SCHILLER DUCANTO & FLECK LLP

CHICAGO
LAKE FOREST
WHEATON

SPRING NEWSLETTER 2009

Family Law. Unparalleled.

JUDGE JANE WALLER JOINS FIRM

Consider for a moment what a divorce attorney must know in addition to the basics of divorce law. The lawyer must know the rules, regulations and statutes concerning income taxation, estate planning and tax, accounting, real estate, corporations, partnerships, retirement benefits, trusts, financial planning and contracts, to name the more obvious. On top of all this the attorney must be a good negotiator, ready to go to trial and

The description "divorce lawyer" used to suggest an attorney with a single dimensional background, outlook and knowledge of the law, but this is far from reality. Because of the myriad of issues, diverse assets, debts, sources of income and, yes, personalities that are part of a divorce, a legal counselor must have a unique combination of skills, experience and legal knowledge.

Consider for a moment what a divorce attorney must know in addition to the basics of divorce law. The lawyer must know the rules, regulations and statutes concerning income taxation, estate planning and tax, accounting, real estate, corporations, partnerships, retirement benefits, trusts, financial planning and contracts, to name the more obvious. On top of all this the attorney must be contracts, to name the more obvious. On top of all this the attorney must be

Table of Contents OR
In This Issue

BEST LAWYERS NAMES DONALD C. SCHILLER "CHICAGO FAMILY LAWYER OF THE YEAR"

Best Lawyers, the country's original and most well-respected lawyer-rating directory, recently named Donald C. Schiller "Chicago Family Lawyer of the Year" and will honor his extraordinary accomplishments during its 25th Anniversary Event in Atlanta, Georgia, in April 2009. Mr. Schiller has been named in every single edition of *Best Lawyers* since it began rating lawyers in 1983.

ECONOMIC CHALLENGES IN DIVORCE

Celia G. Gamrath
Partner
cgamrath@sdflaw.com

In good marriages and bad, money puts a major stress on marriage. Some people have chosen to stay together because they cannot afford to divorce, while others feel desperate to get out of a bad marriage before they lose it all. Now more than ever, we need to examine new creative ways to structure a divorce settlement and learn to be flexible; that is, ready and willing to renegotiate a negotiated deal that's gone bad.

Prioritizing goals is the best way to determine whether a divorce in this economic climate is the right thing to do. More people have lost their jobs, have upside down mortgages, and cannot afford to pay spousal maintenance or child support. Some cannot afford to maintain their current home, let alone two, and cannot afford to separate. Nor can they sell their home in a declining real estate market. Although maintenance recipients have a duty to become self-supporting, it is particularly difficult when a person has been out of the workforce for years and has no marketable skills and the unemployment rate is steadily increasing among qualified workers.

The situation is worsened by obligors coming into court to reduce maintenance and child support because their income has been cut or they have lost their jobs. Support obligors cannot unilaterally reduce or abate their support obligations, but must get a court order approving the reduction. Without a court-approved agreement, an obligor could be held in contempt and fined for arrearages for not being current on support even where there is a side agreement between the obligor and the support recipient to reduce support.

Commuter marriages and removal cases are also on the rise because of unemployment and job transfers. Particularly in today's market, if the relocating parent can show a direct corollary between the proposed relocation with the child, enhanced or secure employment, improved quality of life, and that relocation is in the best interests of the child, he/she should be allowed to move outside the state with the child, either temporarily or permanently.

Persons contemplating divorce must take a hard look at their priorities and determine whether their marriage is really that bad or if it can be saved. Some couples are giving their marriage another chance, pulling together to try to make things work financially and emotionally. Where that is not feasible, couples are better off working with experienced counsel to negotiate a reasonable and realistic settlement to achieve the best possible result under the circumstances, minimize conflict, and reduce the cost of attorney fees without leaving valuable property rights on the table.

Excerpts of original article reprinted with permission from Law Bulletin Publishing Co.

