In Brief

Quarterly Publication●McHenry County Bar Association ●June 2021

LAW DAY 2021

ADVANCING THE

RULE OF LAW NOW

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2020/2021

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Upcoming Events

Date	Event	Location	Time
July 8	Civil Law Section	Virtual	Noon
July 20	Board of Governors Meeting	Virtual	Noon
July 27	General Meeting	Virtual	Noon
August 6	44th Annual Golf Outing	Whisper Creek Golf Course	9:30
August 17	Board of Governors Meeting	Virtual	Noon
August 24	General Meeting	Virtual	Noon

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Board Meeting Minutes

April Meeting Minutes

May Meeting Minutes

June Meeting Minutes

President's Page

By Jenette M. Schwemler

2020/2021 MCBA President

A Time to Reflect and Celebrate

Looking back on this year, I have to applaud my colleagues, friends, judges, and, at the risk of sounding self-serving, myself, on how ALL of us endured an exceptionally trying time, AKA the Covid-19 black hole. In the first article of my term, I wrote about never imagining watching court on YouTube or arguing motions over Zoom. Now it seems difficult to imagine standard court appearances without using Zoom. I found it saves my clients significant money because they are not billed for my travel time to and from court. I found other billable tasks to complete because I was not driving to and from court. As a result, I was able to accomplish more in a day.

Covid forced us to think outside of the box in terms of how we conduct hearings and trials. We had to become accustomed to paying attention to a small box on our computer screens to assess a witness's nonverbal cues such as nervousness or facial expressions while testifying. We had to confirm that a third party was not in the room with the witness feeding him or her answers to questions. We had to confirm a witness was not reading from a document. We had to consider how clients or opposing parties could cheat the system in a remote hearing setting. Unfortunately, at least one bar member witnessed the opposing counsel pass a note to his client *while his client was testifying*, and she had to call the fact to the court's attention. Although I am sure there are other stories of lawyers and/or witnesses cheating the system in this manner, I am happy to report that this was the only instance of which I'm aware.

I am especially proud of, and grateful to, our bar and bench in McHenry County. While getting accustomed to the technology of doing a Zoom hearing, the judges are and continue to be incredibly patient and helpful. As I watched "Court TV" over Zoom or YouTube, I saw my colleagues assisting less technologically savvy opposing counsels with screen sharing exhibits. I saw our judges and attorneys exercise patience when an opposing attorney or party had connection issues with Zoom. One of our fine judges assisted me in a trial to deal with the echo caused by having my client in the same room with me during the proceedings. Our judges have graciously provided us with their email addresses to submit exhibits, courtesy copies and orders.

Now that we've had over a year in this "bizzaro world," I think it is time to celebrate our achievements. We were forced into reimagining how we do business. We found a way to keep our offices open. We discovered new ways to network and drum up business. We learned new technology that makes our businesses more efficient. Hopefully, we can continue to utilize some of the new tricks we learned, such as using Zoom for routine status court appearances.

With the vaccine finally becoming available, there is a light at the end of the Covid tunnel. Soon we will be returning to business as usual. Although I have enjoyed the convenience of conducting a trial from my desk, I am, like many of you, ready for in person hearings and trials to resume. When I pass the attorney's lounge at the court house, it will remind me how important face to face contact is, whether you are trying to settle a case, discussing legal theories with a colleague, or just socializing. I hope, in the future, I will not take this for granted. To sum it up, the MCBA will continue to provide a forum for members to turn to during the pandemic and after. It has been my honor to serve as your MCBA President this year.

VAP: Voluntary Acknowledgment of Paternity

Jennifer Chiappetta, Esq

Births to Unmarried Mothers (2019)

State	Percentage	Rank
Mississippi	55%	1st
Illinois	39.5%	26th
Utah	19.2%	50th

In many states when a child is born to unwed individuals, they may agree to sign a Voluntary Acknowledgment of Paternity (VAP) to establish paternity of the child. The VAP is generally signed at the hospital by the biological mother and presumed father and is handed to the new parents by a nurse or other hospital personnel without a detailed explanation or a suggestion that either party confer with an attorney, though the document does provide such information. In most cases, however, parents likely sign the document in the moment without further thought and the document becomes binding on the individuals and has the same effect as a court order.

A presumed father, in Illinois, is only required to acknowledge under oath that he is the presumed father. There is no biological testing, or further investigation as to the father's biological ties to the child. In fact, in Illinois a VAP may be signed by a man where another is the presumed parent if the presumed parent signs a denial of parentage. 750 ILCS 46/303.

In Illinois a VAP confers upon the signatory father "all of the rights and duties of a parent." 750 ILCS 46/304(a). A presumed parent may rescind his voluntary acknowledgment before the earlier of (a) 60 days after the effective date of the VAP; or (b) the date of a judicial or administrative proceeding relating to the child in which the signatory is a party. 750 ILCS 46/307(a)-(b). After the expiration of the period for recission a VAP may be challenged "only on the basis of fraud, duress, or material mistake of fact by the filing of a verified petition under Section 309 within 2 years after the effective date of the VAP." 750 ILCS 46/309(a).

State laws vary as to the amount of time during which an action contesting a rebuttable presumption of paternity must be commenced. Some states have no specified process at all for the recission of a VAP while others have express provisions.

Time limits for actions contesting presumed paternity if not made within 60 days:

State	Statute	Time period
Alabama	ALA Code §26-27-22	No process
Colorado	Col. Rev. Stat §19-4-107	Non-existence of presumed father child relationship must be brought
Iowa	Iowa Code Ann. §600B.41A	Paternity which is legally established may be overcome if subsequent blood or genetic testing indicates that the previously established father of a child is not the biological father of the child. The action to overcome can be filed at any time prior to the child reaching the age of majority.
South Dakota	SD Codified Laws §25-8-59	3 years after the creation of any presumption
Texas	Texas Family Code §160.308(1)	4 years after effective date

In Illinois, if a VAP is not rescinded with HFS within 60 days of its effective date, the person moving to rescind the VAP must file an action in court and prove fraud, duress, or material mistake. The petitioner has the burden of proof by clear and convincing evidence. This may include a negative DNA test, but it is not the final determination.

The Parentage Act asserts that the public policy of Illinois is to "recognize the right of every child to the physical, mental, emotional, and financial support of his or her parents." 750 ILCS 46/102. But, what about the interests of the father who steps up to the plate after finding out his girlfriend is pregnant only to find out years later when the child doesn't resemble him, or his girlfriend reveals that he is not the true father? Is it fraud if his girlfriend led him to believe the child was his and knew it wasn't? Probably. Is it fraud if the presumed father knew or believed his girlfriend had other sexual partners? Probably not. Should the wrongly presumed father be financially responsible over the biological father? Maybe. How much does biological dad earn? With which male does the child have a father-child relationship? Does it matter? Can a child have a biological dad and a VAP dad? Yes. Can both be liable for child support even if only one is exercising parenting time? Maybe. What if VAP dad has a relationship with the child and wants to maintain his presumed parentage but biological father moves to disestablish the existence of VAP dad?

Before a legal determination of paternity is made there is no requirement that a court consider the best interests of the child. *See In re Parentage of John M*., 212 Ill.2d 252, 264, 817 N.E.2d 500 (2004). "[O]nce parentage has been established, then the trial court is charged with the responsibility of deciding other issues which surround paternity, including custody and visitation, where the best interests of the child are of paramount concern." *Id.* at 264-65, 817 N.E.2d 500 (2004). "'When a best interests hearing is required prior to some action, *it is for the protection of the child*,' and not of the rights of the presumed father." *People v. Matthew A*, 43 N.E.3d 947, 954 (Ill. 2015) *citing In re John M.,* 212 Ill.2d 252, 270, 817 N.E.2d 500.

While there is some case law to provide guidance to these questions, these cases largely remain matters which need to be resolved on a case-by-case basis with a close analysis of the individual facts and greatly depends on in which state the VAP was signed.

OFFICE OF THE STATE'S ATTORNEY
McHENRY COUNTY
PATRICK D. KENNEALLY

March 25, 2021

DOMESTIC VIOLENCE DEFERRED PROSECUTION PROGRAM

Patrick D. Kenneally, the McHenry County State's Attorney, is launching the Domestic Violence Deferred Prosecution Program (DVDPP). This Program is designed for less serious or "situational" offenders, i.e. those offenders with no prior Domestic Battery arrests who have engaged in low-level violence as means of conflict management.

Participants of the Program will meet with and be approved by a panel experienced in the field of domestic violence. Upon acceptance into the program, participants will complete program requirements designed specifically for the individual participant. Program requirements may include, among other things, completing the Partner Abuse Intervention Program, participating in substance abuse counseling, paying restitution, obtaining career counseling, and completing public service work.

As part of the Program, the State's Attorney's Office, in conjunction with Turning Point will contact and seek to meet with the victim of the Domestic Battery. The victim will be provided information to help connect them with community-based services and as well as an opportunity to provide input if they desire.

Upon successful completion of the Program, the charge against the defendant will be dismissed. If the defendant fails to successfully complete the Program, the case will be returned to court for prosecution.

Of the Domestic Violence Deferred Prosecution Program, Kenneally stated:

"*The DVDPP is an effort to promote a better and more intensive rehabilitation program for the "situational offender," refocus prosecutorial and court resources on those offenders that pose considerable risk of escalating violence, and ensure that the State's Attorney's Office is responding to individual offenses, with specific factual circumstances, in a proportionate manner. We are excited to offer this new, innovative program that will be monitored for its impact on recidivism and believe it will further our mission of maintaining the public trust and doing justice."*


4
"My
country
'tis of thee,
sweet Land
of Liberty,
of thee
I sing"

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Hon. Michael J. Fusz, ret.

H. Case Ellis, Esq.

Hon. Margaret Mullen, ret.

Hon. J. Edward Prochaska, ret.

Resolute Systems mediators Case Ellis, Michael Fusz, Margaret Mullen and Ed Prochaska are pleased to help resolve McHenry County cases. Our mediators will mediate in McHenry County, or any location the parties prefer, including our Chicago office. Please contact Mike Weinzierl at mweinzierl@resolutesystems.com or 800.776.6060, x125 to schedule your case.

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MCBA Collects Goods for Local Food Pantry

Over a few weeks in late January/early February, 2021, the MCBA conducted a food drive for the Woodstock Food Pantry. In total, the MCBA donated over 425 pounds of goods to the Woodstock Food Pantry.

The goods were collected over a three week period at ZRFM in Crystal Lake and Peter Carroll's office in Woodstock. Additionally, Judge Nader organized a massive haul from staff at the court-house that accounted for a significant portion of the donated goods.

Thanks to everyone for your donations, time, and effort in making the Food Drive a success!

Please be on be lookout for additional outreach events in the near future.

TJ Clifton

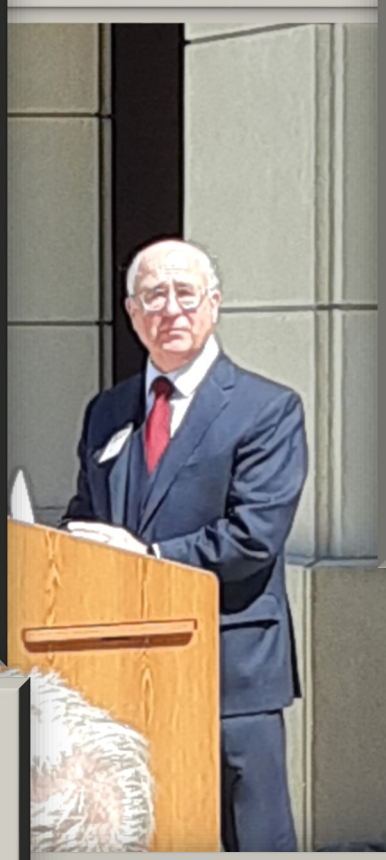
GEORGE MUELLER IS

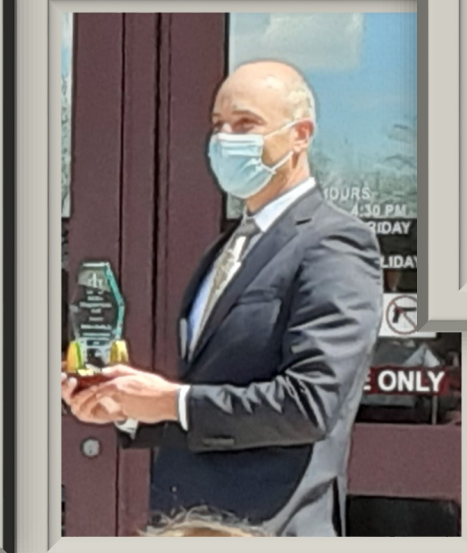
O-FISH-ALLY

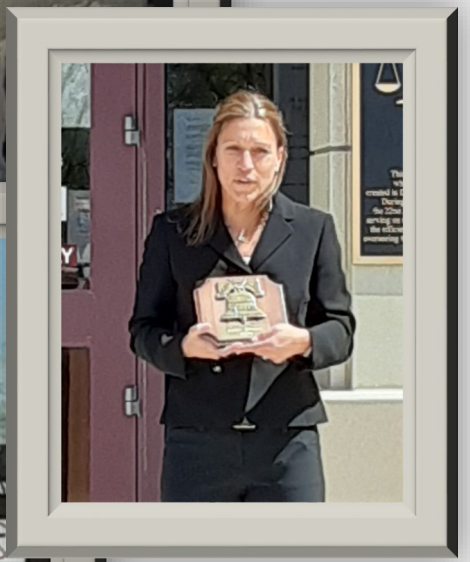
RETIRED

It is with mixed emotions that Botto Gilbert Lancaster officially announces the retirement of George A. Mueller. His last day with us was June 25, 2021. After more than 40 years as a practicing lawyer George can now be found on the golf courses or fishing on the lakes of eastern Tennessee. George has been an integral part of our practice for the last 6 years and his contributions will always be valued and remembered by those of us at BGL. His hard work, commitment and dedication are worthy of admiration. George worked tirelessly to provide superb service to all of his clients and will be greatly missed by many. We wish him the best of luck and will miss him immensely. For those who were able to join us at his retirement celebration on June 10th we appreciate you stopping in to wish him well. We know that he was really touched.

LAW DAY 2021
ADVANCING THE RULE OF LAW NOW







Report on Law Day 2021
Advancing the Rule of Law Now

Despite the pandemic, this year's Law Day activities were a success. In-school presentations took place at Jefferson Elementary (Harvard), North Elementary (Crystal Lake), and Prairie Ridge High School (Crystal Lake). About eighteen classrooms were visited, either remotely or in person.

Thanks go to those who presented in elementary school classrooms:
Case Ellis
Judge Jennifer Johnson
Jenette Schwemler
Kelly Lancaster
Beth Vonau
Jean Butler
Peter Carroll

An outdoor awards ceremony was held May 7, 2021 in front of the main entrance to the Michael J. Sullivan Judicial Center. Over 60 people attended the ceremony, including retired Judge Michael Sullivan, several judges and other dignitaries, lawyers, well-wishers, family, and friends. Weather cooperated, although it was windy. Chief Judge Cowlin gave a short summary of the history of The Rule of Law, quoting from Thomas Paine's Common Sense.

Two junior high students won the annual essay competition. Caelie Mendro (Cary Junior High) and Munisrikar ("Rikar") Mokkala (Hannah Beardsley Middle School) each received a framed certificate, a $100 check, and a Law Day 2021 day pack for their winning essays.

Liberty Bell Awards (non-lawyers) for 2020 and 2021 went to Linda Hooten of the Sheriff's Department (formerly of the Huntley Police Department) for her exceptional work with domestic violence victims, and Mary Foley (retired) of the Court Administration Office for her 30+ years of hard work and assistance to many (sometimes cantankerous) lawyers and the administration of our courtrooms.

Distinguished Service Awards (attorneys) went to James Campion for his community involvement including service organizations and school board membership, and Steve Greeley Jr. for his work with Prairie State Legal Services and setting up the Attorney Help Desk for pro bono assistance.

Commemorative Plaques and tasteful Law Day 2021 Mugs were presented to the adults.

Thanks to the Law Day Committee:
Jenette Schwemler (ex officio)
Dawn Roth
Case Ellis
Rhonda Rosenthal
Mary Sump

Special thanks to Noel Ilkow (Bar Association Administrator) for all of her hard work and creative extras. – Peter Carroll, 1st VP and Law Day 2021 Chair

2021 Law Day Essay Contest Winners

Caelie Mendro—Cary Junior High—7th Grade

MASK WEARING

A lot has happened in the past year, with Coronavirus being the number one. Coronavirus, or COVID-19 for short, is a new virus that first appeared in 2019. COVID-19 has caused us to have to do many things including shutting down schools, restaurants, and requiring us to wear masks. Wearing masks is what we are going to be talking about.

Wearing masks has been essential throughout the year. We are required to wear masks whenever we aren't able to social distance or when we are in any public building. But some people don't like that they have to wear masks. They think that they shouldn't have to wear a mask because they think it is a violation of their rights. The Director of the Division of Infectious Diseases at the medical center in Nashville, David Arnof, said, "Some people don't wear masks because they say that they don't work...There are other people who see masks as a violation of their rights" These are just some people's beliefs, and that's what David Arnof has pointed out. Even people who do wear face masks are contributing to the virus because they don't wear them correctly. The face masks are supposed to be covering your nose and mouth, not just your mouth. Dr. Ngozi Ezike has said, "Stop wearing your face coverings, incorrectly,...You're literally contributing to infection transmission by doing so." He is stating that any one who doesn't wear their masks correctly, aren't helping limit the spread of the virus in any way.

Even though there are those people who don't wear masks and people who say they don't work, there are also people who say they do work and people who have done research on it. In an article by Stanford Medicine, Larry Chu explains why we should wear masks. He said "40% of people infected with the virus that cause COVID-19 may have no symptoms. But when they talk, cough or sneeze, they can still spread the virus to others in the form of respiratory droplets into the air. Those droplets evaporate into fine particles that may linger. The mask traps these large droplets before they can evaporate." This shows that wearing a mask is necessary to help contain the spread of the virus. It also shows that even if you don't have symptoms of the virus, you could still have it and spread it. So a mask is necessary to make sure that it doesn't spread from someone who doesn't know they have it. Larry Chu also said, "Across the country, communities are beginning to end shelter-in–place and returning to work and community settings. Nonmedical face masks will become an increasingly important way, in conjunction with frequent hand washing and social distancing, to prevent resurgence of the disease". He is saying that now, more than ever, it is important to wear our mask, so the virus doesn't start spreading even more.

Finally, wearing a mask is something we should be doing to keep the virus from spreading. It isn't that hard and you get used to wearing them after a while. JB Pritzker has said, "Wear a mask...This is not a difficult thing to do. This is for a period of time. It will end...but in the meantime wear masks, social distance, wash your hands. These are just basic, easy things that everybody ought to be doing". Let's all do our part and wear masks like we are supposed to, and help stop the spread of the virus.

Caelie Mendro and Her Family

Cary Junior High

7th Grade

Munisrikar Mokkala and His Family

Hannah Beardsley Middle School

Munisrikar Mokkala—Hannah Beardsley Middle School

Topic: Advancing the Rule of Law Now

Due to the pandemic (Covid-19), things are far more different and difficult than they were about one and a half years ago. In addition, so are the laws and the ways of addressing them. To avoid the pandemic from spreading, now we are required to wear/contain a mask at all times when you are outside. Also, due to the pandemic, it has become essential to clean all objects that have been around multiple people, and the use of hand sanitizer has also become necessary in keeping the pandemic at bay.

It was very difficult and frustrating to adapt into a new way of living. This was especially difficult because many people were not able to see each other and large gatherings were prohibited. The isolation was a cause of depression in many young people as it effected their life style drastically. Another problem was that schools and work places were shut-down to avoid further spreading of the pandemic. Due to this many people lived in uncertainty because there was no medicine or vaccination for Covid—19.

The lockdown had a severe effect on many people economically, many people lost their jobs, and business came to a standstill. The flow of money stopped and this was an added reason for depression in many people. Any person who was found affected by Covid had to be in isolation. This caused distress among people as they had no one to rely on and nobody empathized with them. Isolation was a very necessary step in the process to trying to avoid the spread of the pandemic.

Covid-19 has taught mankind a number of lessons, one being that we should be ready for the unpredictable future and try to adopt new ways for our survival. I have also been trying, and am to a certain level successful, in following the new laws. As a student, I want to encourage my friends to be responsible and to follow all the Covid-19 guidelines. I always wear a mask myself and remind my friends to use one if they don't. Whenever I go outside, I always try to stay 6 feet away from others and remind them to do the same. I have habituated myself into following social distancing so that I am safe and at the same time help other people around me to be safe.

Certain problems and issues can only be solved when every individual contributes their efforts. Covid is one such problem, only government policies or laws cannot change the scenario unless every human being takes it up as their responsibility to adopt the laws passed by the government for the welfare of the nation and its people.

McHenry County Bar Association Welcomes our newest members....

Heather Eckert—Gehris & Associates

Elizabeth Dalton—Gehris & Associates

Michael Pettet—State's Attorney's Office

Rebekah Kim—State's Attorney's Office

Eric Seeleman-State's Attorney's Office

Jean Butler—Prime Law Group

Julia Almeida—Prime Law Group

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Prime Law Group

Celebrating New Hire, Jean Butler

3/26/2021: Woodstock, IL, March 26th — Jean Butler is a family law attorney whose main focuses lie in dealing with divorce, parentage, and child support among many other things. Jean is also a prosecutor for the Village of Island Lake in McHenry County where she works on traffic violations, hit and runs, and DUI's. Jean's personal life benefits her work in the sense she has a blended family with four children and is proudly married to a former Marine, Austyn. Jean and Austyn have a four-year old son. Jean's two teenage daughters are from a previous marriage and she has a twelve-year old stepson, she is certainly no stranger to family law. The addition of Jean Butler to Prime Law Group allows us to continue bringing the very best attorneys forward to help assist you in any legal matters you may face.

Prime Law Group, LLC is a full-service law firm from business to litigation with over 100 years of combined experience, our lawyers have the knowledge and skills necessary to navigate the most complex situations. **Let us help you with your next** family law matter.

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Prime Law Group

Celebrating New Hire, Julia Almeida

6/28/2021: Woodstock, IL, June 28th —Julia Almeida began her legal career as a family law attorney and has made that her main focus as of November 2020. In addition, she was also a child abuse prosecutor for the State's Attorney Office, as well as a criminal prosecutor handling the misdemeanor jury trial court rooms. Julia worked with law enforcement and DCFS during the investigation and prosecution of abuse and neglect cases. Julia has also worked closely with the Court Appointed Special Advocates Program (CASA). Her goal is to help her clients formulate parenting plans that best suit their families and put them in the best roles for long term success. Julia has completed the divorce mediation program at Northwestern. In 2021, Julia is seeking to complete the collaborative divorce program by September. The collaborative divorce process provides another path for clients to resolve their marriage. Prime Law Group, LLC is excited to welcome Julia to the team. The addition of Julia will help us continue providing the best lawyers available in McHenry County. Julia will be handling **civil litigation, criminal law, family law, probate and other legal matters.**

Prime Law Group, LLC is a full-service law firm from business to litigation with over 100 years of combined experience, our lawyers have the knowledge and skills necessary to navigate the most complex situations. Let us help you with your next family law matter.

LAMB
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CUNABAUGH P.C.

The Law Offices of ***Lamb, Carroll, Papp & Cunabaugh, P.C.***

proudly announces the addition of a new Associate Attorney in our Harvard office

Grace L. Jinkins

Grace has been working in McHenry County since passing the bar exam in 2018 and focuses on real estate and estate planning. Grace is a lifelong Harvard resident, and still lives here with her husband, Andy, their son, and their four dogs.

Grace is excited to work and serve in her hometown.

18 North Ayer Street, Harvard IL (815) 943-2824
8600 US Hwy *14, Suite 201, Crystal Lake IL 60012*
(815) 261-3800

SAVE THE DATE

McHENRY COUNTY BAR ASSOCIATION'S

44TH ANNUAL GOLF OUTING

AUGUST 6, 2021

WHISPER CREEK GOLF CLUB

GOLF & 19TH HOLE

Package includes: 18 holes of golf, cart, continental breakfast, box lunch, 19th Hole reception (dinner buffet and drinks)

$150.00

19TH HOLE ONLY

Dinner buffet and drinks

$50.00

Second District Appellate Decision Digest

QUARTER 1, 2021

Andrew J. Mertzenich

*The content, citations, and analysis provided are for informational use only. No legal advice is being presented herein. An in-person consultation coupled with in-depth and independent research should be made before citing a case.

**Cases are arranged by type, and then chronologically by decision posting date with the most recent appearing last in the section.

Table of Contents

Attorney and Client

People v. Addison, 2021 IL App (2d) 180545

Date Filed: 2/8/2021

County: Kane

Facts: Defendant was indicted in connection with his use of counterfeit money to purchase a motorcycle. Defendant failed to appear at first, and was late to a pretrial conference. The court admonished defendant that, if he failed to appear, he could be tried in absentia. At the pretrial conference, defendant moved in limine to bar statements that he made to the police. Hearing and trial were scheduled for the same date. Defendant failed to appear for the hearing, and the court granted the State's motion to try defendant in absentia.

Issues on Appeal: Whether postconviction counsel was ineffective when counsel failed to file an affidavit from him supporting the allegations of the amended postconviction petition and when they failed to allege ineffective assistance of appellate counsel.

Holding: Reversed;Remanded

Analysis: While the State contended that the Defendant forefeited their right by not appearing at trial, case precedent shows that a defendant's failure to appear at trial does not extinguish their right to bring proper constitutional claims in a collateral proceeding. Here, many of defendant's claims allege the ineffective assistance of counsel. Normally, such claims cannot be resolved during a trial - they are reserved for direct appeal or collateral review. Therefore, defendant could not have forfeited those claims by failing to appear at trial.

The Act provides a three-stage mechanism for a defendant to advance a claim that he or she suffered a substantial deprivation of constitutional rights. The Supreme Court has held that a failure of postconviction counsel to make a routine amendment to a post-conviction petition which would overcome the procedural bar of waiver constitutes unreasonable assistance in violation of rules. Here, Defendant raises several instances of potential ineffective assistance of appellate counsel. By failing to allege ineffective assistance of appellate counsel, postconviction counsel prevented the circuit court from considering the merits of petitioner's claims and directly contributed to the dismissal of the petition without an evidentiary hearing. Therefore, there was error and the case was remanded.

Common Interest Communities

Westgate Townhome Association v. Kirsch, 2021IL App (2d) 200373-U

Date Filed: 3/2/2021

County: Lake

Facts: The plaintiff townhome association filed an eviction action against the defendant, a 77-year-old woman, who lived at the dog-friendly common interest community property for over thirty years. The plaintiff alleged that the defendant failed to pay certain common expenses which were the result of a hearing assessing fines and costs, including attorney fees, for damages related to the defendant's dog urinating on a neighbor's lawn. During the hearing, the plaintiff failed to show the defendant an available video of the alleged violation or any evidence of the damages to the neighbor's lawn. The trial court entered judgment in favor of defendant.

Issues on Appeal: Whether the board breached its fiduciary duty in finding that defendant violated its rules.

Holding: Affirmed

Analysis: The plaintiff has a duty of candor when investigating charges of misconduct against the defendant unit owner. The duty of candor requires that the plaintiff afford defendant a "full, fair, complete, and timely disclosure of material facts." Here, the plaintiff had available videos that its attorneys viewed several times prior to the board hearing, but, no video was not shown to defendant. Further, the plaintiff had other available evidence of the damages to the neighbor's lawn, yet again, the defendant was not provided an opportunity to view any of the evidence prior to the hearing and the plaintiff making its determination. The plaintiff did not act in good faith when it failed to provide all of the available evidence to the defendant in a timely manner. Accordingly, the plaintiff could not claim that the business judgment rule applied to its decision and thereby shielded it from any judicial interference, and the trial court's decision was affirmed.

Constitutional Law

People v. Rollins, 2021IL App (2d) 181040

Date Filed: 3/26/2021

County: Lake

Facts: Following a bench trial on stipulated evidence, defendant was convicted of one count of child photography by a sex offender. Defendant was already certified and convicted of criminal sexual assault and was required to register for life as a sex offender. During the course of trial, Defendant argued that the statute he was convicted under was unconstitutional. The same motion being denied, that is the issue on appeal.

Issues on Appeal: Whether section 11-24 of the criminal code is constitutional.

Holding: Affirmed.

Analysis: A party alleging that a statute is facially unconstitutional on first amendment grounds must show that 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' After finding that intermediate scrutiny attached to the analysis (a statute to be substantially related to an important governmental interest.) the court went on to affirm the conviction.

As to the important interest prong, the sufficiency of the government's interest in protecting children from sex offenders is beyond dispute. The question remains as to the adequacy of the relationship between prohibiting child-sex offenders from taking photographs of children without parental consent and the protection of children from such offenders.

Regarding Defendant's facial challenge, the section at issue states that It is unlawful for a child sex offender to knowingly *** photograph, videotape, or take a digital image of a child. The word "of" is important here and creates the limit that brings the statute within the confines of constitutionality. A common definition of the word of is, used as a function word indicating the object of an action denoted or implied by the preceding noun. Interpreting a photograph of a child to refer to a photograph in which the child is the object or focus of the photograph comports with the plain meaning of the word of. This interpretation finds further support in the fact that section 11-24 applies only where a child-sex offender knowingly takes such a photograph. A child who is incidentally caught in the background likely was not knowingly included in the photograph. Thus, the statute should be construed as narrow enough to fall within the confines of the constitution.

Editor's Notes: Justice Brennan filed a special concurrence to state that there may very well be circumstances where a photograph taken in violation of section 11-24 of the Code will not in any way implicate first amendment concerns.

Contracts

Peak Exteriors, LLC v. Amy Goebel, 2021IL App (2d) 200244-U

Date Filed: 2/23/2021

County: Boone

Facts: Plaintiff filed a breach of contract complaint against the defendant after plaintiff replaced defendant's hail-damaged roof pursuant to a written agreement provided by the defendant's insurance company. The defendant refused to pay the amount owed to plaintiff under the contract for the roof replacement before plaintiff fully completed the work to be done after the roof was installed. Defendant filed a counter complaint which defendant amended to allege breach of contract, breach of warranty, and violations of the Home Repair and Remodeling Act, the Consumer Fraud and Deceptive Practices Act, and the Home Repair Fraud Act. The parties were sent to arbitration and the arbitration was decided in favor of plaintiff on both the complaint and defendant's counter complaint. The defendant rejected the award the case proceeded to a bench trial on October 28, 2019, where judgment entered in favor of plaintiff and against defendant on her counter complaint. Plaintiff was initially awarded $14,983.56 plus costs of suit. Defendant filed a motion to reconsider, which was granted in part and denied in part, and the court reduced the award to $13,108.60 plus costs of suit. Defendant appealed but plaintiff did not file a brief on appeal.

Issues on Appeal: (1) Whether the plaintiff's actions in carrying out its obligations under the contract amounted to substantial performance in a workman-like manner; (2) whether the trial court's decision not to sequester a witness was prejudicial to defendant; and, (3) whether plaintiff violated the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act).

Holding: Affirmed

Analysis: As for the first issue, plaintiff met its burden to show that it could recover under the elements of substantial performance and demonstrated how much it should recover. Substantial performance in a workman-like manner occurs where omissions or deviations from the contract or some defects in the material workmanship are not the result of bad faith, do not impair the structure as a whole, and are remediable without materially damaging other parts of the structure. In Illinois, contractors are not required to perform perfectly, and are held to a duty of substantial performance in a workman-like manner, which is a question of fact. The Illinois Supreme Court defines substantial performance as performance of all the essential elements necessary to accomplish the purpose of a contract. The term substantial means material or essential parts. For building contracts cases, the literal compliance with the specifications is not necessary to a recovery by the contractor. Instead, good faith substantial performance is sufficient. When a buyer like defendant receives substantial performance in a workman-like manner from a builder, the buyer is obligated to pay the contract price minus a credit for deficiencies which are calculated by comparing what the buyer received to what strict performance would have resulted in. Plaintiff substantially performed by providing defendant with a new roof after defendant's roof was damaged by hail. The roof passed an inspection, and no evidence was presented to show that the roof had any issues related to or resulting from poor workmanship in the two years that transpired between the completion of the roof and the trial. The trial court decided that the differences in the shingle colors and types complained of by the defendant were slight and inconsequential. Further, the incomplete work on the roof pertained to items that could be finished after the roof was installed. The plaintiff also explained that the incomplete work was the result of defendant telling plaintiff not to do any more work on the roof when the defendant refused to pay plaintiff. Since the trial court's factual findings resolving further disputes in plaintiff's favor are also afforded deference, the trial court's findings were not against the manifest weight of the evidence.

For the second issue, the trial court's decision not to sequester a witness who was an owner of the plaintiff and presented testimony which did not overlap with the other witness who testified in front of him was not prejudicial despite defendant's motion to exclude the witness. The defendant had the burden of proving that the failure to exclude the witness resulted in prejudice to defendant. The defendant did not cite to any testimony to support any prejudicial effect, nor did the defendant cite any applicable authority in support of the defendant's arguments. The defendant's failure to present a meaningful argument or cite relevant authority effectively forfeited this issue on appeal, but, unlike other issues the court disregarded, this issue was fully addressed on appeal. The appellate court noted that the decision to exclude a witness is within the sound decision of the trial court and in this instance the trial court did not abuse its discretion in denying defendant's request.

Finally, regarding the third issue, the plaintiff did not violate the Consumer Fraud Act and commit a deceptive act or practice by failing to provide the work contracted for in the contract. The defendant did not provide any evidence to support the allegation that the plaintiff knew it would not be completing some requirements under the contract. Moreover, both parties presented contradictory testimony for industry customs and standards, building code requirements, and best practices. In light of the contradictory testimony concerning best practices, the defendant's complaints about the right amount of ice and water shield and what materials may or may not be reused or replaced did not support a violation of the Consumer Fraud Act. As a matter of public policy, adoption of the defendant's arguments would also potentially turn any breach of contract action into a consumer fraud action. Based on the foregoing considerations and the record the trial court's denial of the defendant's consumer fraud claim was not against the manifest weight of the evidence.

Roberson Construction. LLC v. Ellerby, 2021IL App (2d) 191095-U

Date Filed: 3/9/2021

County: Ogle

Facts: The plaintiff general contractor met with the defendant at the defendant's farmhouse to discuss remodeling of the same, which had been uninhabited for some time and needed a substantial amount of repairs. During the initial estimate, a written contract was provided to the defendant by plaintiff which included a specific contract price and a scope of work provision that was left blank. The parties testified that the plaintiff's employee printed out a list of items to be included in the scope of work but there was conflicting testimony regarding subsequent oral modifications as to the scope of the work and the parties' expectations regarding the costs associated with the modifications, which were never reduced to writing. The trial court held that no enforceable contract existed between the parties because there was no meeting of the minds. The defendant alleged paying additional sums to the plaintiff beyond the price specified in the contract, which the defendant characterized as an overpayment in pleadings against the defendant as early as January 23, 2018. The defendant's counter complaint also included a claim under the Consumer Fraud Act for the plaintiff's admitted failure to provide a consumer rights pamphlet or sworn statements of lien waivers. The Consumer Fraud Act Claim was decided in the defendant's favor with court costs allowed in the defendant's recovery but not attorneys' fees or damages. After a bench trial concluded on October 9, 2019, the plaintiff asked to amend the pleadings according to the proofs to add a claim for quantum meruit, which the trial court denied.

Issues on Appeal: (1) Whether a valid contract existed between the parties; (2) Whether the trial court abused its discretion by denying the plaintiff's motion to amend pleadings to add a claim for quantum meruit; (3) Whether the trial court abused its discretion by denying the defendant attorney fees and damages for the plaintiff's violation of the Consumer Fraud Act.

Holding: Affirmed

Analysis: First, as to whether or not the parties had an enforceable contract, the trial court's factual determination regarding the parties lacking mutual assent to form a valid and enforceable contract was not against the manifest weight of the evidence. The trial court arrived at its decision because of the conflicting documentation and testimony offered by the parties. In a bench trial, the court is tasked with determining whether there is an enforceable contract, which is an issue for the trier of fact. In a bench trial, it is the function of the trial judge, as the trier of fact, to weigh the evidence and make factual determinations. The reviewing court will not substitute its judgment in lieu of the trial court's regarding credibility of witnesses, weight given to evidence, or inference drawn from such evidence.

Second, whether the trial court's decision to grant or deny a party's request to amend pleadings according to the proofs amounts to an abuse of discretion is governed by the following factors in the *Loyola* case: (1) would the proposed amendment have cured a defect in the pleadings; (2) would the proposed amendment have prejudiced or surprised other parties; (3) was the proposed amendment timely; and (4) were there previous opportunities to amend the pleading. The ultimate question is whether the amendment would further the ends of justice. Considering the factors, the trial court did not abuse its discretion in denying the plaintiff's request because the plaintiff was on notice well in advance of the trial due to the allegations in the defendant's motion to dismiss which was filed over one year before the conclusion of the trial. The plaintiff offered no excuse or explanation for the failure to amend despite the prior knowledge and as such the trial court acted within its discretion in denying the plaintiff's request.

Finally, as for the Consumer Fraud Act issue there was no abuse of discretion in denying attorneys' fees and damages to the defendant because while a violation of the Consumer Fraud Act was found, the trial court found that the defendant did not suffer damages as a result of the failure to provide a consumer rights pamphlet or the failure to provide sworn statements of lien waivers. No liens were received from the subcontractors and no liens were being foreclosed upon after the statute of limitations regarding such claims expired.

Criminal Law

People v. Alexander, 2021IL App (2d) 180193

Date Filed: 3/10/2021

County: Lake

Facts: Defendant was convicted based on evidence obtained by police via a subpoena to Defendant's Internet service provider. The subpoena was falsely characterized as relating to a grand jury investigation.

Issues on Appeal: Whether the results of the subpoena should be suppressed as a Fourth Amendment violation.

Holding: Affirmed

Analysis: The appellate court found the subpoena protected under the third-party doctrine, distinguishing the the limited information sought in the subpoena from the more extensive cell-phone data found to implicate privacy concerns in Carpenter v. United States, 138 S. Ct. 2206 (2018). (The appellate court also affirmed the circuit court's finding of no prejudice from the violation of grand jury rules.)

People v. Dryer, 2021IL App (2d) 190187

Date Filed: 3/17/2021

County: Boone

Facts: Defendant was charged with 13 counts of child pornography, four of which alleged Defendant discussed sexual acts by means of the Internet. Over a year later, the State filed a superceding indictment that added seven counts reprising the original conduct but adding that Defendant produced a film or other similar visual portrayal of the acts. Defendant was found guilty of all charges.

Issues on Appeal: Whether the additional counts violated Defendant's right to a speedy trial.

Holding: Affirmed.

Analysis: There was no speedy trial violation. The counts in the superceding indictment were not new and additional charges, since the Internet language in the original indictment gave notice of the visual-portrayal language in the new counts. The appellate court rejected Defendant's argument that notice was inadequate since only four counts contained the Internet language, holding that an original indictment should be considered holistically.

People v. Kosobucki, 2021IL App (2d) 190476

Date Filed: 3/30/2021

County: Kane

Facts: Defendant repeatedly and unsuccessfully moved for a mistrial due to the absence of a police witness. The parties eventually agreed to a stipulation as to the testimony of the witness. During the defense case, the prosecutor brought to the court's attention statements by Defendant and the alleged victim that had not been tendered. The prosecutor thus asked for a mistrial, which the court granted. Afterwards, defendant argued that a mistrial was inappropriate and then moved to dismiss the charges on double jeopardy grounds.

Issues on Appeal: Whether the circuit court's granting of a mistrial violated Defendant's double jeopardy rights.

Holding: Reversed.

Analysis: When a defendant does not consent to a mistrial, a court can only order a mistrial if there was a manifest necessity. Defendant's earlier motion for a mistrial did not show consent to the later mistrial ruling, since the earlier motion involved different grounds. And the court's abrupt ruling prevented denied counsel the opportunity to object. The lower abused its discretion in denying the defense's motion to dismiss.

People v. Kulpin, 2021IL App (2d) 180696

Date Filed: 2/8/2021

County: DeKalb

Facts: A grand jury charged defendant by superseding indictment with two counts of first-degree murder, aggravated domestic battery and concealment of a homicidal death. Prior to trial, defendant moved to suppress evidence that the police seized from his apartment during a warrantless search. At the hearing on the motion, several witnesses testified. The court took the matter under advisement and ultimately denied the motion as it determined that the facts surrounding the matter indicated that there was an emergency situation and the police could, therefore, enter Defendant's home and conduct a reasonable search. The parties proceeded to bench trial. The court found defendant guilty on all four counts of the superseding indictment. The court sentenced defendant to 60 years' imprisonment and a consecutive three-year term on the counts.

Issues on Appeal: (1) Whether the Motion to Suppress was improperly denied; (2) whether the Defendant's sentence was unconstitutional and/or excessive.

Holding: Affirmed

Analysis: Case law shows that an emergency-assistance search is valid where (1) there are reasonable grounds to believe that there is an emergency that requires the intrusion and (2) there is a reasonable basis, approximating probable cause, to associate the emergency with the area searched. Here, defendant conceded the existence of the second prong at the hearing on the motion to suppress. Thus, the question is whether the officers had reasonable grounds to believe that an emergency required their intrusion into defendant's apartment before obtaining a search warrant. The reasonableness of an officer's belief that an emergency exists is determined by the entirety of the circumstances known to the officer at the time of entry.

Here, the officers responded to a a missing person report rather than an emergency in progress, such as a 911 hang-up call. However, upon investigating the matter, the officers ascertained that there was an emergency. The testifying police officer's concern for the victim increased after he spoke with a witness who indicated the victim had disappeared under suspicious circumstances. Other information, i.e. the information that the witnesses did not know if the apartment was empty, that the defendant declared having drugs and paraphernalia, and other information. Collectively, the officers knew that the victim was not at work, her car was in the apartment building's parking lot, defendant lied about her whereabouts, and he was not sure how many people were in his apartment. Further, the officers determined that defendant was under the influence of drugs, drugs were present inside the apartment, and defendant had a history of violence towards the victim. Therefore, the search was proper.

As to the issue of unconstitutional sentencing, defendant fails to persuade the court that his sentence is so wholly disproportionate to the offense that it shocks the moral sense of the community. On the issue of excessiveness, it is well established that a trial court has broad discretionary powers to impose a sentence and that the court's sentencing decision is entitled to great deference because it is in a better position than the appellate court to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age.

The parties agreed that the sentencing limits for defendant's first-degree murder conviction were a minimum of 20, and a maximum of 60, years' imprisonment. Additionally, the court found defendant eligible for an extended term of up to 100 years. Defendant does not challenge his eligibility for the extended term. Despite that eligibility, the court elected not to sentence defendant to an extended term. Under these circumstances, we cannot say that an aggregate 63-year sentence of incarceration is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. Accordingly, the sentence was appropriate.

Editor's Notes: People v. Rogers, 209 P.3d 977, 995 (Cal. 2009); State v. Carlson, 548 N.W.2d 138 (Iowa 1996); People v. White, 2020 IL App (5th) 170345

People v. Miller, 2021IL App (2d) 190093

Date Filed: 2/2/2021

County: Winnebago

Facts: Defendant admitted to violating a probation term prohibiting him from having contact with one individual. The court imposed the maximum, extended-term sentence. In its findings, the court mentioned, inter alia, that the defendant thumbed his nose at the system by violating probation terms.

Issues on Appeal: Whether the court improperly sentenced Defendant based on his conduct while on probation, as opposed to basing the sentence on the original crime of conviction.

Holding: Affirmed

Analysis: The appellate court found the sentence was not based on Defendant's actions on probation. Though the trial court did not mention the crime of conviction, it considered that offense by implication, through comments on Defendant's repeated contacts with the individual protected by the probation term. The appellate court found it significant that that individual was the victim of the original crime.

People v. Owens, 2021IL App (2d) 190153

Date Filed: 3/25/2021

County: Du Page

Facts: Defendant pled guilty to aggravated battery. Within 30 days, Defendant filed a notice of motion and petition, asking to vacate the guilty plea. Eventually, counsel filed a postplea motion, which was denied. On direct appeal, appellate counsel filed a motion to withdraw for lack of arguably meritorious issues under Anders v. California, 386 U.S. 738 (1967).

Issues on Appeal: Whether appellate counsel's Anders motion, finding no viable challenge to jurisdiction or the denial of the postplea motion, should be granted.

Holding: Affirmed

Analysis: The appellate court found no arguable challenge to jurisdiction, construing Defendant's notice of motion or petition liberally to be a postplea motion. The court also found no error in the circuit court's denial of the motion to withdraw guilty plea. A dissent found the majority erred in treating a notice of a motion as a motion itself.

Editor's Notes: Justice McLaren, as noted, dissented on the issue of jurisdiction.

People v. Pearson, 2021IL App (2d) 180775

Date Filed: 3/5/2021

County: Winnebago

Facts: While on bond for one offense, Defendant committed another offense. Defendant entered guilty pleas on both cases. During the plea proceedings on the second offense, Defendant was not admonished that the sentences on the two cases were mandatory consecutive. The State then filed a petition to revoke probation and, on resentencing, the court imposed consecutive sentences.

Issues on Appeal: Whether the consecutive sentence imposed were proper, given the lack of admonitions concerning consecutive sentences.

Holding: Remanded

Analysis: The appellate court found that the court's failure to admonish Defendant concerning consecutive sentences was plain error and remanded for resentencing.

People v. Sweigart, 2021IL App (2d) 180543

Date Filed: 2/22/2021

County: Kane

Facts: Under the Murderer and Violent Offender Against Youth Registration Act, a registrant without a fixed residence must report to law enforcement weekly. Before the alleged crime, Defendant, a registrant, had reported variously to have an address and to be homeless. A week after reporting as homeless, Defendant did not report to the same police station and was arrested. He was charged with violating the weekly reporting provision and convicted.

Issues on Appeal: Whether the State needed to prove Defendant was present in the jurisdiction and lacked a fixed residence on the alleged offense date and, if so, whether that was proven.

Holding: Reversed.

Analysis: The appellate court held that the State needed to prove Defendant was in the jurisdiction and lacked a fixed residence on the alleged offense date. The court adopted cases interpreting the Sex Offender Registration Act to support this conclusion. The court also found the State failed to show either Defendant's location or that he lacked a fixed residence.

People v. Welling, 2021IL App (2d) 170944

Date Filed: 2/18/2021

County: Lee

Facts: Defendant was found guilty of first degree murder. He filed an initial post-conviction petition, which argued that trial counsel was ineffective not arguing that Defendant lacked the mental state for murder due to his intoxication and history of alcoholism. The circuit court summarily dismissed the petition.

Issues on Appeal: Whether Defendant's petition set out an arguable claim of ineffective assistance of counsel for not raising an insanity defense based on the effects of Defendant's prolonged alcohol abuse.

Holding: Affirmed

Analysis: The appellate court found, citing People v. Free, 94 Ill. 2d 378 (1983), that substance abuse could only support an insanity defense if the abuse was so chronic that the defendant was "insane" when sober. Since the evidence at trial rebutted any claim that Defendant was in such a condition, the circuit court was right to summarily dismiss the petition.

Discovery

Doe v. Great America LLC, 2021IL App (2d) 200123

Date Filed: 2/24/2021

County: Lake

Facts: In November 2017, plaintiff John Doe and Jane Doe filed a complaint seeking damages in connection with a battery at defendant's amusement park. The complaint alleged that a group of youths attacked the Does' family at the park, causing serious injuries, and that park employees failed to intervene. In interrogatory responses, John Doe and Jane Doe both stated that they were not claiming any psychiatric or psychological injuries. On May 5, 2019, Jane Doe committed suicide. John Doe then amended the complaint adding a wrongful death count alleging that Jane suffered a traumatic brain injury in the attack which left her insane, bereft of reason, and suicidal. Defendant then sought discovery regarding Jane Doe's mental health providers and treatment on the ground that the wrongful death count put Jane Doe's mental health at issue in the case. Plaintiff asserted that the information sought was privileged under the Mental Health and Development Disabilities Confidentiality Act, 740 ILCS 110/10. Plaintiff did not comply with the trial court's order compelling him to produce the requested information and was held in contempt.

Issues on Appeal: Whether the claim that a physical brain injury caused one to commit suicide puts the decedent's mental condition at issue in the litigation such that information regarding decedent's mental condition is discoverable under the Mental Health and Development Disabilities Confidentiality Act.

Holding: Affirmed

Analysis:

Editor's Notes: In order for plaintiff to recover for Jane Doe's wrongful death, he must prove that, as the proximate result of her head injury, she became insane and bereft of reason and committed suicide while in that state. Such proof requires examination of her mental state.

Divorce

In Re: Marriage of Levites, 2021IL App (2d) 200552

Date Filed: 3/3/2021

County: Lake

Facts: Petitioner filed for divorce against Respondent, citing abusive and controlling behavior. During the course of proceedings, the Petitioner obtained Orders of Protection for her and her minor child. Later, Petitioner filed to alter visitation and for leave to relocate, which was denied. The ensuing appeal was dismissed for lack of jurisdiction and the matter returned to the Trial Court. The trial court heard the petition to relocate and, then, denied it after hearing on best interests of the child.

Issues on Appeal: (1) Whether the trial court erred in discerning a burden of proof within section 609.2 of the Act; and (2) whether the trial court's judgment was against the manifest weight of evidence presented at hearing. The Appellate Court also determined if it had jurisdiction over the matter.

Holding: Affirmed

Analysis: As to the issue of jurisdiction, the case at bar was dismissed in its first appeal because a final order was not entered. At present, though, a final order had now entered. Therefore, jurisdiction would attach upon the filing of a valid Notice. A notice of appeal from an order or judgment which the Illinois Supreme Court rules do not make appealable neither deprives the trial court of jurisdiction to proceed with the case nor vests the appellate court with jurisdiction to consider it. As such, because the first Notice of Appeal was a nullity, it does not deprive the trial court of jurisdiction to continue proceedings.

As to the issue of how the trial court construed the burden of proof under the Act. The burden of proving that removal is in the best interests of a child or children is on the party seeking the removal. Nevertheless, in relocation, the Act is silent as to the burden of proof. Therefore, the Appellate Court must undertake statutory interpretation. In this matter, while it is true that the burden of proof language was not included in the amended statute, to find that the burden of proof has shifted is unworkable within the statutory framework. Under the statute, the burden of making the "first step" places the movant in the position of placing before the court satisfactory evidence so as to allow the court to grant the relief requested. The burden of persuasion is analogous to this analysis. Therefore, the burden of proof in matters relocation must fall upon the proponent of relocation.

The Appellate Court then found that the evidence presented warranted the trial court's decision and that it was, therefore, not against the manifest weight of the Evidence.

In re: Marriage of Osseck, 2021IL App (2d) 200268

Date Filed: 3/19/2021

County: Boone

Facts: Petitioner sought a divorce. Respondent sought to modify maintenance based upon a substantial change in circumstances. Respondent stated that the substantial change in circumstances occurred as his employer had been acquired and the salary and pay structure had changed. The trial court found that a substantial change had occurred, and that change in maintenance was allowable. The trial court then analyzed the assets and liabilities of each party, and modified maintenance.

Issues on Appeal: (1) whether the maintenance modification was a final and appealable Order; (2) whether the Respondent had proven a substantial change in circumstances; and (3) whether the trial court had weighed the appropriate factors in its analysis for modifying the maintenance award.

Holding: Remanded;Affirmed in Part, Reversed in Part

Analysis: As to the issue of a final order, post-decree modification orders are final and appealable, even if they are temporary in duration and subject to review. Therefore, the order was final and appealable.

As to the second issue of whether there was as substantial change in circumstances, an order of maintenance may be modified only upon a showing of a substantial change in circumstances since the most recent award. substantial change in circumstances means that either the needs of the receiving spouse have changed or the ability of the other spouse to pay has changed.

Case law shows that Courts have regularly determined that a decrease in income of more than 25% constitutes a substantial change in circumstances, as is the case here. Therefore, there was a substantial change in circumstances warranting modification.

In modifying maintenance, the court must consider the statutory factors set forth in both sections 510(a-5) and 504(a) when deciding whether and under what terms to modify maintenance. Here, the record does not support that the trial court considered the requisite statutory factors. The transcripts of proceedings and written Orders show that the trial court merely recited the factors on whether a substantial change in circumstances had occurred. Similarly, the trial court conducted the hearing in a manner that shows that it did not understand the proper analysis. Twice, it limited the evidence and argument to the issue of Steven’s decrease in income. In failing to adequately consider the statutory factors, the trial court simply accepted the proposed solution of a purely percentage-based maintenance award. Though not inherently inappropriate, purely percentage-based maintenance awards have been criticized for good reason. The better approach, when dealing with fluctuating income, is to bifurcate the award into a guaranteed dollar amount plus a percentage amount.

Therefore, because the appropriate factors were not the focus of the trial court's analysis, the matter should be remanded the court to reconsider the maintenance award upon consideration of the statutory factors.

Elections

Cohen v. Vaughn, 2021IL App (2d) 210084-U

Date Filed: 3/8/2021

County: Lake

Facts: The petitioner filed a petition for review in the trial court of the decision of the electoral board removing the petitioner's name from the ballot as a candidate for Township Assessor at the April 6, 2021, Consolidated Election. The petitioner's Statement of Candidacy stated the office sought was board of trustees and included an oath that he was legally qualified for that office. The petitioner did not provide an oath from anywhere in the nomination papers that the petitioner is qualified for the office of assessor. The petitioner stated in the nominating papers that the office sought was that of Board of Trustees in his Statement of Candidacy and as Assessor on his petition signature

sheets (and other documents). Both of the listed offices exist in the township, with differing authority and responsibilities. The electoral board held that the Statement of Candidacy did not substantially comply with section 10-5 of the Election Code, and upon judicial review the trial court reversed the decision. The respondent objectors timely appealed and the trial court's decision was reversed, and the electoral board's decision affirmed.

Issues on Appeal: Whether the Electoral Board's decision to exclude petitioner's name from the ballot was not clearly erroneous.

Holding: Reversed; Reversed judgment of circuit court and affirmed decision of electoral board.

Analysis: The electoral board's decision that the petitioner's Statement of Candidacy does not substantially comply with section 10-5 is not clearly erroneous. An electoral board's exclusion of candidate from ballot for failing to meet statutory standards in nominating paper is reviewed under clearly erroneous standard of review because the issue presents a mixed question of fact and law. An electoral board's decision is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed. The statutory requirement governing statements of candidacy and the accompanying oath are mandatory requirements. When a statement of candidacy does not substantially comply with statutory requirements, the candidate is not entitled to have his or her name on the ballot. The *Lewis* court established two requirements to determine if the candidate has complied with the requirement of nomination and is therefore entitled to have the candidate's name placed on the ballot. First, the nomination papers as a whole must not create a basis for confusion as to the office sought. Second, the purpose of the papers that contain the incorrect office must not be frustrated by the error. Here, the petitioner's nomination papers contained inherent inconsistencies by listing two different offices which had differing authority, which in turn frustrated the purpose of the petition. Further, the reviewing court clarified that the electoral board and not the voters decide whether confusion exists. Accordingly, the reviewing court reversed the judgment of the circuit court and affirmed the decision of the electoral board excluding the candidate's name from the ballot in the election.

Segneri v. Ruhl, 2021IL App (2d) 210036

Date Filed: 3/4/2021

County: Du Page

Facts: A local political organization conducted a caucus to determine candidates for office. Due to ongoing pandemic restrictions, the caucus was to be done by electronic teleconference. The online caucus participants included at least two people who were never present at the township building to sign affidavits, including one who participated in the virtual caucus from Scottsdale, Arizona. The plaintiffs arrived in person, but were told of the electronic means for the selection and told they were "too late" to participate and run as candidates. After the plaintiffs were asked to leave, the doors to the township offices were closed.

The plaintiffs, therefore, conducted a caucus in the parking lot outside the offices. They voted themselves to be the candidates to represent the organization in upcoming elections. The plaintiffs subsequently requested that the chairman certify them as candidates, which he refused to do. The present action ensued without the plaintiffs seeking relief from the election board.

The six plaintiffs sought declaratory judgment and injunction for the Defendant, the chairman of the local political organization, to file on their behalf the necessary papers to make them candidates in the upcoming election. The complaint also sought to have the local County Clerk certify their names as candidates. Following an evidentiary hearing, the circuit court issued a writ of mandamus ordering the clerk to certify the plaintiffs as candidates. The trial court found that the Zoom caucus was held in blatant contravention [of] the Township Code and of the Governor's Executive Order 2020-73 which exempts Township Caucuses from electronic means. The trial court concluded that the Zoom caucus was not properly conducted in a fair and honest manner.

Issues on Appeal: (1) whether the plaintiffs were required to initially file objections before the township electoral board before bringing their action in the circuit court; (2)

Holding: Reversed.

Analysis: The election code provides the procedure for objecting to any certificate of nomination or nomination papers or petitions filed. Emphasis is added to the word "any," which means that the plaintiffs were required to file their grievance with the local election board first before seeking relief from the circuit court. Therefore, the entry of the writ was in error as the trial court lacked jurisdiction over the matter.

Evidence

People v. Morales, 2021IL App (2d) 190408

Date Filed: 2/16/2021

County: De Kalb

Facts: Defendant was charged with one count of aggravated domestic battery and two counts of domestic battery stemming from an incident that took place between defendant and the victim. The State sought to have the victim's 911 call introduced into evidence. The trial court granted the motion, ruling that the first 33 seconds of the call were admissible under the excited-utterance exception to the hearsay rule. Following a bench trial, defendant was found guilty of all charges.

Issues on Appeal: Whether the admission of the 911 call was improper as it constituted inadmissible hearsay.

Holding: Affirmed.

Analysis: For a hearsay statement to be admissible under the excited-utterance exception, the court must find that (1) there was an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, (2) there was an absence of time for the declarant to fabricate the statement, and (3) the statement relate[s] to the circumstances of the occurrence. Courts use a totality-of-the-circumstances analysis to decide whether a statement is admissible under the excited-utterance exception. The critical inquiry is whether the statement was made while the excitement of the event predominated.

Here, the evidence makes clear that Ross called 911 while the startling nature of the event predominated. As soon as defendant let Ross go, Ross immediately picked up defendant's phone from the floor and ran to the upstairs bathroom to call 911. The 911 recording indicates that Ross was distraught. The call began with Ross yelling, I need help! I need help! Ross was breathing heavily and needed to state her address twice because the operator could not understand her. Within the first 33 seconds of the phone call, after obtaining basic information from Ross, the operator asked Ross what defendant had done. The operator's preliminary questions were clearly an effort to determine the nature of the situation and the type of assistance that Ross required, rather than a persistent interrogation. Under the circumstances, the fact that Ross's statement "that defendant had choked her" was made in response to the operator's question did not destroy its spontaneity.

Foreclosures

Lisle Savings Bank v. Tripp, 2021IL App (2d) 200019

Date Filed: 3/30/2021

County: DuPage

Facts: On August 10, 2015, Lisle Savings Bank (Bank) filed a mortgage foreclosure complaint against defendant Deanna Tripp, her husband, Ronald, and others. The summons served on defendant was captioned Lisle Savings Bank v. Ronald D. Tripp, et al. and defendant was listed individually in the service list. None of the defendants appeared as summoned and the trial court entered a default judgment in favor of the bank on December 21, 2015. A foreclosure sale was conducted on May 10, 2018 following the resolution of a bankruptcy proceeding in which defendant was a debtor. On June 26, 2018, the trial court entered an order approving the sale. On July 23, 2018, defendant entered an appearance and moved to quash service on the ground that the summons was ineffective because her name did not appear on its fact. The trial court denied the motion and this appeal ensued.

Issues on Appeal: Whether the service of summons conferred to the trial court personal jurisdiction over defendant where her name "without her defendant status" appeared only on the service list accompanying the summons.

Holding: Affirmed.

Analysis: Pursuant to 735 ILCS 5/2-201(c), [a] court's jurisdiction is not affected by a technical error in format of a summons if the summons has been issued by a clerk of the court, the person or entity to be served is identified as a defendant on the summons, and the summons is properly served. Here, the caption of the summons was a technical error at most and did not affect the trial court's jurisdiction over defendant. We have recently noted that the purpose of a summons is to notify a party that an action has been commenced against him. The summons here served that purpose. Although [defendant] was not named in the caption, the words "To each Defendant: see attached service list" appear directly underneath the caption. Those words were sufficient to notify those named on the service list that they were defndants, and even a cursory inspection of the complaint served with the summons would confirm that that was the case. (Â¶25; citation omitted)

Lisle Savings Bank v. Tripp, 2021IL App (2d) 200019

Date Filed: 3/30/2021

County: Du Page

Facts: In 2015, Lisle Savings Bank filed for foreclosure of a mortgage issued by the Defendant. None of the defendants appeared, and the trial court entered a default judgment on the foreclosure complaint on December 21, 2015. A foreclosure sale was conducted on May 10, 2018. The delay in conducting the sale was due to the pendency of a bankruptcy proceeding in which one of the defendants was a debtor.

Issues on Appeal: Whether the failure to name a Defendant in the caption on the summons, as required by Rule 131(c), is a technical error and whether that defendant was otherwise identified as a defendant on the summons because their name appeared on the service list.

Holding: Affirmed.

Analysis: Illinois courts have had several occasions to consider how a defendant must be named in a summons. The form of a proper summons comes from the applicable statute and Supreme Court Rules. The purpose of a summons is to notify a party that an action has been commenced against them.

In this case, the summons at issue served that purpose. Although the Defendant was not named in the caption, the words To each Defendant: see attached service list appear directly underneath the caption. Those words were sufficient to notify those named on the service list that they were defendants, and even a cursory inspection of the complaint served with the summons would confirm that that was the case.

Home Rule

Souza v. City of West Chicago, 2021IL App (2d) 200047

Date Filed: 3/9/2021

County: Du Page

Facts: The City owned a water and sewage system that provided services to residential and commercial properties within City boundaries. The City contracted with Water Resources to replace residential water meters, update meter equipment, and implement electronic advancements that would benefit customers by allowing electronic access to monitor water consumption. Shortly after the equipment installation, the City learned that numerous customers were experiencing deficient, inaccurate, and/or missing water meter readings. After experiencing years of these errors, the City terminated its contract with Water Resources. Despite the water-meter and software malfunctions, the City attempted to bill and collect water-usage charges from affected residents.

The plaintiffs initiated suit. During the course of suit, where the City confirmed that it had billed outside of the 12-month limitation provided by statute, the City amended its ordinances to provide that the "Failure to bill any charges provided herein on a bimonthly basis shall have no impact on liability for any outstanding usage charges incurred for any period of time."

The trial court found that home rule authority was not expressly preempted and, therefore, the ordinance was valid.

