NORTH SUBURBAN
BAR ASSOCIATION

NSBA NEWS

Winter 2016

In this Issue:

PRESIDENT'S MESSAGE

January 2016

By Raymond R. Ricordati, III, President

Dear NSBA Members:

Happy 2016! I hope everyone had a great holiday season and is enjoying the new year. Anna and I are certainly enjoying our new arrival, Jasper Douglas Raymond Ricordati, who was born on December 29. See page 6 for some photos of the little guy!

It's hard to believe that the NSBA year is almost half over. It seems like just yesterday, I saw most of you at our Installation Dinner. If you weren't there, you missed a riveting and well-informed dissection of the criminal justice system from Judge Matthew F. Kennelly, this year's Sanford L. Blustin honoree. Judge Kennelly exposed various problems from over incarceration to mandatory sentencing.

This year's General Meetings/CLE dinners have continued our tradition of offering top-notch legal insight for incredible value. To kick things off, we learned how to zealously represent clients (or yourself) before the IRS from Jonathan E. Strouse. In November, the Hon. Michael Bender (ret.) explained the relative strengths and weaknesses of the available mechanisms for representing children in domestic relations cases. Most recently, the NSBA's own family law dream team of the Honorable

Jeanne Reynold (past president), David Pasulka (past president and current director) and Michael Craven (current director) provided excellent insight into the recent changes to the Illinois.

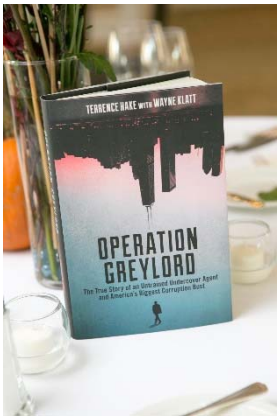
December saw our annual Holiday Party at the Happ Inn (and if you missed it, please see the many photos in this newsletter). Thanks to generosity of all those able to attend, we received so many toys that we were able to fill over an entire donation box for Toys For Tots and enough food to fill a half-box for the Greater Chicago Food Depository.

I hope you will join us for the annual Gary Wild Dinner, which will take place on March 15. Formal invitations will be out soon. And, of course, please save the date of May 10, 2015 for the NSBA's annual Judges Night at the North Shore Country Club. You will not want to miss our upcoming General Meetings/CLEs on February 9 and June 7 as well as the NSBA's Annual Ethics CLE on April 19, where you can complete your ethics CLE requirements in one day. Please stay tuned for more details.

Our next big event is the 3rd Annual NSBA Mock Court Invitational at the Skokie Court House on tomorrow, January 28, 2016. Thanks to past president Jan Weinstein for her efforts in organizing and preparing for the competitions (and to our member volunteers for their time as judges). Several area high school teams will be competing this year, including: Niles West; Niles North; Main South; Evanston and York. Following the event, volunteers will provide student feedback at the pizza party. If you would like to participate, IT'S NOT TOO LATE!! Please contact Jan (asap) at jan@jsweinsteinatty.com.

Your membership and participation in NSBA events is greatly appreciated!

Ray



2016 L. Sanford Blustin Honoree:

Hon. Matthew F. Kennelly

Hon. Matthew F. Kennelly is a 1981 graduate Harvard Law School, magna cum laude, after receiving his undergraduate degree at University of Notre Dame in 1978. After law school, he was an associate as Hedlund, Hunter & Lynch/ Latham & Watkins. His practice involved litigation of complex civil matters in the Federal and State Courts. He served for two years as law clerk to United States District Judge Prentice H. Marshall in the United States District Court for the Northern District of Illinois. He also worked at Cotsirilos, Stephenson, Tighe & Streicker, Ltd. for 15 years, during this time was a partner there for 10 years. His practice included trials and appeals in civil and criminal cases in the Federal and State courts, and representation of professionals in disciplinary matters. The civil matters he handled in the Federal courts included representing plaintiffs and defendants in cases involving RICO, securities fraud, common law fraud, trade secrets, breach of contract and other commercial and business disputes, civil rights, ERISA, labor, environmental, attorney malpractice, attorney sanctions and discipline, and bankruptcy related matters. The criminal matters that he handled in the Federal courts included cases involving RICO, mail and wire fraud, bank fraud, bribery, extortion, arson, securities fraud, tax fraud, false claims, perjury, obstruction of justice, customs, counterfeiting, narcotics, and robbery. He also represented individuals in habeas corpus and asset forfeiture cases.

Since talking his seat on the bench, Judge Kennelly has heard a wide variety of important cases, including *Terkel et al.v. AT&T Corp.* in which he dismissed a challenge to AT&T's alleged turnover of customer phone records to the NSA in light of the state secrets privilege, which can bar suits that would disclose information harmful to national security. In addition, Judge Kennelly was instrumental in the creation of the Northern District of Illinois' local patent rules. Judge Kennelly also is an active member of the legal community, serving as the current President of the Federal Bar Association and volunteering his time to many other bar association throughout the city.

2015-2016 NSBA Officers & Directors:

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From the Editor's Desk:

Thanks to those able to attend the NSBA events this past year and for willingly participating in the photos used in these Newsletters. We have had great attendance at our events this year. If you have any recent articles or information you would like to include in the newsletter, please forward them to our new newsletter editor, John Stimson. We can always use more articles!

We have also had several new members join our ranks. I invite all new members to submit a short biographical statement (and photo) for inclusion in the newsletter to introduce yourself to the organization.

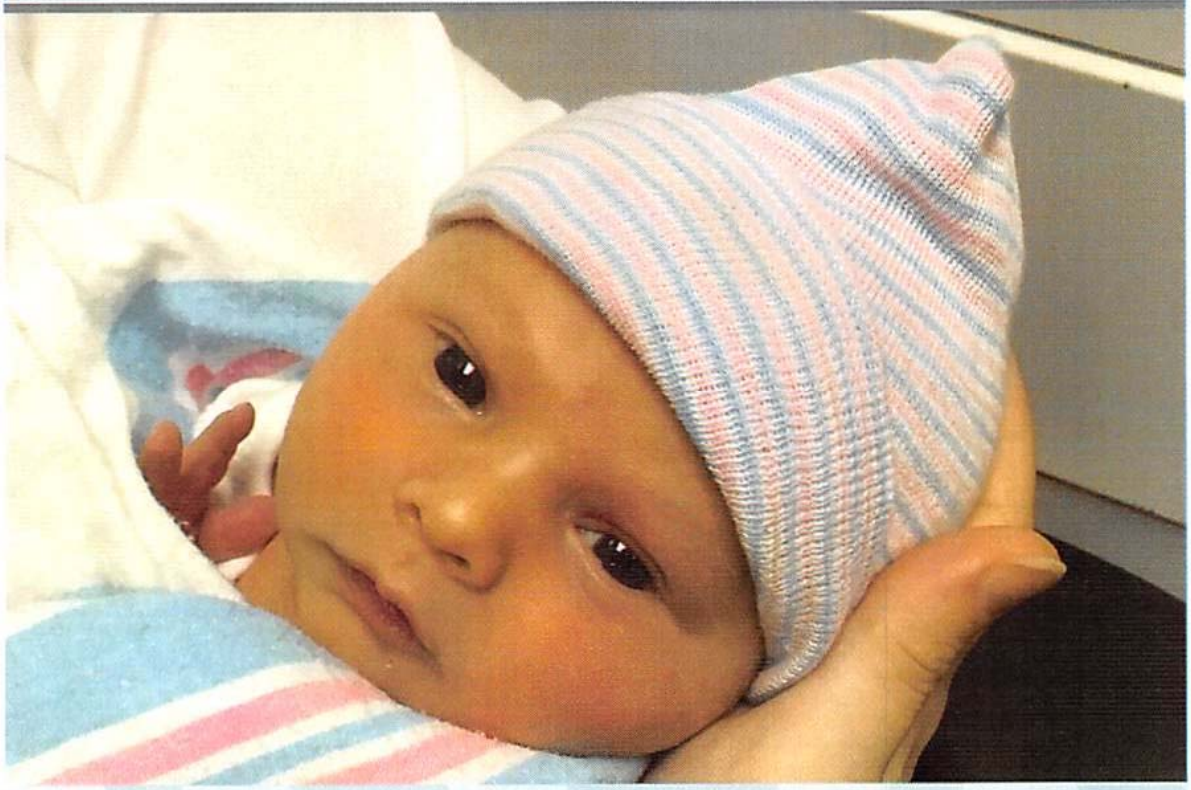
In addition, please send any suggestions for the newsletter to John at John@stimson-law.com.

Thanks, Ray Ricordati

WELCOME TO THE WORLD

Jasper Douglas Raymond Ricordati

December 29, 2015



5:33 AM SIX POUNDS, SIX OUNCES, NINETEEN INCHES
PROUD PARENTS ANNA & RAY

Representing Children

The difference between an Attorney for the Child, Guardian Ad Litem and Child Representative.

By: David P. Pasulka,
Molly E. Caesar and
Morgan A. Gay –
All of Pasulka & Associates, P.C., a law firm concentrating on family law

Custody and visitation issues are often the most contentious issues in a family law proceeding. On January 1, 2016, major amendments to the Illinois Marriage and Dissolution of Marriage Act ("Act") will go into effect, many of which affect provisions regarding children.[i] For example, a significant change to the Act amends "Joint custody" and "Sole custody" to "Allocation of parental responsibilities."[ii] Though there will likely be a transition period during which judges, attorneys and litigants adjust to the revisions, it is important not to forget the provisions of the Act that have not changed as they will be important tools to guide you through this period of transition.

