cannot be served upon defendant.

2. Defendant's place of residence is (check ONE of the following):

☐ (Address) _____

_____

(City (State) (Zip)

☐ cannot be ascertained after diligent inquiry. His/Her last known place of residence is:

(Address) _____

_____

(City (State) (Zip)

Affiant:_____

Subscribed and sworn to before me this _____ day of _____, _____

Atty. No.: _____ Notary Public:_____
Name:_____
Attorney for:_____
Address:_____
City/State/Zip:_____
Telephone:_____

C. [7.154] Order of Default — Service by Publication

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS, COUNTY DEPARTMENT —
MATRIMONIAL DIVISION

In re the Marriage of)
)
)
and) No. _____
)

Order

On motion of _____, solicitor for _____.

The requisite affidavit having been filed and due notice of the pendency of this suit having been given to the respondent, _____, by publication and mailing, which notice in manner and content was in all respects as required by law, and ____ having failed to file answer or otherwise make appearance herein, the respondent, ____, is adjudged in default, and it is ordered that the petition herein be taken as confessed against the respondent, _____.

Enter this ____ day of _____, __.

_____

Judge

D. [7.155] Stipulation Waiving Two-Year Separation

[Caption]

Stipulation Waiving Two-Year Separation

Now come _____, Petitioner, and _____, Respondent, and hereby irrevocably stipulate and agree to waive the requirement that the parties live separate and apart for a continuous period in excess of two (2) years set forth in §401(a)(2) of the Illinois Marriage and Dissolution of Marriage Act.

The parties have been living separate and apart for a continuous period of not less than six months prior to this date. In support of this statement, the parties submit their affidavits which are attached to and made a part of this Stipulation.

WHEREFORE, the parties have freely and voluntarily set their hands and seals this ____ day of _____, ____.

_____

PETITIONER

_____

RESPONDENT

Attorney No.
Name
Attorney for
Address
Telephone

E. [7.156] Affidavit in Support of Waiver of Two-Year Separation Requirement

[Caption]

Affidavit in Support of Waiver of
Two-Year Separation Requirement

_____ herein certifies under penalty of perjury pursuant to §1-109 of the Code of Civil Procedure the following:

1. That he/she is the [Petitioner] [Respondent] **in the above-entitled cause.**

2. That he/she wishes to waive the two-year separation requirement for the parties to obtain a dissolution of marriage on the grounds of irreconcilable differences causing the irretrievable breakdown of the marriage.

3. That he/she has been separated from the [Petitioner] [Respondent] **for a continuous period of more than six months from this date in that he/she and the** [Petitioner] [Respondent] [have been living in separate residences] [have been occupying separate rooms in the same residence] **during that time.**

Under penalties as provided by law pursuant to §1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct except as to matters therein stated to be on information and belief and as to such matters I certify that I verily believe the same to be true.

DATED: _____

_____

[Petitioner] [Respondent]

F. [7.157] Stipulation To Waive Immediate Entry of Order of Withholding

[Caption]

Stipulation To Waive Immediate Entry of Order of Withholding

The undersigned, pursuant to §706.1(b) of the Illinois Marriage and Dissolution of Marriage Act, hereby waive the requirement that there be an immediate withholding of [Petitioner's] [Respondent's] **wages in satisfaction of** [his] [her] **maintenance and child support obligations and instead shall ask the court entering the Judgment for Dissolution of Marriage to enter an Order of Withholding that will not take effect unless** [Petitioner] [Respondent] **becomes delinquent in payment of said obligations. This agreement shall neither suspend the application of §706.1 of the Illinois Marriage and Dissolution of Marriage Act nor alter the parties' rights as set forth therein.**

_____

Petitioner

_____

Respondent

G. [7.158] Stipulation Concerning Child Support and Maintenance

[Caption]

Stipulation

It is hereby stipulated by and between the parties hereto that, pursuant to §709(e) of the Illinois Marriage and Dissolution of Marriage Act, the unallocated child support and maintenance payments provided in the Judgment for Dissolution of Marriage entered herein shall be paid directly to the [Petitioner] [Respondent], [Name of Party], **and shall not be paid to the Clerk of the Circuit Court of Cook County.**

_____
Petitioner

_____
Respondent

H. [7.159] Affidavit as to Military Service

[Caption]

Affidavit as to Military Service

_____ on oath states:

With respect to the respondent, [he is] [he is not] [I am unable to determine whether he is] **in the military service of the United States.**

This affidavit is based on these facts:

_____

Signed and sworn to before me
_____, ___,
_____
Notary Public

Name
Attorney for
Address
City
Telephone

I. [7.160] Appearance and Waiver Under the Soldiers' and Sailors' Civil Relief Act

[Caption]

The undersigned having had fully explained to him his rights under 50 App. U.S.C. §501, *et seq.,* **the Soldiers' and Sailors' Civil Relief Act, in connection with the above captioned matter by** [name of attorney representing serviceman or name of military assistance

officer of serviceman's command] **hereby waive my rights thereunder, enter my appearance in the above-captioned matter, and stipulate that it may be heard as in cases of default.**

[Signature]

I hereby certify that I have explained to [name of serviceman] **his rights under 50 App. U.S.C. §501,** *et seq.,* **The Soldiers' and Sailors' Civil Relief Act, that he understands the same, and that he has freely and knowingly waived the same by execution of the above document.**

[Signature of officer or attorney]

J. [7.161] Stipulation To Hear Default Case

[Caption]

Stipulation

It is stipulated by and between the parties hereto, through their respective attorneys, subject to the approval of the court, that this matter may be heard on the Petition and Response filed herein as in cases of default.