Celia G. Gamrath was recently named to the "Top 50 Woman" Illinois *Super Lawyers* list. Her article titled "Declaratory Judgments and Premarital Agreements: *In re Marriage of Best*," was published in the April 2009 issue of the Illinois Bar Journal, and she continues to write a bimonthly column for the *Chicago Lawyer*.

Collaborative divorce lawyers, healers of human Conflict

James R. Galvin
Partner
jgalvin@sdflaw.com

In 1982, United States Supreme Court Justice Warren Burger pointed out, "The obligation of our profession is, or has long been thought to be, to serve as healers of human conflict."

To help divorcing couples resolve conflict requires an understanding of how loss, uncertainty and unmet subjective needs lead to anger, anxiety and a host of other destructive emotions.

Dr. Honey A. Scheff, Ph.D., writes:

> "The divorce experience is all about loss. Loss of love. Loss of relationship. Loss of net worth. Loss of dreams. Loss of control. The combined effects of these multiple losses layered one over the other can be overwhelming for an individual. When faced with loss, people can react in a variety of destructive ways in their misguided attempts to cope with the resulting pain and stress, and behave destructively in the process. People will drink too much, abuse substances, behave impulsively, act out in anger and frustration, and break rules, not with any evil intentions, but because they are hurt and unable to cope with the pain engendered by the losses they are facing. They simply want the pain to go away, and they may resort to harmful, self-defeating methods to help themselves feel better."

> "The divorce process is replete with uncertainty, which allows us to predict that the couple members are likely to be in a continual state of anxiety. Indeed, the only certainty about divorce is that it is a time of uncertainty. . . .The future is unclear and the security of life as it has been is gone. What stretches ahead is a giant unknown; perhaps better, perhaps worse, definitely different. Knowledge is power, and it has been shown that even knowing a poor outcome is, in fact, less anxiety-provoking than an uncertain outcome that might be better, or might not. Anxiety, as a state of being, can often be a precursor to depression, which can ultimately lead to helplessness. These emotional states feed each other in such ways as to interfere with cognitive processing, decision-making and the ability to communicate and negotiate clearly and effectively." "Collaborative Review," Journal of the International Academy of Collaborative Professionals (Vol. 9, Issue 2, Summer 2007).

In short, many divorcing couples deal with the loss and uncertainty in highly conflictive and combative ways resulting in enormous cost both emotionally and financially to their family and society.

Negotiations in divorce are not driven as much by what you see, but by what you do not see mainly: Core identity issues and feelings. In a collaborative process, mental health professionals working as part of an interdisciplinary team help attorneys and clients understand how to channel destructive emotions and redirect them in productive ways, and ways that allow divorcing couples to reach amicable agreements and provide attorneys an opportunity to serve as healers of human conflict.

James R. Galvin will be speaking on the topic of "Conflict Resolution Using Effective Family Law ADR Techniques in Other Types of Disputes" on May 20, 2009 at the Cliff Dwellers Club in Chicago. *(See page 8 for more information)*

"NET INCOME" FOR CHILD SUPPORT PURPOSES - A COMMON SENSE APPROACH TO THE TREND IN ILLINOIS LAW

A frequent question for family law practitioners is, what is "net income" for child support purposes? The law on this issue has been evolving over the decades since the enactment of the child support statute, which defines net income as the total of all income from all sources, minus certain specified deductions. Net income for child support purposes is not the same as reported income for federal and state tax purposes, and courts are increasingly looking at cash flow (i.e., what someone uses to pay his/her expenses) as opposed to what is properly declared as income for IRS purposes.

Timothy M. Daw
Partner
tdaw@sdflaw.com

The child support statute also sets out guidelines that are presumed to be the correct amount of child support; however, the court may deviate from them. A common basis to deviate downward from the guidelines is where the obligor has a high income, in which case the utility of the statutory guidelines decreases. The guidelines were not intended to create windfalls, but to ensure adequate support payments for the upbringing of the child.

The emerging focus on "cash flow" is not unique to divorce. The focus on "cash flow" and "lifestyle" are common inquires for the IRS in cases being reviewed for possible under-declared or improperly declared income. The questions become twofold: (1) How much cash flow is being expended verses what is being declared; and/or (2) How are the parties living verses what are they declaring income? If there are any significant discrepancies in regard to either inquiry, red flags are raised that there may be undisclosed or under-reported income. If parties have one or two primary accounts out of which they pay expenses, the amount they are spending as opposed to what they are declaring is a preliminary inquiry which has great value. There may be legitimate reasons for the discrepancies: People living beyond their means using increasing debt to fund a lifestyle, people cannibalizing assets to fund such discrepancies, legitimate business expenses, etc.

Three relatively recent cases highlight the trend in the law to focus on "cash flow." In *In re Marriage of Baumgartner*, 384 Ill.App.3d 39 (1st Dist. 2008), proceeds from the sale of a residence that were reinvested in a second residence were not income for child support. In *In re Marriage of Lindman*, 356 Ill.App.3d 462 (2d Dist. 2005), retirement account distributions used to pay expenses were viewed as income for child support. In *In re Marriage of Rogers*, 213 Ill. 2d 129 (Ill. 2004), loans from parents, which were forgiven and not subject to taxation and utilized for living expenses, were deemed income for child support. This trend indicates the need to focus on what people are spending and what the child would have enjoyed had the marriage not been dissolved, not what the obligor declares as income for tax purposes. Where there is a question of net income, one must start with the tax returns, but the inquiry should not end there.

Celia G. Gamrath, Editor

(Put this information on the last page)

The Importance of the Trial Record in an Appeal

Sarane C. Siewerth
Partner
ssiewerth@sdflaw.com

Skilled, experienced attorneys know that, from the very first meeting with a client, they prepare that case keeping in mind the possibility of an appeal. While such a mind-set might, at first glance, appear to reflect a defeatist attitude, the reality is just the opposite; only by developing the trial record with an eye toward an appeal does the attorney ensure that, if the case is eventually presented to a reviewing court, the record on appeal is sufficient to support whatever arguments the attorney must make to persuade the appellate court to rule in favor of his or her client.

Today, litigants are generally knowledgeable about the trial process itself, thanks to films and television, and they have seen or read details of pre-trial investigation and fact-gathering primarily in criminal cases. Appeals, however, are rarely mentioned, much less depicted in the popular media, so the average litigant, particularly in a family law case, has little if any knowledge of the appellate process itself.

While litigants know generally that a party who files an appeal is asking a reviewing court to change the trial court's decision in his or her case, they may be unaware of the one significant restriction on the appellate court: it cannot consider anything that was not presented to the trial court. The task of the appellate court is not to decide whether the trial court's decision was right or wrong; its task is to assess whether that decision is a sustainable result when the facts presented at the trial through testimony and exhibits are measured against the applicable law. In other words, does the law as applied to the facts presented support the result?

The only thing the appellate court is permitted to work with is the record on appeal—the record made by the parties in front of the trial court. The appellate judges may not consider any facts or arguments not originally considered by the trial court. Whether the individual client is the one who wishes to challenge the trial court's decision (the appellant) or the one who wants the decision affirmed (the appellee), the key is the record on appeal. The task of the appellate attorney, therefore, is to demonstrate that the record on appeal—the facts and exhibits presented and the arguments made concerning the law-supports that attorney's client, whether appellant or appellee.

What is the record on appeal? Basically, it consists of (1) every written document submitted to or entered by the trial judge during the course of the entire case—pleadings, motions, responses, court orders, memoranda of law, and written closing arguments, if any; (2) transcripts of all the testimony and attorney arguments presented to the court during pre-trial hearings and the trial itself; and (3) all the exhibits entered into evidence at pre-trial hearings or the trial itself. The trial attorney's analysis of the case, formulation of the issues to be raised, decisions about the documents and testimony needed for success on each issue, and the gathering, organizing, and presenting that evidence, all contribute to the creation of the necessary record on appeal.

This is the first in a series of articles concerning appeals in family law cases.

GRANDPARENTS' RIGHTS

In the past 25 years, few areas of family law have changed more dramatically than those concerning grandparents' rights in relation to grandchildren. Between 2005 and 2007, the Illinois Legislature passed a series of amendments to the Illinois Marriage and Dissolution of Marriage Act addressing grandparent visitation. In *Flynn v. Henkel*, 227 Ill.2d 176 (Ill. 2007), the Illinois Supreme Court ruled on some of these amendments, lending tremendous insight into the Illinois Supreme Court's current opinion on grandparent visitation. Effective January 1, 2007, the Illinois Legislature passed the following series of amendments concerning grandparent visitation:

Andrea K. Muchin
Partner
amuchin@sdflaw.com

1) The Grandparent Visitation Act no longer applies to children less then one year old. 750 ILCS 5/607(a-3).

2) The new amendment contains a specific venue provision such that "[a] petition for visitation with a child by a person other than a parent must be filed in the county in which the child resides." 750 ILCS 5/607(a-3).

3) The statute now allows a grandparent to petition for visitation during a "pending dissolution proceeding or any other proceeding that involves custody or visitation issues." 750 ILCS 5/607(a-3).

4) A grandparent will be able to petition for visitation if a parent "has been missing for at least 3 months." 750 ILCS 5/607(a-5)(1)(A-5).

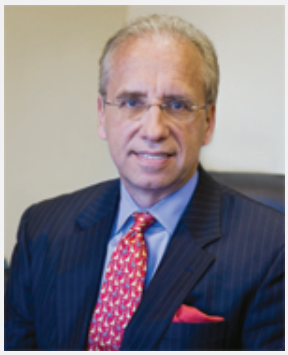
5) The statute allows for a grandparent to petition for visitation if the parent has been "incarcerated in jail or prison during the 3 month period preceding the filing of the petition." 750 ILCS 5/607(a-5)(1)(A-15).

6) If a child is adopted by a relative or a stepparent, a grandparent still has standing to petition for visitation after the adoption, which is in stark contrast to the old law which forbade a grandparent to petition for visitation after the child had been adopted. 750 ILCS 5/607(a-5)(1)(B).

In *Flynn*, the Illinois Supreme Court interpreted the new laws to mean that a grandparent seeking court-ordered visitation must prove that the child's mental, emotional, or physical health will be harmed if visitation is denied, and the fact that a child simply will be cut off from one side of the family if visitation is stopped is not enough to prove harm to the child. For now, *Flynn* is the controlling opinion for grandparents seeking visitation in Illinois, although the constitutionality of these new provisions has not yet been challenged. (Practitioners will recall that in 2002, in *Wickham v. Byrne*, 199 Ill.2d 309 (Ill. 2002), the Illinois Supreme Court held the prior grandparent visitation statute unconstitutional on its face because it infringed on the natural parents' fundamental right "to make decisions concerning the care, custody, and control of their children without unwarranted statue intrusion.")

This article is adapted from Chapter 12 of the 2008 Edition of Advising Elderly Clients and Their Families (IICLE, 2008), which chapter was authored by Andrea K. Muchin of Schiller DuCanto & Fleck LLP, with assistance from law clerk Eric T. Saar.

Divorce lawyering requires more than just a knowledge of divorce law



Carlton R. Marcyan
Executive Committee Chairman
cmarcyan@sdflaw.com

The description "divorce lawyer" used to suggest an attorney with a single dimensional background, outlook and knowledge of the law, but this is far from reality. Because of the myriad of issues, diverse assets, debts, sources of income and, yes, personalities that are part of a divorce, a legal counselor must have a unique combination of skills, experience and legal knowledge.

Consider for a moment what a divorce attorney must know in addition to the basics of divorce law. The lawyer must know the rules, regulations and statutes concerning income taxation, estate planning and tax, accounting, real estate, corporations, partnerships, retirement benefits, trusts, financial planning and contracts, to name the more obvious. On top of all this the attorney must be a good negotiator, ready to go to trial and know the rules of evidence to boot! It is the unique lawyer that possesses all of these. Some time ago I recall reading in the *New Yorker Magazine* the definition of a divorce lawyer. It reads:

> *"Divorce Lawyers – Unsung heroes of the bar. Part confidant, auditor, psychologist, negotiator, gladiator. Capable of solving difficult human problems in an atmosphere not conducive to same. Also part scholar, salesman, advocate. Given to lively conversation and great human insight. Some of my best friends."*

The attorneys at Schiller DuCanto & Fleck LLP are unique; they possess all of the skills needed to not only be good divorce lawyers but great ones. And yes, they are indeed some of my best friends.

Standing from left to right: Deborah A. Carder, Karen Pinkert-Lieb, Jennifer Dillon Kotz, Tanya J. Stanish, Anita M. Ventrelli, Celia G. Gamrath, Meighan A. Harmon. Sitting from left to right: Andrea K. Muchin, Sarane C. Siewerth, Elizabeth M. Wells. Not Pictured: Claire R. McKenzie, Jessica Bank Interlandi, Jane D. Waller

Schiller DuCanto & Fleck LLP topped the charts in the **Chicago Bar Association Call To Action** initiative designed to advance women attorneys in leadership in Chicago. Over a four-year period, Schiller DuCanto & Fleck LLP increased its percent of women partners by more than 3% to become the firm with the highest percentage of women partners among the Chicago law firms surveyed. A list of signatories to the Call to Action initiative can be found at www.chicagobar.org.

In the News

David H. Hopkins delivered a "Grand Rounds" presentation to the OB/Gyn Department at Rush University Medical Center on parameters of the Illinois Domestic Violence Act particularly relevant to medical service providers.

Eric L. Schulman was named to the Editorial Board of The Matrimonial Strategist, a national and monthly family law publication from Law Journal Newsletters.

Claire R. McKenzie spoke on March 11, 2009 at a Chicago Bar Association seminar titled "Tax Topics Related to Divorce."

Jay P. Dahlin was hired as an Adjunct Professor at DePaul School of Law to teach legal writing for matrimonial law for the Spring 2009 semester.

Jason N. Sposeep was accepted as a fellow of the Collaborative Law Institute of Illinois and was invited to join the Pro Bono Initiative Committee for the Chicago Bar Foundation Legal Academy. Mr. Sposeep is also on the steering committee of the MS Society, which is responsible for raising $1,000,0000 and planning the MS Walk in Chicago.

Joseph N. DuCanto will review the Corps of Cadets of the Marine Military Academy at Harlington, Texas and will speak to the graduating class of 2009 on May 30th

Upcoming Events

Drafting Prenuptials to Avoid Tax Traps and Litigation Pitfalls

April 28, 2009 from 5:00 p.m. – 7:15 p.m.
Arrowhead Golf Club, Wheaton, Illinois

Speakers: David H. Hopkins, Deborah A. Carder and Tanya J. Stanish

RSVP by April 21, 2009
Christine Rust: (630) 784-7403

Conflict Resolution Using Effective Family Law ADR Techniques in Other Types of Disputes

May 20, 2009 from 5:00 p.m. – 7:00 p.m.
The Cliff Dwellers Club, Chicago, Illinois

Speakers: Carlton R. Marcyan, James R. Galvin, Benjamin S. Mackoff and Jane D. Waller

RSVP by May 12, 2009
David Young: (312) 609-5564

SCHILLER DUCANTO & FLECK LLP

CHICAGO
LAKE FOREST
WHEATON

sdflaw.com

CHICAGO
200 North LaSalle Street
30th Floor
Chicago, IL 60601-1089

(312) 641-5560 Phone
(312) 641-6361 Fax

LAKE FOREST
225 East Deerpath Road
Suite 270
Lake Forest, IL 60045-1973

(847) 615-8300 Phone
(847) 615-8284 Fax

WHEATON
311 South County Farm Road
Suite G
Wheaton, IL 60187-2477

(630) 665-5800 Phone
(630) 665-6082 Fax