Specifically, section 5/506 of the Act still provides for the legal representation of a child.[iii] Section 5/506 provides for three different types of appointments: 1) attorney for the child, 2) guardian ad litem and 3) child representative (for the purposes of this article, hereinafter collectively "representative").[iv] By understanding the different responsibilities of each representative, attorneys can better advise their clients on their child's representative's role in the proceeding.

When to Appoint:

A representative may be appointed in any proceeding "involving the support, custody, visitation, education, parentage, property interest or general welfare of a minor or dependant child…to address the issues the court delineates."[v] Thus, the representation of a child may extend beyond custody issues, including assisting the parties in settling property disputes or representing the child's property interests.[vi]

Prior to appointing a representative on behalf of a child, parties must attend mediation in an attempt to resolve any issues involving custody, visitation or removal.[vii] A party may object to mediation on the basis that an "impediment to mediation" exits.[viii] An impediment to mediation is defined as a "circumstance which may render mediation inappropriate or unreasonably interfere with the mediation process."[ix] For example, a party may object to mediation and ask for the immediate appointment of a representative in emergency situations where there are allegations of family violence, abuse or harassment. [x]

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[i] *See* Matthew Hector, *Family law rewrite goes to the governor*, 103 IL B.J. 12 (2015)
[ii] 750 ILCS 5/602.5 (eff. Jan. 1, 2016)
[iii] 750 ILCS 5/506
[iv] *Id.*
[v] 750 ILCS 5/506(a)
[vi] *Id.*; 750 ILCS 5/506(a)(3)
[vii] Cook Co. Cir. Ct. R. 13.4(e)(ii)(b); Ill. S. Ct. R. 923(a)(3); Ill. S. Ct. R. 905(b)
[viii] Cook Co. Cir. Ct. R. 13.4(e)(ii)(d)
[ix] Cook Co. Cir. Ct. R. 13.4(e)(i)(b)(3)
[x] *Id.*

If referred to mediation, a party will first have to complete a parenting education program called Focus on Children prior to starting mediation.[xi] If the parties cannot reach an agreement through mediation, the court shall consider whether to appoint a representative on behalf of the child.[xii]

The purpose of appointing a representative is to represent the best interest of the child, especially in cases where the interests of the child are being neglected or manipulated.[xiii] The court may appoint a representative on behalf of the child on its own motion or on the motion of any party.[xiv] When appointing a representative the court shall consider "the nature and adequacy of the evidence to be presented by the parties and the availability of other methods of obtaining information, including social service organizations and evaluations by mental health professions, as well as resources for payment."[xv]

Duties:

Attorney for the child:

An attorney for the child shall "provide independent legal counsel for the child and shall owe the same duties of undivided loyalty, confidentiality, and competent representative as are due an adult client."[xvi] Unlike a guardian ad litem or child's representative, the attorney for the child is bound to advocate for the child's position.[xvii] All communications between the attorney and child are privileged and confidential and the attorney cannot be called as a witness at trial. Courts rarely appoint attorneys for the child as they are to be give the same representation as an "adult client," which may not be parallel to the child's best interest.[xviii] Further, it is not unimaginable that a child could sue his former attorney for acting against his wishes.[xix]

Guardian Ad Litem:

The court can also appoint a guardian ad litem on behalf of the child.[xx] Unlike the attorney for the child, the guardian ad litem represents the best interests of the child and is not bound by the child's wishes.[xxi] The guardian ad litem shall have investigatory powers and make recommendations on the specified issues directed by the Court. The guardian ad litem "shall testify or submit a written report to the court regarding… her recommendations."[xxii] She is also subject to being called as a witness and cross-examined at trial regarding her report or recommendations. As such, communications between a guardian ad litem and a child are not privileged or confidential.[xxiii]

[xi] Cook Co. Cir. Ct. R. 13.4(e)(ii)(b)
[xii] Ill. S. Ct. R. 923(b)
[xiii] Muller Davis, James L. Rubens & Jody Meyer Yazici, *§506. Representation of child*, 12 Ill. Prac., Fam.L. 750 5/506 (2014) *citing Hartman v. Hartman*, 89 Ill. App. 3d 969, 972 (4th Dist. 1980)
[xiv] *Id*.
[xv] 750 ILCS 5/506(a-5)
[xvi] 750 ILCS 5/506(a)(1)
[xvii] Muller Davis, James L. Rubens & Jody Meyer Yazici *§506. Representation of child*, 12 Ill. Prac., Fam.L. 750 5/506 (2014)
[xviii] *See* Helen W. Gunnarsson, *Guardian Ad Litem, Attorney for the Child, Child Representative: How's the System Working?*, 95 IL B.J. 352 (2007) available at http://www.isba.org/ibj/2007/07/guardianadlitemattorneyforthechildc.
[xix] *But see In re the Marriage of Lonergan*, No. 1-94-2457, Rule 23 (1st Dist. 1996)(permitting attorney for the child to express her opinion, which was not consistent with the child's preference); *see also* Ill. S. Ct. R. 907 (providing that attorney for the child shall enter into settlement agreements that serve the best interest of the child)
[xx] 750 ILCS 5/506(a)(2)
[xxi] *Id*.
[xxii] *Id*.
[xxiii] *Id*.

In cases where a child cannot express their preference or wishes, due to age, immaturity or special needs for example, a guardian ad litem can be extremely beneficial for the court.[xxiv] The guardian ad litem uses her investigatory powers to become the eyes and ears of the court.[xxv] She can testify on her conversations with the child, parents, collateral witnesses, other professionals and her own observations.[xxvi] If the child can express their preference as to custody or visitation, the guardian ad litem can take the child's preference into consideration but is not bound by the child's preference. [xxvii]

Child Representative:

The child representative is a hybrid of the attorney for the child and the guardian ad litem.[xxviii] A child representative "shall have the same authority and obligation to participate in the litigation as does an attorney for a party and shall possess all the powers of investigation as does a guardian ad litem."[xxix] The child representative advocates for the child's bests interest and is not bound by the child's wishes, though she shall take the child's wishes into consideration. All communications between the child representative and child are privileged and confidential, except as required by law or by the Rules of Professional Conduct.[xxx] Further, the child representative cannot be called as a witness at trial.[xxxi] The child representative does not submit an opinion or report to the court; however, she shall disclose her position in a pre-trial memorandum to counsel of record prior to a trial. The pre-trial memorandum shall not be considered evidence.[xxxii] The child representative has standing to conduct necessary discovery, file appropriate pleadings, depose, present witnesses, and review expert reports. 750 ILCS 5/506(a)(3).

Similar to guardian ad litems, a child representative can be beneficial for the court in ascertaining and representing the best interest of a child. Child representatives have the ability to directly participate in the proceeding rather than relying on the attorneys of the parties to take action on behalf of the child.[xxxiii] Therefore, a court may appoint a child representative in cases where direct participation would be beneficial.[xxxiv] However, unlike a guardian ad litem, the child rep is limited to making "evidentiary based" arguments.[xxxv]

Obligation of an Attorney to the Child Representative:

Illinois Supreme Court Rule 907 provides for the minimum duties and responsibilities of representatives for minor children.[xxxvi] Rule 907 provides that a representative shall have the right to interview, or observe, the child without limitation or impediment.[xxxvii] The representative may also interview family members and others possessing special knowledge of the child's circumstances.[xxxviii] Attorneys for the

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[xxiv] Helen W. Gunnarsson, *Guardian Ad Litem, Attorney for the Child, Child Representative: How's the System Working?*, 95 IL B.J. 352 (2007) available at http://www.isba.org/ibj/2007/07/guardianadlitemattorneyforthechildc
[xxv] *See* Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 IL B.J. 458, 458-462 (2001) available at http://www.woodstocklegal.com/articles/UnderstandingtheIllinoisChild.pdf
[xxvi] *Id.*; Ill. S. Ct. R. 907
[xxvii] *Id.*
[xxviii] 750 ILCS 5/506(a)(3)
[xxix] *Id.*
[xxx] *Id.*
[xxxi] *Id.*
[xxxii] *Id.*
[xxxiii] *See* Helen W. Gunnarsson, *Guardian Ad Litem, Attorney for the Child, Child Representative: How's the System Working?*, 95 IL B.J. 352 (2007) available at http://www.isba.org/ibj/2007/07/guardianadlitemattorneyforthechildc
[xxxiv] *Id.*
[xxxv] 750 ILCS 506 (a)(3)
[xxxvi] Ill. S. Ct. R. 907
[xxxvii] Ill. S. Ct. R. 907(b)
[xxxviii] Ill. S. Ct. R. 907(c)

parents should advise their clients to cooperate with representatives in scheduling appointments for representatives to interview or observe the child. Further, attorneys for the parents should include the representative in all relevant communication regarding the litigation and send the representative all pertinent documents.

Other Considerations:

The First District held that child representatives and guardians ad litem act as "arms of the court" and, thus, are absolutely immune from civil liability.[xxxix] The court stated, to "best aid the court in its determination of the child's best interests, the child representative must be accorded absolute immunity so as to allow him to fulfill his obligations without worry of harassment and intimidation from dissatisfied parents."[xl] Citing the First District, the Second District also found that child representatives are afforded absolute immunity "from suit related to his court-appointment duties as a child representative."[xli]

Attorneys for the child, guardian ad litems and child representatives are extremely beneficial to the court. It is helpful to understand the subtle differences between these roles, especially when navigating the revisions to the Illinois Marriage and Dissolution of Marriage Act.








[xxxix] *Vlastelica v. Brend*, 352 Ill. Dec. 791, ¶ 23(1st Dist. 2011)
[xl] *Id.*
[xli] *Davidson v. Gurewitz*, 2015 IL App (2d) 150171, ¶ 13

DOROTHY BROWN
CLERK OF THE CIRCUIT COURT OF COOK COUNTY

ATTENTION

Effective January 1, 2016

E-MAIL ADDRESSES ARE REQUIRED FOR ATTORNEYS AND OPTIONAL FOR UNREPRESENTED PARTIES

Amended Illinois Supreme Court Rules 11, 101, 107, 131 and 291 — Effective January 1, 2016

Attorneys are required to include a primary e-mail address on notices of hearing for an order of replevin; general summonses; summonses requiring appearance on a specified day; summonses in certain other cases in which specific date for appearance is required; summonses requiring appearance within 30 days after service; summonses under the Administrative Review Law; appearances and all pleadings filed in the Circuit Court to which documents may be served in conformance with Illinois Supreme Court Rule 131(d). In addition to the required primary e-mail address, attorneys may designate no more than two secondary e-mail addresses on all documents filed or served in any cause by an attorney upon another party.

Unrepresented parties may designate a single e-mail address to which service may be directed under Illinois Supreme Court Rule 11(b)(6). If an unrepresented party does not designate an e-mail address, then service upon and by that party must be made by a method specified in Illinois Supreme Court Rule 11 other than e-mail transmission.

Please review and comply with Amended Illinois Supreme Court Rules 11, 101, 107, 131 and 291.

01/01/16

ON THE TIP OF YOUR TONGUE

By Angela Peters

FAMILY LAW

In re Marriage of Enders, 2015 IL App (1st) 142435, December 31, 2015, Cook Co., 5th Div., GORDON, Affirmed. Husband appeals court's division of property based on parties' premarital agreement. Plain and ordinary meaning of "any", in premarital agreement stating that right of reimbursement provision stating that it applies to "any" pension plan, does not exclude defined pension benefit plans, and thus those plans were properly found subject to right of reimbursement for marital contributions made. Wife acquired promissory note in exchange for or with proceeds of a residence she was awarded in previous divorce, and thus promissory note remained nonmarital. Thus, per premarital agreement, nonmarital property remains nonmarital regardless of contributions from marital funds. Court's denial of husband's request for visitation with the parties' 2 dogs was not against manifest weight of evidence. Under Animal Control Act, wife is the dogs' "owner", as dogs were left in her "care" when the husband moved out of the parties' residence; and scarce Illinois case law addressing pet visitation. (REYES and PALMER, concurring.)

In re Marriage of Johnson, 2016 IL App (5th) 140479, January 7, 2016, Marion Co., STEWART, Reversed and remanded. Considering all relevant statutory factors, award of rehabilitative maintenance in amount of $2,750 for 30 months was an abuse of discretion. Wife should have been awarded permanent maintenance in an amount sufficient for her to maintain the lifestyle the parties enjoyed during the marriage. Although recent amendment of Section 504 of Marriage and Dissolution of Marriage Act is not applicable to appeal, it provides some guidance. If that provision were applicable, court would be required to order either permanent maintenance or maintenance for almost 29 years (length of marriage). In ruling on wife's petition for attorney's fees, court erred in failing to consider all relevant statutory factors, instead basing its decision on disapproval of her attorney's conduct. Court's valuation of marital assets, including marital home, gold and silver coins, and oil lease, was against manifest weight of evidence. (WELCH and CHAPMAN, concurring.)

Garcia v. Pinelo, No. 15-2983, U.S.Ct.App. 7th Cir. Dist. Ct. did not err in granting petitioner-father's petition for return of parties' child to Mexico, where father alleged that mother had moved with child from Mexico to Chicago and had improperly refused to return child to Mexico, which was child's country of habitual residence for purposes of resolving questions of child's custody. Although father had never resided with child's mother and had received only visitation rights to child at time child traveled to Chicago, father had sufficient rights (i.e., patria potestas) under Mexican law at time child was retained in Chicago, so as to constitute violation of International Child Abduction Remedies Act (ICARA). Moreover, although child eventually told Dist. Ct. that he preferred to remain in U.S., so as to potentially qualify for exception to requirement that child be returned to country of habitual residence, Dist. Ct. could properly refuse to apply said exception, where: (1) any grant of exception would allow mother to benefit from her own violation

of ICARA and U.S. immigration laws; and (2) child had been inconsistent on issue of returning to Mexico.

IRMO Young, 2015 IL App (3d) 150553, Dec. 21, 2015. Court awarded parents joint custody of parties' son, who was 7 when parties separated, with residential custody to father and visitation to mother. Trial court found that mother systematically attempted to exclude father from son's life. Court's residential custody award was not an abuse of discretion, as m (other was incapable or unwilling to foster a relationship between father and child and took active steps to limit father's involvement in son's life, including making decisions about child without father's knowledge or input. (McDADE and HOLDRIDGE, concurring.)

IRMO Betsy M., 2015 IL App (1st) 151358 No. 1-15-1358, Dec. 17, 2015. Upon judgment of dissolution, parties entered into stipulation granting mother sole custody, with father to have restricted visitation with the parties' 3 children. Father filed petition to modify or increase visitation time. Court was within its discretion in relying upon opinion of Rule 604(b) expert retained solely for evaluating whether additional visitation with father was in best interests of children, in allowing increase from 1 to 3 hours visitation every other week, but denying father's request for more lengthy visitation. (McBRIDE and ELLIS, concurring.)

In re Marriage of Figliulo, 2015 IL App (1st) 140290, First Div., December 7, 2015. Husband sought determination of his maintenance obligation pursuant to dissolution judgment. Court found that order intended for maintenance obligation to begin on date of judgment, and court thereby clarified rights and obligations of parties, and did not impose new or difference obligations. Thus, court had jurisdiction to consider motion and enter its order. Petitioner was not required to first file a Section 2-1401 petition to vacate dissolution judgment before seeking to enforce terms of order. (CUNNINGHAM and CONNORS, concurring.)

Warga v. Warga, 2015 IL App (1st) 151182, 6th Div., December 4, 2015. Under Illinois Supreme Court's 2012 Karbin case, and under 2014 amendment to the Probate Act, both allowing a guardian to seek court permission to bring a marriage dissolution action on behalf of a ward, a ward's non-guardian spouse does not have standing to participate at the best interests hearing to determine whether a ward should be allowed to file a petition for dissolution. Even though Appellant is spouse of her husband, who is age 91, she is not his guardian, and there is no statutory basis for her to challenge guardian's decisions as to dissolution. (HOFFMAN and HALL, concurring.)

In re A.A., 2015 IL 118605 Ill.S.Ct., November 19, 2015. Trial court was not required to make a best interests of the child determination prior to granting the GAL's petition to declare the nonexistence of a parent-child relationship between a child, now age 2, and a man who had signed a Voluntary Acknowledgement of Paternity. After DNA tests, it was found that this man was not the child's biological father, and DNA testing identified the person who was the biological father (and who was recently deceased). (GARMAN, FREEMAN, THOMAS, KILBRIDE, KARMEIER, and BURKE, concurring.)

In re Marriage of Veile, 2015 IL App (5th) 130499, Notice: Decision filed 11/10/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same. Because of limitations on wife's ability to earn and her lack of financial resources, as compared to husband, wife should have been awarded permanent maintenance in amount sufficient for her to attempt to maintain lifestyle during 28-year marriage. Remanded for court to fashion a post-majority award of educational support for parties' daughter, a college student who chooses to not live with either parent.(CHAPMAN, concurring; MOORE, dissenting.)

In *In re Visitation of J.T.H.*, 2015 IL App (1st) 142384, the First District upheld the trial court's dismissal of a same-sex partner's petition seeking visitation with a minor child of her former partner for lack of standing. The petitioner alleged that for approximately seven years the parties acted as co-parents of the child, even after their romantic relationship ended two years after the child's birth. The petitioner claimed that she continued to maintain a weekly parenting schedule with the child including picking him up from daycare and spending every other week with him. After the relationship ended, the parties discussed guardianship and adoption, but it never came to fruition. The petitioner asked the court to apply the equitable adoption to allow her standing to seek visitation. However, under the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, et seq., because the petitioner is not a grandparent, great-grandparent, sibling, or a stepparent (all of whom have standing under §607 of the IMDMA) and because the Illinois Supreme Court has clearly held that the concept of equitable adoption does not apply in divorce or parentage proceedings, the petitioner did not have standing to seek visitation.

In *In re Marriage of Weddigen*, 2015 IL App (4th) 150044, the husband was found in indirect civil contempt of court after he posted comments on his Facebook page stating that he had intentionally and secretly recorded a hearing in violation of Illinois Supreme Court Rule 63(A)(8), and encouraged other litigants to do the same. At a rule to show cause hearing regarding the secret recording, he testified that he had lied on his Facebook page, and he in fact, did not make an illegal recording. The trial court, on its own motion, found him in indirect civil contempt of court for the comments he made encouraging other litigants to break the law, and ordered a purge in the form of an apology on his Facebook page as well as a retraction of his claim to have recorded the hearing. Because the purge was punitive in nature, not coercive, the appropriate contempt standard was criminal, not civil. And because the husband was not afforded all of the constitutional rights and protections afforded to other criminal defendants, the finding of contempt was improper and reversed.

In *In re Marriage of Kuyk*, 2015 IL App (2d) ¶4 140733, the issue on appeal was the following language: "Charles shall pay Kimberly maintenance in the sum of $6,200.00 per month for a period of 60 months at which time the maintenance shall be reviewable upon the filing of a petition prior to the termination of the maintenance." The wife filed her petition to review the maintenance after the 60 month period and the trial court dismissed it because it was filed after the expiration of the 60 months, at which point maintenance had terminated. However, the appellate court held the above language was ambiguous in terms of whether the maintenance was actually reviewable or terminable after the 60 months had passed, and construed the language against the husband since he was the drafter of the agreement. The wife's petition to review her maintenance was allowed to proceed.

In *In re Marriage of Hill*, 2015 IL App (2d) 140345, the ex-husband appealed the trial court's child support award of $19,284 per month based on his annual net income of $826,478. He claimed that the trial court erred in not deducting loan payments he made for the purchase of a business as "reasonable and necessary expenses for the production of income" under §505 of the IMDMA. Of significance was the fact that the loan payments were made to the ex-husband's father from whom he had purchased the business. The trial court gave a partial deduction of the overall loan payment (interest but not principle), but did not deduct the full amount and noted that the payments were extraordinarily high and that prepayment had also occurred. The appellate court affirmed the award and held that in determining what expenses are reasonable and necessary, a court may properly conclude that such expenses are only partially deductible. The loans the ex-husband incurred clearly benefitted himself financially, and potentially his children as well, because they allowed him to earn a significantly greater income.

In *In re Marriage of Hill*, supra, on a petition to modify child support, the father appealed the guideline support award in the amount of $19,284 on $826,478 of annual net income claiming that the court should have deviated downward. The evidence showed that the father owned a home in Naperville, two vacation homes, seven cars, and over $1 million in savings as well a base salary of $500,000. The mother, who was the children's primary residential parent, earned $35,000 per year and still lived in the former marital residence, which had gone into disrepair because she did not have enough funds to maintain it. Because the trial court could have reasonably determined that, had the parties stayed married, the children would have enjoyed a high standard of living, the award was not an abuse of discretion.

In re Marriage of Platt, 2015 IL App (2d) 141174, November 6, 2015, Lake Co.,-SPENCE, Reversed and remanded with directions. Dissolution judgment was final and enforceable at time husband died, and thus the action did not abate and no basis existed for trial court to rule that it lacked jurisdiction. Absence of QDRO needed to effect pension distribution does not prevent dissolution judgment from being final. Thus, former wife was entitled to enforce Marital Settlement Agreement (MSA). (SCHOSTOK and ZENOFF, concurring.)

Thank you to the Family Law Section of the ISBA for its contributions.

Thank you to IICLE Family Law Flashpoints, by Donald C. Schiller & Michelle A. Lawless for this month's contributions.

TOP TEN FAMILY LAW FLASH POINTS OF 2015

Major Revisions to Illinois Marriage and Dissolution of Marriage Act and New Illinois Parentage Act of 2015 To Take Effect January 1, 2016.

– Governor Rauner signed P.A. 99-90, rewriting the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, et seq., and P.A. 99-85, adopting the new Illinois Parentage Act of 2015, 750 ILCS 46/1, et seq., and the Illinois Parentage Act of 1984, 750 ILCS 45/1, et seq., all effective January 1, 2016. This is the first comprehensive rewrite of the IMDMA since 1977 and the parentage statutes since 1984. While there are significant changes to existing laws, some of the significant highlights are as follows:

– There is one ground for dissolution of marriage — irreconcilable differences.

– A court will no longer award custody or visitation, but rather allocate parental responsibilities and parenting time.

– Parental responsibilities are broken into categories such as education, health, religion, and extracurricular activities, and the court can allocate the specific responsibilities either jointly or solely to one parent.

– Parents who reside in Cook, DuPage, Kane, Lake, McHenry, and Will counties may move up to 25 miles from their current residence without leave of court. A parent in any other county may move up to 50 miles without leave of court. Parents can move up to 25 miles across state lines without leave of court.

– Courts must issue judgments after trials on dissolution of marriages no later than 60 days after the close of proofs.

– Courts will have discretion to use one of several different dates to determine the value of assets at a dissolution of marriage trial.

– College education expenses, under §513 of the IMDMA, are capped at what is charged at the University of Illinois at Champaign-Urbana unless good cause is shown.

– This list is not exhaustive and is intended only to illustrate a limited selection of the new provisions.

– United States Supreme Court Legalizes Same-Sex Marriages Nationwide.

In Obergefell v. Hodges, [4] ___ U.S. ___, 192 L.Ed.2d 609, 135 S.Ct. 2584 (2015), a five-four decision, the U.S. Supreme Court held that the Fourteenth Amendment of the Constitution requires individual states to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage is lawfully performed in another state. The Court relied on precedent that invalidated bans on interracial marriages and denying prisoners the right to marry in its ruling. Additionally, the right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection.

In In re Marriage of Mueller, [5] 2015 IL 117876, the Supreme Court held that participants in the social security program do not have accrued property rights to their benefits, but rather expectancies or non-contractual interests in their benefits. Unlike pension benefits, social security benefits are not owned in the proprietary sense. Because social security benefits are not "acquired" by a spouse, they are not marital property subject to consideration or division by a trial court. The case effectively nullifies any precedent, including the Third District case In re Marriage of Roberts, 2015 IL App (3d) 140263, decided weeks prior to this decision.

In In re Parentage of Scarlett Z.-D., 2015 IL 117904 [6], after a lengthy discussion on functional parent theories and the applicability of the doctrine of equitable adoption to a probate case and a custody case, the court ultimately concluded that the doctrine, which allows a person who was accepted and treated as a natural parent or adopted child, and to whom adoption typically was contemplated but never performed, to share in the inheritance of a foster or stepparent, was not appropriate in custody cases.

In Szafranski v. Dunston, [7] 2015 IL App (1st) 122975-B, a case of first impression, the First District held that the plaintiff, Jacob Szafranski, and the respondent, Karla Dunston, entered into an oral contract in which they agreed to create pre-embryos that Karla could use to have a biological child in the future, and that the parties did not modify this contract when they executed the medical informed consent presented to them by the doctor performing the in vitro fertilization (IVF) procedure. The court further held that Karla's interests in having the opportunity to have a biological child outweighed Jacob's interests because the pre-embryos were Karla's only chance to have a biological child due to her diagnosis with lymphoma. The appellate court affirmed the trial court's decision that the parties intended to allow Karla to use the pre-embryos without limitation when they formed their oral contract and further held that the medical informed consent neither modified nor contradicted the parties' oral contract. Therefore, Karla was awarded custody of the pre-embryos. It is our understanding that the plaintiff will seek leave to appeal the Illinois Supreme Court.

In In re Marriage of Moorthy, 2015 IL App (1st) 132077 [8], a case of first impression, the First District held that retained earnings of a Subchapter S Corporation were properly excluded when the trial court calculated the father's net income under §505 of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/100, et seq. Trial courts should engage in a case-by-case, fact-specific analysis to determine whether retained earnings of a corporation should be imputed to the sole or majority shareholder for purposes of calculating child support. The factors to be

evaluated are (1) the extent of the obligor's ownership share in the corporation; (2) the obligor's ability to decide whether corporate earnings should be retained or distributed; (3) the corporation's history of retained earnings and distributions, in comparison to post-divorce corporation activities; (4) whether the retained earnings are excessive; and (5) whether there is evidence that income is actually being manipulated.

In In re Marriage of Perez, [9] 2015 IL App (3d) 140876, 29 N.E.3d 1217, 390 Ill.Dec. 947, the appellate court upheld a trial court's award of joint custody and a 50 – 50 parenting schedule after a full evidentiary hearing when the evidence showed that the parties acted with an extraordinary level of cooperation. The court did acknowledge that 50 – 50 arrangements have traditionally been viewed with caution, but held that, based on the facts of this particular case, the trial court did not abuse its discretion in fashioning such a schedule because of the level of cooperation between the parents and because they lived within close proximity to each other.

In In re Marriage of Crecos, [10] 2015 Ill App (1st) 132756, the appellate court reversed a trial court's decision to deny a motion for substitution of judge (SOJ) as a matter of right after the trial court entered an order declaring that the ex-husband's emergency verified petition for preliminary injunction to enforce joint parenting agreement and to preserve status quo was not an emergency and set a briefing schedule and a future hearing date. The court held that an order finding the emergency petition was not an emergency did not rise to the level of expressing his opinion on the relief prayed for in the petition and therefore, no substantial ruling on the merits was made. All orders entered after the denial of the SOJ as a matter of right were therefore void.

In Fleckles v. Diamond, [11] 2015 IL App (2d) 141229, the father filed a claim for paternity, custody, and visitation in Illinois prior to the birth of the minor child. The mother was residing in Colorado at the time he filed his petition and the mother thereafter filed a competing petition in Colorado. The Illinois trial court denied the mother's motion to dismiss the custody portion of the father's petition utilizing the significant-connection analysis under §201(a)(2) of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA). The appellate court reversed. The home state determination of a child must be deferred until the child's birth and the birth state will ultimately become the home state of the child. UCCJEA jurisdiction does not exist prior to a child's birth. In this case, Colorado had proper jurisdiction over the custody of the child because, during the case, the child was born there.

In Blumenthal v. Brewer, [12] 2014 IL App (1st) 132250, the First District, by allowing a domestic partner to sue her former partner of 26 years under several legal theories including partition, imposition of a constructive trust, and claims of unjust enrichment, declined to follow the 1979 Supreme Court case Hewitt v. Hewitt, 77 Ill.2d 49, 294 N.E.2d 1204, 31 IL.Dec. 827 (1979), which stood for the proposition that recognizing mutual property rights of unmarried cohabitants would violate the statutory ban on common-law marriage. Because the domestic partners in this case held themselves out as committed partners, bought a house together, raised three children, commingled their assets, and divided up their domestic responsibilities and career objectives between themselves, the court held that the respondent should be allowed to pursue the same common law claims that are available to all people.

Thank you to IICL Family Law Flashpoints for its contributions this month, from Donald C. Schiller & Michelle A. Lawless, Schiller DuCanto & Fleck LLP

CIVIL MISCELLANEOUS LAW

Battaglia v. 736 N. Clark Corp., 2015 IL App (1st) 142437, December 22, 2015, Cook Co., 2d Div., PIERCE, Affirmed. Court opinion corrected 1/13/16.) Plaintiff landlords filed forcible entry and detainer action, claiming breach of commercial lease by their tenant, defendant 736 N. Clark Corp. d/b/a 25 Degrees. After bench trial, court entered "split decision" awarding Plaintiffs $4,021 in damages for defendant's breach of lease and denied order of possession requested by Plaintiffs. Record supports court's finding that attorney fees at issue constitute "additional rent." Court ordered a 5-month proration, which was a compromise between both parties' requests, and was neither unreasonable, arbitrary nor against manifest weight of the evidence. As court entered "split decision" favoring both parties on separate issues, court properly denied defendant's motion for attorney fees as "prevailing party".(NEVILLE, concurring; HYMAN, dissenting.)

Jackson Park Hospital v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st), 142431WC, January 8, 2016, Cook Co., WC Div., STEWART, Reversed and remanded. Claimant worked as a stationary engineer for hospital, and sustained injuries to neck, low back, and left knee in work-related accident and can no longer perform job duties of stationary engineer; undisputed that claimant is permanently and partially disabled. Commission had duty to admit and factor all evidence as to nature of claimant's post-injury employment with employer, not simply compare her pre- and post-injury wages. Commission had duty to factor other evidence as to positions available to claimant in competitive job market based on her restrictions and job skills and determine whether her disability has resulted in impairment of earning capacity. (HOLDRIDGE, HOFFMAN, HUDSON, and HARRIS, concurring.)

Stuckey v. The Renaissance at Midway, 2015 IL App (1st) 143111, December 18, 2015, Cook Co., 6th Div., ROCHFORD, Reversed and remanded. Court opinion corrected 1/13/16.) Plaintiff filed personal injury suit against long-term care facility on behalf of resident injured upon being physically assaulted by another patient, who was his roommate. Court erred in, after conducting in camera review of records, ordering nursing home to turn over partially redacted records of resident attacker, as they were protected by privilege under Mental Health and Developmental Disabilities Confidentiality Act, and Plaintiff failed to establish that any exception to Act applied. Confidentiality Act affords broad protections, including for records which reveal diagnoses such as that of Alzheimer's and dementia. (HALL and LAMPKIN, concurring.)

Board of Managers of Park Point at Wheeling Condominium Association v. Park Point at Wheeling, LLC, 2015 IL App (1st) 123452, September 30, 2015, Cook Co., 4th Div., McBRIDE, Affirmed in part and reversed in part; remanded. Modified upon denial of rehearing 12/31/15.) Court dismissed claims that various parties involved in design, construction and sale of condominium complex completed in 2004 breached implied warranty of habitability by incorporating latent defects into the units and common elements. Limited warranty language in purchase agreement, containing disclaimer for implied warranties, including implied warranty of habitability, was conspicuous and sufficient as a matter of law to bring the waiver to the buyer's attention, and is thus an effective disclaimer. Seller was not required to verbally call warranty disclaimer to each buyer's attention, or to have each buyer initial it. (PALMER and GORDON, concurring.)

Lakeview Loan Servicing, LLC v. Pendleton, 2015 IL App (1st) 143114, December 24, 2015, Cook Co., 4th Div., ELLIS, Vacated and remanded. (Court opinion corrected 1/7/16.) A person who provides a traditional home-equity mortgage on her home as security for a loan, even though she is not a party to the loan itself, is entitled to a notice of a right to rescind the mortgage under the federal Truth in Lending Act (TILA). (McBRIDE and COBBS, concurring.)

Skridla v. General Motors Company, 2015 IL App (2d) 141168, December 28, 2015, Winnebago Co., McLAREN, Affirmed. (Court opinion corrected 12/30/15.) Plaintiff filed 42-count 4th Amended Complaint for damages from auto accident involving his wife and son. Court properly dismissed Plaintiff's spoliation of evidence counts against Defendant's insurer were properly dismissed as time-barred. Limitations period for spoliation claim begins to run not on same day as that for underlying claim, but on day of destruction of evidence, provided that underlying claim itself was not time-barred. Because spoliation is a derivative cause of action, the limitations period of underlying action (2 years for personal injury action) applies. (ZENOFF and JORGENSEN, concurring.)

Tummelson v. White, 2015 IL App (4th) 150151, December 30, 2015, Champaign Co., APPLETON, Affirmed in part and reversed in part. Parties lived together, unmarried, for years. Plaintiff filed suit claiming that Defendant has been unjustly enriched by funds he contributed to purchase of a house titled solely in her name and in they lived together until she required him to move out. Court was within its discretion to impose a constructive trust to the extent of $7,000, the amount of the down payment his parents made on the house presumably as a gift to him. A trust in any greater amount was an abuse of discretion, considering that mortgage payments were made out of a joint account and that any amounts Plaintiff had deposited into that account were gifts from him to Defendant. Court erred in finding that parties were in a fiduciary relationship, as no evidence that Defendant exercised undue influence over Plaintiff or was in position of superiority over him. (HARRIS and STEIGMANN, concurring.)

Arch Bay Holdings, LLC-Series 2010B, 2015 IL App (2d) 141117, November 23, 2015, 2d Dist., DuPage Co., HUDSON, Reversed and remanded. Model form for summons requires that names of all defendants appear in the caption on the summons. A missing name from the face of the summons is a barrier to obtaining personal jurisdiction. For a summons to be valid, the defendants' names must appear on its face, according to Rule 101(a) which requires that summons "shall be directed to each defendant". (HUTCHINSON and ZENOFF, concurring.)

Storino, Ramello & Durkin v. Rackow, 2015 IL App (1st) 142961, November 24, 2015, Cook Co., 2d Div., HYMAN, Affirmed. (Court opinion corrected 12/8/15.) Law firm is entitled to attorney fees under contingent fee agreements based on a percentage of the savings from a proposed special assessment which was never levied because village voluntarily dismissed its suit involving the special assessment rather than continue to litigate. Contingency fee agreement was not ambiguous. Defendants never bore any of the financial burden sought to be imposed by the Village, a "savings" of 100% realized as a result of the objections pursued by law firm. Court properly denied Defendants' motion to transfer venue and their motion to disqualify counsel, and properly struck their affirmative defenses. Transaction at issue was execution of contingent fee agreement, which occurred at law firm's office in Cook County, and 90% of the firm's work was done. Law firm's attorneys were explicitly authorized under rules of legal ethics to represent themselves in pursuing firm's action for fee recovery. (NEVILLE and SIMON, concurring.)

Fiala v. Bickford Senior Living Group, LLC, 2015 IL App (2d) 150067, November 19, 2015, Kane Co., BIRKETT, Reversed and remanded. Plaintiff, who had previously been a resident at a long-term-care facility for 10 months, filed action including medical-battery claims and civil-conspiracy claims. Plaintiff's medical chart indicated that use of Paxil was prohibited, but Plaintiff alleged that Defendant physician prescribed it and had staff administer Paxil to him. Medical-battery claim does not require Section 2-622 reviewing physician's affidavit and report. As Plaintiff has pled only intentional tort claims and not negligence-based claims, request for punitive damages is allowed. Plaintiff alleged that nursing care facility violated Nursing Home Care Act, which is the independent cause of action that underlies the conspiracy claim against Defendant required as basis

for his claim of civil conspiracy. Plaintiff sufficiently alleged each element necessary to state claim of civil conspiracy. (McLAREN and JORGENSEN, concurring.)

Christopher B. Burke Engineering, Ltd v. Heritage Bank of Central Illinois, Illinois Supreme Court, 2015 IL 118955, November 19, 2015, 3d Dist., Peoria Co., GARMAN. Appellate court reversed; circuit court reversed; remanded. Mechanics Lien Act does not restrict the availability of liens for architects, engineers, land surveyors, or property managers to services performed only for the raising, lowering, or removal of a house, and can include services done for the purpose of improving property. Resolution of issue as to whether owner of property at time contract for services was entered into knowingly permitted developers to enter into contracts regarding the property involves genuine issues of material fact, and thus summary judgment is precluded. (FREEMAN, THOMAS, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

Carolyn Anne H. v. Robert H., 2015 IL App (2d) 150409, December 3, 2015, Ogle Co., SCHOSTOK, Reversed and remanded with directions. Court erred in denying wife's petition for order of protection against her husband, as against manifest weight of evidence. Court erred in finding that Petitioner had not proved factual predicate for OP: that Respondent had committed abuse against her. Most of evidence was undisputed, as Respondent put on no evidence. Respondent shoved Petitioner hard enough to cause her to collide with a cabinet, bruising her elbow and breaking the skin; and Respondent applied a sophisticated "pressure point" tactic to her thumb that left injury lasting 5 weeks.(ZENOFF and BIRKETT, concurring.)