Petitioner	**Petitioner's Attorney**
Respondent	**Respondent's Attorney**

K. [7.162] Certification and Agreement by Counsel

[Caption]

Certification and Agreement by Counsel

We, the undersigned attorneys of record, certify that there are no contested issues in this cause, that all required court fees have been paid, and that each counsel is ready to proceed in this matter by uncontested prove-up as in cases of default. We further certify that we are prepared to present to the judge on the date of trial the following documents:

1. **a copy of the Petition for Dissolution and Respondent's Appearance and evidence that all court fees have been paid;**

2. **a copy of this Stipulation and Request to Hear Uncontested Case signed by the parties;**

3. [in appropriate cases] **a written stipulation executed by the parties that waives the required two-year separation period;**

4. **a proposed Judgment including any Marital Settlement Agreement and/or Joint Parenting Agreement previously executed by the parties that may be appended thereto;**

5. **an immediate Order for Withholding as provided in §706.1 Illinois Marriage and Dissolution of Marriage Act;**

6. **a completed Family Support Affidavit as required by Domestic Relations Division General Order 89-D-1; and,**

7. [when appropriate] **a completed Application for Child Support Services with the IV-D Agency.**

Signed:	**Signed:**
Attorney for Petitioner **Date**	**Attorney for Respondent** **Date**
Street Address	**Street Address**
City/Zip	**City/Zip**
Telephone No.	**Telephone No.**
Attorney Code No.	**Attorney Code No.**

STIPULATION AND REQUEST TO HEAR UNCONTESTED CAUSE

We, the undersigned parties, STIPULATE AND AGREE that all matters pending between us have been settled, agreed and compromised, freely and voluntarily after full disclosure, and we hereby REQUEST that this cause be heard as an uncontested matter. We further STIPULATE AND AGREE that:

☐ **we have waived our right to a CONTRIBUTION HEARING on the issue of fees and costs, pursuant to 750 ILCS 5/503(j); OR**
☐ **a CONTRIBUTION HEARING will occur subsequent to the prove-up and before Judgment.**

Petitioner	**Date**	**Respondent**	**Date**

L. [7.163] Stipulation and Request to Hear Uncontested Cause in Suburban Municipal District

[SEE HARD COPY]

M. [7.164] Order for Withholding

[SEE HARD COPY]

N. [7.165] Notice to Withhold Income for Support.

[SEE HARD COPY]

O. [7.166] Family Support Affidavit

[Caption]

Family Support Affidavit

This completed form must be attached to any judgment, decree, or order of court that contains an initial order for the payment of child support and/or maintenance. Both parties may use one form or they may complete separate forms. If either party is not present, both Part I and Part II must be completed by the party who is present to the best of his/her information and belief.

Part I. To Be Completed by Custodial Parent

Full Name

_____

Address _____

City _____ **State** _____ **Zip** _____

Soc. Sec. No. _____ **Home Phone** _____ **Work Phone** _____

Employer _____

Address _____

City _____ **State** _____ **Zip** _____

Child(ren) to be supported:

Name	**Sex**	**Date of Birth**

Are children receiving Public Assistance? (Yes or No)

_____

If yes, give case number:

_____

Part II. To Be Completed by Noncustodial Parent

Full Name

_____

Address _____

City _____ **State** _____ **Zip** _____

Soc. Sec. No. _____ **Home Phone** _____ **Work Phone** _____

Employer _____

Address _____

City _____ **State** _____ **Zip** _____

Height _____ **Weight** _____ **Eyes** _____ **Complexion** _____

Race _____ **Birthplace (city, state)**

_____

Occupation _____ **Driver's License No.** _____

Father's name (last, first)

_____

Mother's name (maiden, first)

_____

Military Service? _____ **If yes, which branch?** _____

Retired? _____

Certification

Under penalties provided by law in §1-109 of the Code of Civil Procedure, the undersigned certifies that he/she knows the statements set forth in this document are true and correct, except as to matters therein specifically stated to be on information and belief, and as to those matters the undersigned certifies that he/she believes them to be true.

_____ _____

Custodial Parent **Date**

Noncustodial Parent

Date

Attorney for Custodial Parent

Attorney for Noncustodial Parent

Attorney Name:
Attorney No.:
Address: