

A Significant Change: Financial Advisors for Domestic Relations Court



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The New Year has brought many amendments to the Illinois Marriage and Dissolution of Marriage Act ("IMDMA"). I believe among the most significant changes in Illinois domestic relations law and practice is now allowing Domestic Relations Courts to seek advice from financial experts or other professionals. 750 ILCS 5/503(1).

The Illinois Legislature amended Section 503 of the IMDMA, now adding paragraph (l), a procedure for a court to seek advice from financial experts or other professionals. This new power granted to courts facing challenging financial issues is likely to cause a major change in procedures used by lawyers and courts handling pretrial negotiations and litigation concerning financial issues. Introducing a neutral appointed by a court to give it advice regarding Section 503 issues is likely to create a practice and process for financial issues similar to that developed over the years when courts routinely sought the advice of professionals in custody disputes (750 ILCS 5/604(b)).

Scope of Section 503(l)

The court's power to seek financial advice extends to the entirety of Section 503 dealing with all aspects of property and debt disposition. In addition, the court may seek advice incident to Motions for Temporary Restraining Orders ("TRO") under Section 501 to have an expert or professional administer payment and accounting for the divorcing parties' living and business expenses *pendent lite* if their assets are subject to a TRO (750 ILCS 5/501(a)(2)(i)).

The court's appointed "financial experts or other professionals" ("advisor(s)") are likely to be a court's eyes, ears and advisor concerning countless issues arising under Section 503. Consider that an advisor may be appointed to give advice to the court when tracing assets and making recommendations to the court concerning non-marital property claims. The court may choose to have an advisor concerning retirement plans, both on value and its provisions; an advisor may look into all aspects of stock options, restricted stock, estate planning transactions, dissipation of assets, tracing, the mechanics for dividing or distributing complex assets, tax effects of possible divisions of assets and sales or other dispositions courts may order in distributing assets and liabilities.

The advisor could also advise the court on the necessity for selling or retain-

ing property, the accuracy of business valuations, and the reliability of a business' financial records and statements. The advisor could also be called upon to give the court an opinion whether the increase in value of a non-marital asset has been substantial and if the owner was adequately compensated during the marriage for work done increasing its value. Advisors could also give opinions whether there were legitimate business purposes for a non-marital corporation to retain earnings. The range of subjects that advisors may speak to is as broad as the creativity of lawyers making property claims and defenses under Section 503.

Likely Change in the Practice of Handling Property Disputes

The process and techniques used by the lawyers and courts regarding Section 604(b) custody experts have been developed over many years and are well known. Once the Section 604(b) expert is appointed, all efforts to impress and convince the merits of the client's position are focused on the 604(b) expert. That expert can talk to the parties, speak to non-parties having knowledge, and read or view anything submitted by both sides. Although the parties may hire their own custody evaluators, there is always the feeling that the court's evaluator will have much more influence in the

court's decision making. Many times recommendations from the 604(b) expert become the foundation for the custody or visitation settlement ultimately achieved. Frequently, courts defer considering the parties' Section 604.5 motions to appoint their own evaluators until after a Section 604(b) report is submitted.

When dealing with Section 503(l) advisors, there is no reason to believe that the practice will differ greatly from Section 604(b) experts. The attention given to the Section 503(l) advisor may even be greater because the Section 503(l) advisor may deal with many more issues than does the custody advisor. The former could be asked to appraise an asset themselves, value a business, as well as advise the court concerning the parties' respective appraisers or business evaluator's opinions. Although the advisor is not the judge, the parties will probably treat the advisor like a judge due to the influence they will have on the judge. Since the advisor may look at a broad range of issues as suggested in this article, it is fair to assume that the advisor will require complete information like the discovery sought by lawyers. If a party is resisting producing complete discovery, the advisor could expedite the determination of the discovery issue by advising the court concerning their own need for the discovery sought.

Who Are the Advisors?

Obviously, the advisor will greatly influence the resolution of financial issues. They may be perceived as being the decider of the outcome of financial issues. However, the terms used in Section 503(l) for "Financial Expert" or "Other Professionals" are not defined in the IMDMA. Since the advisor could be anyone the judge trusts and has confidence in related to the subject for which advice is sought, it is crucial for courts to be cautious in selecting an advisor. They must be carefully vetted for independence and integrity, as well as for their knowledge and experience related to the assignment. Also, there is no limitation on the number of advisors to whom courts may turn. Therefore, the court is not limited to appointing a single omnibus advisor to deal with all of the financial issues of a case. There may be very different issues requiring different talents, and therefore different advisors.

Obviously, substantial costs may be connected with advisors. Section 503(l) authorizes the court to allocate their costs and fees between the parties using criteria the court considers appropriate. Also, the initial allocation is subject to reallocation under Section 508(a) at the conclusion of the case. Although advisor fees may be substantial, the advisor's recommendation, much like those from Section 604(b) custody expert's recommendations, may

lead the parties to an earlier settlement compared to the time it may have taken and greater costs if there is a contested trial. Such a result would be well worth the advisor's fees.

Like Section 604(b) advice to the court in custody cases, the Section 503(l) advisor must give their advice in writing and it must be made available to counsel. If a trial is necessary, the advisor would be the court's witness, subject to cross examination at trial and subject to pretrial discovery.

Conclusion

Precedent tells us that a Section 604(b) custody evaluator's opinion in and of itself is entitled to no more weight in trial than the opinions of the experts retained by the parties. However, anecdotally there have been very few custody decisions contrary to the 604(b) expert's recommendation. Nor do many published reviewing court opinions hold that a custody or removal decision was contrary to the trial court's independent expert's recommendation. Hence, there is every reason to believe this same dynamic will occur with Section 503(l) advisors. Therefore, it is important that lawyers and judges work together to ensure those selected to give advice to the court have not only the requisite expert knowledge but the same integrity we expect from our courts.

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