DG Enterprises v. Cornelius, Illinois Supreme Court, 2015 IL 118975, December 3, 2015, 3d Dist., Will Co., THOMAS, Appellate court reversed; circuit court reversed. An order issuing a tax deed is not void and subject to collateral attack because of failure to include address and phone number of county clerk in publication and certified mail take notices that were required to be sent to the delinquent owner prior to the issuance of the tax deed. Due process standards were not violated where certified mail notices to the owner were returned unclaimed. Whether the unclaimed notices included address and phone number of county clerk has nothing to do with whether notices were reasonably calculated to reach respondent. Alternative relief may be available to estate of deceased former owner of properly under indemnity provisions of Tax Code. (GARMAN, FREEMAN, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.

1010 Lake Shore Association v. Deutsche Bank National Trust Company, 2015 IL 118372, December 3, 2015, 1st Dist., Cook Co., KILBRIDE, Appellate court affirmed; circuit court affirmed. Under Section 9(g)(3) of Condominium Property Act, the payment of post-foreclosure sale assessments formally approves and makes certain the cancellation of the condominium association's lien, and extinguishment of the lien is confirmed by payment of post-foreclosure sale assessments. Plain language of the Act and Foreclosure Law may be reasonably construed together to provide a process to extinguish and confirm the extinguishment of condo association's lien. Defendant bank, which purchased condo unit at judicial foreclosure sale, failed to confirm the extinguishment of condo association's lien for prior owner's unpaid assessments, and thus court properly granted summary judgment for condo association. (GARMAN, FREEMAN, THOMAS, KARMEIER, BURKE, and THEIS, concurring.)

Bayer v. Panduit, No. 119553, 1st Dist., This case presents question as to whether trial court properly granted plaintiff-injured worker's motion for attorney fees under section 5(b) of Workers' Compensation Act that requested order compelling plaintiff's employer (which had previously entered into settlement agreement with plaintiff as part of plaintiff's negligence action against third-party for plaintiff's work-related injuries) to pay plaintiff's attorney fees in amount representing 25% of future workers' compensation benefits (i.e., future medical bills, long-term

care and comparable benefits) that had been suspended by statute as result of plaintiff's underlying settlements in negligence action. Appellate Court, in reversing trial court, found that section 5(b) does not require employer to pay attorney fees for suspended future medical payments, since medical payments did not constitute "compensation" to plaintiff, where medical payments were made directly to medical providers as opposed to plaintiff.

Janousek v. Katten Muchin Rosenman LLP, 2015 IL App (1st) 142989, October 27, 2015, Cook Co., 2d Div., HYMAN, Affirmed. Plaintiff sued Defendant law firm and one of its lawyers alleging aiding and abetting of a client's breach of fiduciary duties owed to him. Court properly held that, under discovery rule, Plaintiff knew more than 2 years before he filed the Complaint that he had been wrongfully injured by his former business associates, thus triggering the statute of limitations. Plaintiff's knowledge of a wrongful cause of his injury initiates the 2-year statute of limitations. Plaintiff's claims against law firm and attorney and his former business partners are intertwined and inseparable. Public policy favors protecting attorney-client communications over mandating disclosure of documents deemed by client to be privileged. (PIERCE and SIMON, concurring.)

Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n, 2015 IL App (5th) 130884WC, November 6, 2015, Washington Co., STEWART, Affirmed. Employee tripped and fell while taking trash to a dumpster, landing on his left hand and arm, and sustaining left wrist fracture. Arbitrator found that claimant sustained 5% loss of use of his left hand as a result of accident; Commission affirmed decision, and circuit court confirmed Commission's decision awarding permanent partial disability benefits. Commission is not required to automatically adopt treating orthopedist's reported level of zero impairment merely because parties submitted only one subsection (a) report. Commission properly weighed that report along with other factors listed in Section 8.1b(b). Evidence was sufficient to support Commission's findings as to each factor. (HOLDRIDGE, HOFFMAN, HUDSON, and HARRIS, concurring.)

Harris v. Adame, 2015 IL App (1st) 123306, September 30, 2015, Cook Co., 2d Div., PIERCE, Reversed and remanded. Modified upon denial of rehearing 11/3/15.) Citations to recover assets petitions were filed in probate division of circuit court, one filed by guardian for a disabled person (Arthur), the other filed by administrator of decedent's estate of a disabled person (Arnold). Petition alleged that these two disabled persons, who were brothers, conveyed their home, which they owned as joint tenants, to a third party without approval from probate court. Arnold did not have legal capacity to convey his interest in the property to buyer. There being no evidence to the contrary, Arthur's execution of a warranty deed in favor of seller was an enforceable conveyance of his undivided joint tenancy interest in the home. After-acquired title doctrine does not apply, as there is no evidence that Arthur attempted or intended to convey more than what he then owned. Arnold's death did not trigger doctrine of after-acquired title to vest fee simple title in buyer. Remanded to determine whether buyer is entitled to monetary relief as alleged in his affirmative defenses. (HARRIS and LIU, concurring.)

In re Davon H., 2015 IL App (1st) 150926, October 30, 2015, Cook Co., 5th Div., PALMER, Affirmed. Following adjudication and disposition hearings, court terminated parental rights of Respondent mother to her 3 children, and found children abused and neglected, Respondent to be unfit, found Respondent should not be allowed visitation, and it was in best interests of children that a guardian with right to consent to their adoption be appointed. Children's father had previously admitted to hitting one child's twin brother, who died at 8 months old from cerebral edema due to skull fracture from multiple blunt force injuries, and was convicted of murder. Respondent allowed children to be beaten, failing to notice their injuries and pain, and continued to deny any responsibility for their injuries. Court's findings were not against manifest weight of evidence. Court was within its discretion in denying visitation and in admitting

independent expert witness testimony. Requirement that State disclose basis for each opinion applied only to controlled experts. Expert's opinion that injuries of deceased child were fresh was not a new opinion, as in expert discovery responses expert's opinions included that child sustained acute blunt trauma, which means that injuries were recent. (LAMPKIN and GORDON, concurring.)

Combs v. Schmidt, 2015 IL App (2d) 131053, November 12, 2015, Winnebago Co., HUDSON, Certified question answered; remanded. Complaints made to a defendant about the evidence at issue are not the functional equivalent of a request to preserve evidence. A plaintiff's opportunity to inspect is not a factor to consider in assessing the relationship prong of the duty analysis in a spoliation case. Mere complaints about the evidence plus the defendant's possession and control are not sufficient to create a duty to preserve evidence, nor does one arise out of possession and control and a lack of an opportunity for the plaintiff to inspect the evidence. (ZENOFF and BURKE, concurring.)

Neufairfield Homeowners Association v. Wagner, 2015 IL App (3d) 140775, November 4, 2015, Will Co., LYTTON, Affirmed. Homeowners Association (HOA) filing declaratory action, seeking to enforce a restrictive covenant prohibiting operation of 2 daycare businesses, against homeowners. Court properly entered summary judgment in favor of homeowners, as plain language of HOA declaration shows that drafters did not intend it to apply to homeowners' daycare businesses, and are permissible personal businesses as identified in declaration. (CARTER and HOLDRIDGE, concurring.)

Perry v. Fidelity National Title Insurance Company, 2015 IL App (2d) 150168, November 6, 2015, JoDaviess Co., SCHOSTOK, Reversed and remanded. Plaintiffs sued title insurance company seeking declaration that it was obligated to defend them in underlying action filed by Plaintiffs' neighbors who sought to prevent Plaintiffs from placing improvements on an easement for access to their property. Plaintiffs raised at least the possibility of coverage under the policy, thus triggering Defendant's duty to defend. Failure to provide ingress and egress to a property can render title unmarketable. Underlying suit placed at issue whether easement could actually be conveyed, and thus placed at issue marketability of Plaintiffs' title.(BURKE and SPENCE, concurring.)

Folta v. Ferro Engineering, 2015 IL 118070, November 4, 2015, Cook Co., THEIS, Appellate court reversed; circuit court affirmed. Exclusive remedy provisions of Workers' Compensation Act and Workers' Occupational Diseases Act bars an employee's action when the employee's injury or disease first manifests after the expiration of certain time limitations under those acts. Section 6(c) of Workers' Occupational Diseases Act acts as a statute of repose, and creates an absolute bar on right to bring a claim.(GARMAN, KARMEIER, and BURKE, concurring; FREEMAN and KILBRIDE, dissenting.)

DiCosola v. Ryan, 2015 IL App (1st) 150007, November 6, 2015, Cook Co., 6th Div., HOFFMAN, Affirmed. In "Letter of Intent" document signed by parties, where Defendant would provide financing for car dealership company, the illusory undertakings of Plaintiff and another person to act as general manager and general sales manager of company are not sufficient consideration to support a contract. Thus, in the absence of any other undertaking on the part of the Plaintiff, the "Letter of Intent" fails for want of consideration. Thus, court properly dismissed complaint for breach of contract with prejudice, pursuant to Section 2-619.1 of Code of Civil Procedure. (ROCHFORD and DELORT, concurring.)