Issues on Appeal: Whether the court correctly determined that the City's home rule authority permits it to exempt itself, via an amended ordinance passed after the amended complaint in this case was filed, from statutory requirements concerning water-utility billing and whether that exemption can be applied retroactively.

Holding: Affirmed

Analysis: Home rule powers are reserved for municipalities to have the ability to address problems specific to the municipality, and is based on the assumption that municipalities should be allowed to address problems with solutions tailored to their local needs. Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

As to the ordinance under review, the City's water-billing practices were a function pertaining to its local government affairs, as it provides a public water-utility service, the Ordinance regulates billing for that service, and the Ordinance addresses unique problems the City faces. These are local matters that lie squarely within the domain of City functions pertaining to the City's government and affairs. Therefore, the City has home rule authority to issue the ordinance as the legislature is silent regarding preempting the matter. More specifically, while the State may be concerned in the abstract with uniform consumer protections, the Ordinance is designed to address billing local consumers for water usage through services provided by the City, in a manner that addresses impediments to billing that are unique to the City. It is a problem of local dimension. Finally, the state statute regarding billing for municipal utilities contains no language clearly reflecting an intent to limit home rule authority in this manner.

As to the issue of retroactive enactment, the appellate court found that there was no divestment of a vested right with the enactment of the ordinance. A vested right is a complete and unconditional demand or exemption that may be equated with a property interest. The Ordinance expressly calls for retroactive application; however, there is no right to complimentary water usage under the Municipal Code, and no court has decreed that section 11-150-2 gives consumers a right to timely water billing. Therefore, retroactive effect is allowable.

Editor's Notes: For practitioners, this case also provides a good overview of appellate jurisdiction pursuant to post-judgment motions.

Injunction

McHenry County v. Waters, 2021IL App (2d) 210027-U

Date Filed: 3/29/2021

County: McHenry

Facts: The Plaintiff County filed a complaint for injunction. The County requested that corrective action be taken on the subject property to prevent harm to the public health. The County alleged that, on numerous occasions between June 2018 and August 2019, its representatives inspected the property, finding numerous violations.

The trial court granted the County's motion for preliminary injunction based upon the testimony of the parties and witnesses at hearing.

Issues on Appeal: Whether the trial court abused its discretion in granting the injunction.

Holding: Affirmed

Analysis: Generally, the party seeking a preliminary injunction must establish facts demonstrating that: (1) it has a protected right; (2) it will suffer irreparable harm if injunctive relief is not granted; (3) its remedy at law is inadequate; and (4) there is a likelihood of success on the merits. However, when a statute expressly authorizes injunctive relief to enforce its provisions, the second and third elements, irreparable harm and inadequate remedy at law, need not be shown.

Here, the trial court's granting of the injunction was not an abuse of its discretion. The court would have been justified in performing the streamlined test applicable when governmental agencies seek to enforce an ordinance, but the court went beyond that and considered each of the traditional elements necessary to obtain a preliminary injunction. In addition, the court balanced the equities. It reasonably determined that the hardship to be borne by the County absent immediate corrective measures far exceeded the hardship to be borne by the defendant were the court to order the same but later determine at a final hearing on the merits that the ordinances had not in fact been violated.

Judgment

In re Marriage of Spirer, 2021IL App (2d) 200560-U

Date Filed: 2/18/2021

County: Illinois

Facts: Petitioner and respondent were married in Chicago in 2009 and divorced in Missouri on October 26, 2017. Respondent was granted sole custody of the parties' minor child and petitioner was allowed visitation. The parties subsequently moved to Illinois, and the parenting plan allowed for respondent moving the minor child to the Chicago area without notice to petitioner. Petitioner filed a petition to enroll the foreign Missouri judgment in the Lake County circuit court on January 13, 2020, and respondent moved to dismiss said petition on March 12, 2020. The trial court denied the petition because, (1) the parties' marital settlement agreement included a Missouri choice of law provision which stated that Missouri would maintain jurisdiction over all matters and child support and custody; and, (2) petitioner was forum shopping since petitioner previously initiated post-decree modification proceedings seeking the same relief on September 27, 2019, and then voluntarily dismissed the petition in Missouri after a guardian ad litem was appointed.

Issues on Appeal: whether the trial court erred in denying enrollment of the parties' Missouri judgment for dissolution.

Holding: Reversed & Remanded.

Analysis: Section 511(c) of the Dissolution Act is mandatory and dictates that in any post-judgment proceeding to enforce or modify the judgment of another state, the moving party shall commence the proceeding by filing a petition to enroll that judgment, attaching a copy thereof as part of the petition and proceed as provided pursuant to section 511(b). Section 511(b) requires the moving party to (1) file the petition; (2) attach a copy of the judgment; (3) mail notice to the clerk of the court where judgment was entered; and, (4) serve summons. Section 511 is mandatory because if the enrollment process is complied with there is no discretion left to the trial court - the petition must be granted. Nevertheless, the enrollment does not invoke jurisdiction for purposes of modification under UCCJEA and the UCCJEA jurisdiction question was left for another day since the trial court did not rule on the jurisdiction issue. Accordingly, because there was no dispute regarding petitioner's compliance with the statutory steps, the enrollment should have been granted.

Judicial Sales

Federal National Mortgage Association v. Khan, 2021IL App (2d) 190852-U

Date Filed: 3/2/2021

County: DuPage

Facts: Petitioners filed section 2-1401(e) petitions to vacate a judgment of foreclosure as void due to improper service of the mortgage foreclosure action because one party was served through substitute service and later via publication. Petitioners never disputed that they were not notified of the foreclosure through the substitute service and petitioners subsequently filed a bankruptcy which stated they intended to surrender the property to satisfy the debt secured by the mortgage. The petitioners filed their section 2-1401 petitions almost eight years after one party was served and over five years after the trial court approved judicial sale of the property. Title to the property was subsequently transferred four times before the petitioners filed their secion 2-1401 petitions. The respondents filed motions to dismiss which were granted by the trial court.

Issues on Appeal: Whether the doctrine of laches was correctly applied to dismiss section 2-1401 petitions

Holding: Affirmed.

Analysis: The doctrine of laches applied to this instance where, the petitioners failed to exercise due diligence in bringing their lawsuit. Rather, the petitioners were notified of the proceedings via substitute service, included the debt in their bankruptcy filing in lieu of appearing in the foreclosure action, and about five years after judicial sale of the property and several transfers, the petitioners filed their 2-1401 petitions. The equitable doctrine of laches applied because the petitioners did not bring their action within a reasonable amount of time and their unreasonable delay prejudiced the respondents. Specifically, the current owner already incurred costs related to real estate taxes, condominium assessments, and insurance, as well as additional money for improvements to the property. When parties are passive at the risk of other adverse parties entering into obligations and incurring expenses, the doctrine of laches applies and the 2-1401 petitions were appropriately dismissed.

Post Conviction

People v. Johnson, 2021IL App (2d) 180775

Date Filed: 2/18/2021

County: Winnebago

Facts: Defendant plead guilty on charges of domestic battery in exchange for the dismissal of charges brought in two other cases and 30 months of probation, which the court ordered to run concurrently with the 30 months of probation imposed in another case. When the court admonished defendant about the minimum and maximum sentences he faced, the court again advised defendant that, because he was extended -term eligible, he faced a prison term between one and six years. The court never advised defendant that he was subject to mandatory consecutive sentencing because he committed the domestic battery in the other case.

The State petitioned to revoke probation, and the court granted the petition. At the subsequent sentencing hearing, the trial court inquired as to whether the defendant was required to serve mandatory consecutive sentences. After hearing argument, the court sentenced the defendant to the consecutive terms.

Issues on Appeal: Whether imposition of consecutive sentences was proper, given that defendant was never advised before he pleaded guilty in case No. 17-CF-2030 that he was subject to mandatory consecutive sentencing.

Holding: Reversed & Remanded.

Analysis: In this matter, the record reflects that neither the court nor the parties even thought that defendant might be subject to mandatory consecutive sentences. As such, the Defendant was never admonished about what sentences he would face if he were eligible for extended-term(s).

Therefore, as to a remedy, when a defendant is sentenced following the revocation of his probation, the trial court is limited in sentencing by the maximum penalty upon which the defendant had originally been admonished. This means here that the trial court was limited to concurrent sentences for the two offenses. However, the intent of the trial court's sentencing is unclear and, therefore, the cause must be remanded for resentencing with the caveat that any sentences imposed are limited to the maximum term of which defendant was informed before he pleaded guilty. This means that the court is limited to concurrent sentencing. Also, charges dismissed under the plea agreement cannot be reinstated.

In re Marriage of Hurtado, 2021IL App (2d) 190652-U

Date Filed: 3/2/2021

County: DuPage

Facts: The parties were married in July 2002. The petitioner filed for dissolution of marriage in March 2016. In 2017, a ten-day trial occurred and a judgment for dissolution entered on February 27, 2018. The judgment addressed property distribution, dissipation owed by the petitioner, and an award of maintenance and child support to the respondent. The trial court provided a fair market value for the marital home, a balance for the primary mortgage, and a balance for a home equity line of credit (HELOC). In March 2018, the petitioner's sixth attorney filed an appearance and was allowed multiple extensions for filing of a motion to reconsider. In ruling on the amended motion to reconsider, the trial court modified the judgment to reflect amounts paid toward the mortgage on the marital home but denied the remainder of the relief requested. On February 19, 2019, the petitioner had a new attorney who also represented the petitioner on appeal. The new attorney filed a combined motion to reconsider and petition to vacate judgment pursuant to Section 2-1401. The combined motion and petition attacked the trial court's judgment concerning the HELOC because it allegedly deflated the value of the marital home and attacked the trial court's factual findings regarding the respondent's occupation. The combined motion and petition argued that the petitioner was the victim of fraud and factual mistakes to be blamed on the trial court and the respondent's attorney. The combined motion and petition went before a new judge who sent the motion to the presiding trial judge who held he had no jurisdiction to consider the combined motion and petition and sent it back to the referring judge. In ruling, the trial judge held that the combined motion and petition blamed every mistake on findings of the trial judge who already denied the petitioner's motion to reconsider so the combined motion and petition was denied with prejudice with immediate appealability language included. The petitioner filed a notice of appeal within thirty (30) days and the respondent filed a motion for sanctions alleging that the appellate court lacked jurisdiction to hear the entire appeal, which was denied. The respondent then filed a second motion for sanctions based on the petitioner's opening brief.

Issues on Appeal: (1) Whether the appellate court had jurisdiction to hear the motion to reconsider portion of the petitioner's combined motion; (2) whether the trial court's denial of the petitioner's Section 5/2-1401 petition was improper; and, (3) whether sanctions are warranted pursuant to Rule 375(b).

Holding: Dismissed in part, affirmed in part, and sanctions imposed.

Analysis: First, the portion of the appeal challenging the May 8, 2019, denial of the petitioner's motion to reconsider was dismissed for lack of jurisdiction due to the successive post-trial motion practice that the petitioner initiated without authority almost a year after the first motion to reconsider was decided.

However, the court held jurisdiction existed to hear the appeal from the second trial judge's denial of the Section 2-1401 petition. Since the petitioner's Section 2-1401 petition challenged factual findings, the petitioner was required to allege facts to support (1) the existence of a meritorious defense, (2) due diligence in presenting this defense to the trial court, and (3) due diligence in filing the petition. The fact-based challenge is evaluated under an abuse of discretion standard of review. However, the court held that even if the petitioner presented a legal challenge necessitating a de novo standard of review, the petition would still fail. The petitioner could not allege a mutual mistake of fact because the judgment was not a marital settlement agreement or based on a stipulation of the parties. Further, the petitioner did not show any fraud, and could not allege facts to prevent the entry of the judgment. The court also determined that judicial estoppel applied to the petitioner's attorney's statements at the first motion to reconsider hearing discussing the mortgages, which were completely addressed before the trial court on the first motion to reconsider. Since the petitioner could have directly appealed the findings and had the opportunity to do so at that time, petitioner was judicially estopped from raising the issues under Section 2-1401. The petitioner also failed to meet his burden of presenting a sufficient record on appeal with regard to the disputes of the trial court's factual findings. An incomplete record presumes that a judgment conformed with the law and was properly supported by evidence. Accordingly, the unsupported arguments regarding the respondent's occupation and the judgment being procured by fraud were easily discarded. The petitioner's remaining arguments were also forfeited for lack of development, and the trial court's denial of the petition was affirmed.

Regarding the respondent's second motion for sanctions, whether an appeal is frivolous or brought for an improper purpose is an objective test. An appeal is frivolous if a reasonable prudent attorney would not have brought the appeal in good faith. The petitioner's conduct on appeal is improper if a reasonable prudent attorney would not have engaged in that conduct. The petitioner's 57 page brief did not reach an argument section until page 42, and the preceding pages contained improper citations, inaccurate assertions, and arguments that violated Supreme Court Rule 341(h)(6). The petitioner's argument section also failed to comply with Rule 341(h)(7) because it contained numerous lengthy and unfounded assertions that attacked the integrity of the trial court and ignored the basis for the trial court's rulings. The petitioner's attorney in reply brief and in filing a transcript without leave of court only added to the court's frustration with the lack of civility and professionalism displayed throughout the proceedings before the trial court and those on appeal. The court found in favor of petitioner and awarded sanctions pursuant to Rule 375(b) against the petitioner's appellate counsel. The court found that there was no arguable merit on the appeal which warranted sanctions under Rule 375(b) when an appeal is frivolous or brought for an improper purpose, i.e., to harass the opposing party or to needlessly drive up the cost of litigation.

People v. McVeay, 2021IL App (2d) 190292

Date Filed: 3/2/2021

County: Winnebago

Facts: In 1996, McVeay was declared a sexually dangerous person and committed to the custody of the Director of Corrections. In 2018, he filed a pro se petition for review of treatment, care, and conditions provided by Illinois DOC. McVeay alleged that his treatment as a sexually dangerous person was impeded because he was treated as an ordinary convicted prisoner at the Big Muddy Correctional Center. The Director was given leave to intervene and filed a combined motion to dismiss. After a hearing, the trial court dismissed McVeay's petition without prejudice and granted him 30 days to file an amended petition. If not, the order would become final and appealable. McVeay did not file an amended petition, and thus the order became final. McVeay timely appealed.

Issues on Appeal: (1) Whether the Appellate Court has jurisdiction to hear the case; (2) whether the Petition was appropriately dismissed with a finding that the petitioner failed to exhaust all administrative remedies;

Holding: Affirmed.

Analysis: As to the question of jurisdiction, previous case law never entirely addressed appellate jurisdiction to review a final judgment on a petition brought under section 8 of the Act. In general, a sexually dangerous person may bring two statutory claims under the Act before the committing court. Here, McVeay brought a claim for relief under section 8 of the Act. The trial court heard and denied that claim, leaving no other matter pending before the court. McVeay then timely filed a notice of Appeal. Accordingly, jurisdiction attaches.

As to the question of dismissal: McVeay did not allege that he had complied with the Department's grievance procedure. However, deficiencies in a complaint caused by its failure to allege specific facts may not be cured by liberal construction. A petition must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent. McVeay′s petition alleged no facts showing that he availed himself of, let alone exhausted, the Department′s grievance process. Thus, under any pleading standard, the trial court properly dismissed McVeay′s petition for failure to exhaust administrative remedies.

People v. Span, 2021IL App (2d) 180966

Date Filed: 3/11/2021

County: Kane

Facts: Defendant was charged unlawful delivery of a controlled substance. Defendant represented himself throughout the proceedings. Following a jury trial, defendant was convicted of unlawful delivery, and the trial court sentenced him to 15 years' imprisonment. Defendant lost on appeal and filed a postconviction petition alleging that the trial court violated Rule 401(a) when it accepted defendant's waiver of counsel before admonishing him about the charges he faced and that counsel was ineffective for failing to raise this issue on direct appeal. The petition was dismissed.

Issues on Appeal: Whether the Defendant's Appellate Counsel was ineffective.

Holding: Affirmed.

Analysis: Rule 401(a) requires substantial compliance. The touchstone is whether defendant's decision is knowing and voluntary. The Court found substantial compliance in this case where the trial court, all in the same hearing, accepted defendant's waiver and advised him of the charges and possible penalties. The record demonstrates that defendant's decision to waive counsel was indeed knowing and voluntary. Furthermore, defendant's stated reason for choosing self-representation did not depend on the nature of the charge or the possible sentence. Because the court substantially complied with Rule 401(a), it was reasonable for counsel not to raise the issue on direct appeal.

Witnesses

Ashcraft v. Rockford Memorial Hospital, 2021IL App (2d) 190860-U

Date Filed: 3/1/2021

County: Winnebago

Facts: The plaintiffs filed a medical malpractice lawsuit against the defendants. The plaintiffs failed to comply with the trial court's discovery orders when they failed to disclose an Illinois Supreme Court Rule 213(f)(3) expert witness. In addition to failing to disclose the necessary expert witness, the plaintiffs attorney failed to abide by multiple deadlines or properly file motions to extend said deadlines or comply with standard procedures in a medical malpractice case. The defendants filed a motion for summary judgment based on the failure to disclose the expert witness and, after providing the plaintiffs with a multitude of opportunities to comply with discovery, amend their complaint, and otherwise delay decision on the motion for summary judgment, the trial court granted defendants' motion. The plaintiffs filed a motion to reconsider which was handled in similar fashion with a complete disregard of briefing schedules provided by the court or adherence to confining argument to the briefs on file and cases cited therein. As a result, the motion to reconsider was denied after the trial

court again provided the plaintiffs' attorney with multiple opportunities to file a reply and the plaintiffs' attorney blew the deadlines. During the delayed decision on the motion for summary judgment and the motion to reconsider, the plaintiffs still did not identify an expert witness.

Issues on Appeal: (1) Whether the trial court erred in granting defendants' motion for summary judgment; (2) whether the trial court abused its discretion in its application of discovery rules; and, (3) whether the trial court's refusal to revise the Rule 213(f)(3) schedule was an unduly harsh discovery sanction.

Holding: Affirmed.

Analysis: First, the plaintiffs' argument regarding the trial court's abuse of discretion in application of discovery rules was disposed of as forfeited on appeal for a failure to properly develop the argument or cite to relevant authority. Plaintiffs did not clearly define the issue and only cited to Illinois Supreme Court Rule 219(c) to discuss when sanctions are appropriate due to unreasonable noncompliance with discovery rules or orders. Second, the trial court did not abuse its discretion through any alleged refusal to revise the Rule 213(f)(3) schedule resulting in an unduly harsh discovery sanction. The record reflects that the trial court did revise the Rule 213(f)(3) schedule by granting plaintiffs an additional thirty (30) days to file legally sufficient Rule 213(f)(3) disclosures regarding the defendants named in the complaint. Accordingly, the plaintiffs' second issue on appeal was unsupported by the record. Third, summary judgment was warranted because, without an expert in a medical malpractice case who will testify that the defendants deviated from the applicable standard of care or that the deviations proximately cause the plaintiffs' injuries, the plaintiffs simply cannot prove their case. Prior rulings in the Second District under similar facts and circumstances dictated that the plaintiffs cannot avoid the problem posed by the failure to disclose the Rule 213(f)(3) expert by mischaracterizing it as a discovery sanction as they attempted to do in this appeal. Since the plaintiffs were provided multiple opportunities to disclose an expert but failed to demonstrate an ability to do so despite the court providing reasonable discovery deadlines and extensions, summary judgment was appropriate. Further, the plaintiffs' citations to three cases to allege the plaintiffs were victim to a change in circumstances warranting a reversal of the court's entry of summary judgment and reopening of discovery was unpersuasive. In the three cases the plaintiffs misplaced reliance on, the other plaintiffs disclosed Rule 213(f)(3) experts but the experts later refused to testify and then decided they were willing to testify or an expert was improperly disqualified and the plaintiff was not allowed to name another expert thereafter. Finally, the plaintiffs' arguments that no prejudice would result from delayed discovery because the trial court struck the previously scheduled trial date was unsupported by the plaintiffs' blatant disregard for the trial court's orders throughout the litigation. The court further highlighted public policy considerations noting that enforcing reasonable discovery deadlines facilitates judicial economy and fairness. Accordingly, the decision granting summary judgment was affirmed.

About the Contributor

Andrew J. Mertzenich is appellate counsel at Prime Law Group, LLC. Andrew has argued before the Second District Appellate Court for the State of Illinois and contributes opinions on amicus briefs for organizations wishing to file into cases. Andrew also presents CLE on Appellate Practice for bar associations throughout the area and provides consultation services to local attorneys and litigants on how best to approach their appellate issues. He publishes the quarterly *Second District Civil Decision Digest* with several local bar associations.

Outside of law, Andrew is a passionate musician. He is Principal Organist at Court Street United Methodist and Westminster Presbyterian Churches in Rockford, IL. Andrew also volunteers with the Land of Lincoln Theatre Organ Society as a technician and performer. He donates regularly to several causes and sits on the Boards of the American Guild of Organists – Rockford Chapter and the Land of Lincoln Theatre Organ Society. He is also a regular listener and financial contributor to National Public Radio (NPR).

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