CRIMINAL LAW

People v. Harris, 2015 IL App (1st) 133892, December 22, 2015, Cook Co., 2d Div. NEVILLE, Reversed and remanded. (Court opinion corrected 1/14/16.) Defendant was convicted, after severed but simultaneous bench trials with a co-defendant, of armed robbery. (Co-defendant filed separate appeal.) State failed to present evidence that Defendant was armed with a gun that had weight or composition (metallic nature) of a dangerous weapon. Evidence presented by the State failed to prove, beyond a reasonable doubt, that the gun was a dangerous weapon because it could be used as a bludgeon. Remanded for entry of judgment of conviction for robbery and for appropriate sentence. (PIERCE and HYMAN, concurring.)

People v. Maxey, 2015 IL App (1st) 140036, December 31, 2015, Cook Co., 5th Div. GORDON, Affirmed. Defendant pled guilty to attempted aggravated robbery and was sentenced to 11 years. No good cause to overlook untimeliness of Defendant's motion to vacate bond, which was filed several years late. Record does not support Defendant's claim that he misunderstood his guilty plea. Illinois Supreme Court has abolished the "void sentence rule" that a sentence that does not conform to a statutory requirement is void. (REYES and PALMER, concurring.)

People v. Mpulamasaka, 2016 IL App (2d) 130703, January 6, 2016, Lake Co., BIRKETT, Reversed. Defendant was convicted, after jury trial, of aggravated criminal sexual assault, and sentenced to 12 years. State failed to disprove defense of consent by the victim, who testified that she held hands with Defendant and guided his hand to her thigh. Evidence was sufficient to raise affirmative defense of consent. There was no evidence that victim was confused during cross-examination, or that she lacked capacity to understand defense counsel's questions or recall events. By telling jury that they should ignore victim's cross-examination testimony because it was not "her own words", the State undermined Defendant's right to fair trial. Prosecutor committed prosecutorial misconduct, which severly prejudiced Defendant's case, when he sat in witness stand while making closing and rebuttal argument about victim's courage in testifying, and then commented on Defendant's "credibility", although Defendant did not testify. (HUTCHINSON, concurring; BURKE, specially concurring.)

People v. Holmes, 2016 IL App (1st) 132357, January 11, 2016, Cook Co., 1st Div., CONNORS, Affirmed. After bench trial, Defendant was found to be a sexually dangerous person and committed to custody of Department of Corrections. Defendant had been convicted of 3 sex offenses in 3 different states over 6 years. Court only limited how prior allegation was characterized and avoided confusion about whether allegation was false, and court did not prohibit all cross-examination about substance of Defendant's question. State proved that Defendant had serious difficulty controlling his sexual behavior, and court made an explicit "substantial probability finding". Court made finding of sexual dangerousness based on requirements of the Sexually Dangerous Persons Act. Evidence was sufficient to find that Defendant had all 3 mental disorders raised by the experts. (LIU and HARRIS, concurring.)

People v. Dixon, 2015 IL App (1st) 133303, December 22, 2015, Cook Co., 2d Div., NEVILLE, Reversed and remanded. Court opinion corrected 1/14/16.) Defendant was convicted, after bench trial, of armed robbery. State failed to present evidence that Defendant was armed with a gun that had weight or composition (metallic nature) of a dangerous weapon.Defendant's statement was unrebutted that he carried a BB gun during the robbery, and that the BB gun broke when it was dropped. Evidence presented by the State failed to prove, beyond a reasonable doubt, that Defendant was armed with a gun that was a dangerous weapon because it could be used as a

bludgeon. Remanded for entry of judgment of conviction for robbery and appropriate sentence. (PIERCE and HYMAN, concurring.)

People v. Smith, 2015 IL App (4th) 131020, December 4, 2015, Champaign Co., HOLDER WHITE, Affirmed as modified and remanded with directions. (Court opinion corrected 1/4/16.) Jury convicted Defendant of aggravated battery to a person over age 60 and intimidation, and sentenced him 6 concurrent terms of 5 years and 6 years. IPI Criminal Jury Instructions do not accurately convey present law as to charge of aggravated battery to a person over age 60, as instructions do not include element added to offense by amendment in 2006, that State must prove that Defendant knew the victim was at least 60. Evidence of injuries to victim's face and witness testimony as to injuries was sufficient to support battery conviction for Defendant, who was victim's caregiver. Court did not err in answering jury's request for definition of "reasonable doubt" with "the definition of reasonable doubt is for the jury to determine." (HARRIS and APPLETON, concurring.)

People v. Valdez, No. 119860, 3rd Dist., This case presents question as to whether trial court properly denied defendant-noncitizen's motion to withdraw his guilty plea to burglary charges, even though defendant argued that his counsel was ineffective by failing to advise him that he could be deported as result of his plea. Trial court found that while trial counsel's lack of advice on deportation issue was deficient, it did not entitle defendant to withdraw his guilty plea where trial had admonished defendant during plea colloquy that his plea may have adverse immigration consequences. Appellate Court, in reversing trial court, found that defendant's motion to withdraw his guilty plea should have been granted, where: (1) deportation consequences associated with his guilty plea were "truly clear;" and (2) defendant established reasonable probability that he would not have pleaded guilty had he been advised that his guilty plea mandated deportation, where record suggested that he was pleading guilty to avoid deportation. (Dissent filed.)

People v. Espinoza, 2015 IL 118218, December 3, 2015, 3d Dist., Will Co., THOMAS, Appellate court affirmed. A charging instrument that identifies the victim of a nonsexual offense only as "a minor" is insufficient pursuant to Section 111-3 of Code of Criminal Procedure. Courts properly dismissed criminal complaints based on insufficiency of those charging instruments. Under Section 111-3, State was required to identify the victims, and as State failed to amend charging instruments, and refused to identify victims by their names, initials, or any description of than "a minor", to strictly comply with Section 111-3 prior to trial, courts properly dismissed them. (GARMAN, FREEMAN, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

People v. Scott, 2015 IL App (1st) 133180, December 1, 2015, Cook Co., 2d Div., HYMAN, Affirmed in part and vacated in part; remanded with directions. (Court opinion corrected 12/8/15.) Defendant was convicted, after bench trial, of 2 counts of armed robbery, 2 counts of aggravated discharge of a firearm, and 1 count of aggravated battery with a firearm, and sentenced to aggregate term of 43 years. Defendant pointed a gun at pizza delivery driver, and told him not to move; and shot driver's teenage niece, hitting her in the thigh. Evidence does not support conviction for attempted armed robbery, as Defendant never demanded pizza or other property, and thus actions were not a substantial step toward armed robbery. Under one-act, one-crime doctrine, Defendant cannot be convicted of both armed robbery of niece and attempted armed robbery of driver where there was only one attempt to take pizza from niece. Under same rule, Defendant's single act of firing at niece cannot be basis for multiple convictions, and sentence should be imposed on more serious offense. Thus, convictions for aggravated battery with a firearm and aggravated discharge of a firearm are vacated. State's participation in preliminary Krankel inquiry created adversarial situation requiring reversal in claim of ineffective assistance of counsel. (PIERCE and NEVILLE, concurring.)

People v. Mefford, 2015 IL App (4th) 130471, December 3, 2015, Coles Co., STEIGMANN, Affirmed. Defendant was convicted, after jury trial, of first degree murder and robbery. State proved Defendant guilty beyond a reasonable doubt of first degree murder; autopsy showed that victim suffered at least 6 blunt force trauma blows to his face consistent with strikes from a fist. Jury could reasonably have concluded that sometime during his violent encounter with victim, who was frail and small, knew that blows he inflicted on victim created strong probability of death or great bodily harm; no specialized physiological knowledge was required to know that. Court's failure to instruct jury that IPI Criminal 7.15 also applied to involuntary manslaughter was not error. No error in admitting Defendant's statements, made in police interview, as to his criminal history, illicit drug use, and "going to jail all his life", as they were not used to argue propensity to commit crimes. (KNECHT and APPLETON, concurring.)

People v. Wilson, 2015 IL App (4th) 130512, December 3, 2015, McLean Co., KNECHT, Affirmed in part and reversed in part; remanded. Defendant was convicted of 5 counts of predatory criminal sexual assault of a child and 5 counts of aggravated criminal sexual abuse, and sentenced to 5 terms of natural life. Some offenses occurred when Defendant was a minor; victims were Defendant's minor sisters and half-sisters. Court properly admitted testimony on other crimes, as they were proximate in time, within 2 years of charged offenses, similar physical acts, and probative value of other-crimes evidence outweighed its prejudicial effect. Court erred in sentencing Defendant to natural life on counts committed when Defendant was a minor, and on counts which each involved only one victim. Thus, those mandatory natural-life sentences violate 8th-Amendment prohibition against cruel and unusual punishment.(POPE and HOLDER WHITE, concurring.)

People v. Lopez, 2015 IL App (4th) 150217, December 4, 2015, Livingston Co., STEIGMANN, Reversed and remanded. Court erred in dismissing traffic charges "for failure to prosecute" when, after Court waited for 15 minutes, State failed to appear at pretrial conference. Absent statutory authorization, or in case where court has an inherent authority to dismiss indictment where there has been a clear denial of due process, a trial court has no power before trial to dismiss criminal charges on its own motion or on motion of the defendant.(HARRIS and POPE, concurring.)

People v. Jones, 2015 IL App (1st) 142997, December 8, 2015, Cook Co., 2d Div., HYMAN, Affirmed. Police stopped Defendant for running red light, then officer returned to his police car and returned to squad car to check status of his driver’s license and learned of active investigative alert for Defendant involving a homicide. Defendant was then placed in back seat of squad car, and another officer, looking through backseat window, saw brick of cocaine in back seat. That officer, without permission, then entered Defendant's car and retrieved cocaine. Search of Defendant's vehicle was not a valid search incident to arrest, as Defendant was not in custody, and thus officer had no grounds for securing Defendant's car. Discovery of cocaine stems directly from Defendant's improper detention and thus was properly suppressed. (PIERCE and NEVILLE, concurring.)

People v. Smith, 2015 IL App (4th) 131020, December 4, 2015, Champaign Co., HOLDER WHITE, Affirmed as modified and remanded with directions. Jury convicted Defendant of aggravated battery to a person over age 60 and intimidation, and sentenced him 6 concurrent terms of 5 years and 6 years. IPI Criminal Jury Instructions do not accurately convey present law as to charge of aggravated battery to a person over age 60, as instructions do not include element added to offense by amendment in 2006, that State must prove that Defendant knew the victim was at least 60. Evidence of injuries to victim's face and witness testimony as to injuries was sufficient to support battery conviction for Defendant, who was victim's caregiver. Court did not err in

answering jury's request for definition of "reasonable doubt" with "the definition of reasonable doubt is for the jury to determine." (HARRIS and APPLETON, concurring.)

People v. Ford, 2015 IL App (3d) 130810, October 28, 2015, Henry Co., CARTER, Affirmed. Defendant, then age 19, was convicted of 2 counts of aggravated battery and 2 counts of battery, sentenced to 3 years on first aggravated battery charge but not sentenced on remaining charges. Victim, age 15, gave consent for Defendant to place him in a choke hold in exchange for cigarettes. While in choke hold, victim gave signal for Defendant to release him, but Defendant did not, and victim lost consciousness, had a seizure, and awoke with a nosebleed. Consent is not a valid defense to aggravated battery. Evidence was sufficient to reasonably conclude without need for expert medical testimony that Defendant's choke hold caused victim's nosebleed. Fact finder could reasonably infer that Defendant knowingly caused victim to lose consciousness, which is a form of bodily harm. (McDADE and LYTTON, concurring.)

People v. Peterson, 2015 IL App (3d) 130157, November 12, 2015, Will Co., CARTER, Affirmed. Defendant was convicted, after jury trial, of first degree murder of his 3rd ex-wife and sentenced to 38 years in prison. Evidence was sufficient to prove beyond a reasonable doubt that Defendant committed first-degree murder. Court did not err in finding that clergy privilege was inapplicable to pastor's testimony about what Defendant's 4th wife, who disappeared 3 years after 3rd ex-wife's death, had told him at her counseling session 2 months before her disappearance. Court properly found conversation was not confidential, as it was in public with at least one other person present. Court's prior ruling admitting certain statements of 2 victims under common law doctrine of FBWD (forfeiture by wrongdoing) stands as the law of the case. Use of statements was not so extremely unfair to Defendant that their admission violated Defendant's due process right to a fair trial. Court's ruling admitting testimony of a person who testified that Defendant had tried to hire him to kill 3rd ex-wife was within its discretion. Defense attorney did not have a per se conflict of interest in representing Defendant as a result of media rights contract which Defendant and defense attorney jointly co-signed and which began and ended before Defendant was indicted. Decision to call 4th ex-wife's divorce attorney was a matter of trial strategy as Defendant was seeking to discredit impression of her that pastor's testimony had given to jury, and was largely cumulative to pastor's testimony.(O'BRIEN and SCHMIDT, concurring.)

People v. Williams, 2015 IL App (1st) 133582, November 3, 2015, Cook Co., 2d Div., HYMAN, Reversed. Defendant was convicted, after bench trial, of aggravated fleeing or attempting to elude a peace officer. Officer was sitting in a marked police car wearing "civilian dress", and saw Defendant's vehicle not fully come to a stop at a stop sign; officer then activated emergency lights and siren, and pursued Defendant, who continued to pull away from squad car. Conviction for that offense requires State prove pursuing officer was wearing a police uniform. Because officer who stopped Defendant was out of uniform and in civilian clothes, State failed to satisfy an essential element of the offense: the uniform of the police officer. (NEVILLE and SIMON, concurring).

In re H.L., 2015 IL 118529, 2d Dist., DeKalb Co., GARMAN, Appellate court reversed; remanded. Strict compliance of Rule 604(d) does not require counsel to file his or her certificate of compliance prior to or at hearing on Defendant's post plea motion. Strict compliance requires counsel to prepare a certificate that meets the content requirements of Rule 604(d) and to file the certificate with the trial court, prior to filing of any notice of appeal. (THOMAS, KARMEIER, and THEIS, concurring; FREEMAN, KILBRIDE, and BURKE, dissenting.)

U.S. v. Martin, Federal 7th Circuit Court Criminal Court, No. 14-3187, November 10, 2015, Federal District: C.D. Ill., Affirmed. In prosecution on drug trafficking charge, Dist. Ct. did not err

in denying defendant's motion to suppress evidence, even though police obtained said evidence following their warrantless placement of GPS tracking device on defendant's car, which, at time of trial, was deemed "search" for purposes of 4th Amendment under Jones, 132 S. Ct. 945. At time of placement of GPS device, Garcia (474 F.3d 994) was controlling precedent, which allowed instant officers to use GPS device to track defendant's movements without necessity of obtaining warrant to do so. Ct. rejected defendant's claim that officers could not use Garcia to support their actions, even though officers made no prior attempt to determine legality of placing GPS device on defendant's car. Ct. also found that officers' lack of subjective awareness of Garcia was irrelevant, since applicable law regarding GPS placement had been settled at time of said placement.

People v. McGee, 2015 IL App (1st) 130367, October 29, 2015, Cook Co., 4th Div., COBBS, Affirmed in part and reversed in part; remanded with instruction. Defendant was convicted of first degree murder and aggravated kidnapping and sentenced to consecutive terms of 60 years and 25 years in prison. Defendant was lawfully seized, and thus lineup identifications were properly admitted into evidence. Prosecutor sought to discuss reasonable doubt standard in terms which did not diminish its burden of proof, and thus statements in closing arguments were not reversible error. State violated Speedy Trial Act by charging Defendant with first-degree murder 18 months after Defendant was charged with attempted murder, aggravated battery, aggravated kidnapping, and unlawful restraint. Victim was kidnapped and beaten in Chicago but was found dead in Gary, Indiana. State had knowledge that at least part of the injuries that caused victim's death occurred in Illinois. At time of original indictment State had a conscious awareness of evidence that is sufficient to give State a reasonable chance to secure a conviction.(HOWSE and ELLIS, concurring.)

People v. Moravec, 2015 IL App (1st) 133869, November 3, 2015, Cook Co., 2d Div., SIMON, Affirmed. Defendant was charged with one count of aggravated DUI. Court properly granted Defendant's motion in limine and for sanctions to limit State's proof at trial (barring testimony of officers about facts and circumstances of stop, investigation, and arrest) because State failed to produce POD (police observational device) camera video of those events, despite Defendant's timely request for videos. Sanction imposed was within bounds of court's discretion for this discovery violation. (PIERCE and HYMAN, concurring.)

U.S. v. Rahman, Federal 7th Circuit Court Criminal Court, No. 13-1586, November 9, 2015, Federal District: E.D. Wisc., Reversed and remanded. in prosecution on arson and making false statements charges, Dist. Ct. erred in denying defendant's motion to suppress evidence seized from basement of his burnt restaurant, where defendant alleged that fire investigators exceeded scope of his consent, which was limited to search to "determine the origin and cause of the fire." Record showed that at time of instant search, fire investigators had ruled out basement as primary location of instant fire, and thus instant search of basement was beyond scope of consent where: (1) items seized from basement, including bank records, had nothing to do with identifying origin of fire; and (2) search of basement was done primarily to collect only secondary and circumstantial evidence of criminal activity. Moreover, defendant was entitled to acquittal on making false statement to federal agency charge, where: (1) defendant told fire officials that laptop containing business records was in basement at time of fire; and (2) although fire officials did not find laptop in basement and did find laptop under defendant's bed, govt. failed to establish that laptop found under defendant's bed was same laptop defendant was describing to fire officials as being in restaurant.

In re M.A., 2015 IL 118049, November 4, 2015, 1st Dist., Cook Co., THOMAS, Appellate court affirmed in part and reversed in part; circuit court affirmed. Juvenile Respondent, then age 13, inflicted cuts on her 14-year-old brother with a kitchen knife during argument over a missing

shower cap. Respondent was adjudicated delinquent, including for aggravated battery and aggravated domestic battery, and was ordered to register under the Murderer and Violent Offender Against Youth Registration Act. That Act does not violate substantive due process, procedural due process, or equal protection.(GARMAN and KARMEIER, concurring; BURKE, FREEMAN, KILBRIDE, and THEIS, concurring.)

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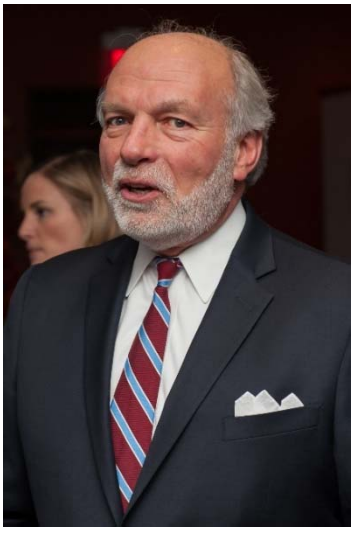

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