

Family Law

The newsletter of the Illinois State Bar Association's Section on Family Law

Workers' Compensation Claims in Illinois Divorces Part 1

BY STEPHANIE L. TANG

For this month and next month's columns exploring seldom-explored areas of family law, I'll be focusing on the intersection of family law and workers' compensation claims. I have gotten a few questions from clients over the years on how these are treated in the context of a divorce case. When it comes to analyzing workers' compensation/personal injury claims in the context of an Illinois divorce

proceeding, the two main question that arise from clients are: 1) am I entitled to/do I have to divide any workers compensation settlement received? and 2) are workers' compensation claims considered income? This month I'll focus on the former.

The seminal case in classification of workers' compensation claims in Illinois

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Recent Fourth District Case Gets It Right on Intended Parent

BY RACHAEL TOFT

A donor is not a legal parent. In a recent decision out of the Fourth Appellate District, the Appellate Court affirmed that the mother, Jessa R. ("Jessa") and her wife, Skyllar M. ("Skyllar"), were the parents of the minor child, (J.M.) while the biological "father," Michael S. ("Michael") was identified as merely the donor.

In this case filed in Tazewell County, Jessa was the biological mother and

married to Skyllar. They decided to have a child and contacted a friend, Michael, who provided sperm. There was no sexual intercourse. There was no intent by any of the parties that Michael was to be the father. By operation of statute, Skyllar is a presumed parent of J.M. as the wife of the biological mother.

However, the case was not so smooth.

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is the Illinois Supreme Court case of *In re Marriage of DeRossett*, 173 Ill. 2d 416 (1996). In *DeRossett*, the court followed the “mechanical approach” to affirm the trial and appellate court’s ruling that where the party was injured *during* the marriage, the settlement received from a workers’ compensation claim will be considered marital property, even if paid out after entry of the final divorce judgment. In *DeRossett*, the workers compensation award was not finalized until after the divorce, but the court split any future award 70/30. This ruling was entered despite Mr. DeRossett’s argument that the workers’ compensation award was designed to compensate him for wages he could not earn because of the accident. Conversely, where a spouse was injured prior to the marriage, the award would be deemed the injured spouse’s non-marital property. *In re Marriage of Burt*, 144 Ill. App. 3d 177 (4th Dist. 1986). Luckily, even if an award is deemed marital property of the parties, as Illinois is an equitable distribution state, practitioners may still argue the non-injured spouse should receive a smaller portion of the final award than half.

Two interesting caveats to note from recent-ish cases:

First, the 2012 case of *In re the Marriage of Berberet*, 2012 IL App (4th) 110749 held that where the Husband was injured in an auto accident during the marriage and had consulted with an attorney but had not decided if he was going to file a case, the claim was too speculative and declined to consider it in its division of the marital

estate. This is a useful note to practitioners who are seeking to classify future awards as marital to conduct discovery regarding any claims filed in court rather than just vague representations. This appears to be a similar analysis to how courts analyze speculative future claims in other areas of property division including future royalties. See *In re Marriage of Heinze*, 631 N.E.2d 728 (Ill. App. Ct. 1994).

Second, in the 2016 case of *In re Marriage of Rivera*, 2016 IL App (1st) 160552, the court clarified regarding timing of an “injury.” In *Rivera*, the Husband was incarcerated in 1983 for first degree murder without parole. The parties were subsequently married in 2000 while Husband was still incarcerated. In 2011, the conviction was overturned. In 2012, Mr. Rivera filed a complaint alleging violation of his civil rights and in 2014, he filed a petition for dissolution of marriage. The court found the \$20 million settlement Mr. Rivera received from this case was marital property as the conviction was overturned during the marriage.

Note of clarification from a prior column: In the November 2022 issue of the Family Law newsletter, I discussed issuing a subpoena to DFAS. I want to just clarify that since DFAS is a federal agency, they are bound by the Privacy Act, so you may need a court order or consent from the service member to receive information pursuant to the subpoena. Accordingly, you may need to take the additional step to seek a court order or consent to ensure the information you are seeking is released. ■

Recent Fourth District Case Gets It Right on Intended Parent

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Since it arose from proceedings to adjudicate a minor neglected, it is common to have a DNA test ordered at the case outset to determine the father. However, in this case, the parents were a same-sex couple so the DNA should not be determinative.

DNA confirmed Michael as the biological father. Michael then surrendered his rights in open court. However, with DNA in hand, the GAL filed a petition to declare the non-existence of a parent-child relationship between J.M. and Skyllar (referred

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Personal Injury & Workers' Compensation Claims in Illinois Divorces Part 2

BY STEPHANIE L. TANG

Following up on my column from last month, in this month's column, I will be focusing on whether personal injury and workers' compensation settlement awards are considered income for purposes of child support. The first thing family law practitioners often jump to when analyzing this question is the statutory definition of "income" under Section 505 of the IMDMA as "income from all sources." In

line with this broad definition, the Second District in *In re Marriage of Dodds*, 222 Ill. App. 3d 99 (2d Dist. 1991), found a workers' compensation award received by the husband for an injury that occurred after the parties were divorced constituted income for child support purposes. What has followed are several cases where Illinois appellate courts provide additional

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Adjudicating a Parentage Matter—Without the Parent?

BY STACI BALBIRER

In the last few years, parentage matters have become prevalent in my practice and that of my partners—likely due to the fact that in 2020, 40.5 percent of all Illinois babies were born to unwed mothers. *Center of Disease Control, National Center for Health Statistics*.¹ That being said, just when I thought I had a handle on parentage matters, I was recently tasked with a first: adjudicating parentage for a

non-parent.

The facts in this specific case are fairly unusual and worth mentioning. A man and woman engaged in a consensual relationship. During the period in which this consensual relationship occurred, woman becomes pregnant. Man tragically passes away before child is born but man's mother (my client), who helped raise the

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clarification on when these awards are considered "income."

The 1996 Second District case of *Villanueva v. O'Gara*, 282 Ill. App. 3d 147 (2d Dist. 1996) took a slightly different approach, looking at the allocated portions of the \$251,655 awarded to the husband as and for a workers' compensation settlement specifically. The *Villanueva* court found that only a portion of the workers' settlement awarded represented lost wages or earnings which could be used for child support, and the portion awarded for pain and suffering and ongoing medical expenses would not be eligible as "income" for child support purposes. Conversely, the 2018 4th District case of *In re Marriage of Plowman*, 2018 IL App (4th) 170665, found that even net proceeds from a mother's personal injury settlement attributable to damages for pain and suffering and disability was income to her for purposes of setting child support.

Practitioners should also recall the underlying premise from *In re Marriage of Rogers*, 213 Ill. 29 129 (2004) that income

is defined as income from all sources, but if the evidence shows a parent is unlikely to continue receiving certain lump-sum or fixed-time payments in the future, the court may consider deviating from the child support guidelines. *See also Mayfield v. Mayfield*, 2013 IL 114655 (2013). Therefore, even if the award is considered marital, it is still worthwhile to argue a deviation from statutory guidelines based on that parties' income is proper, particularly if the award was applied to something in the children's benefit. A similar argument was successful in the 2016 case of *In re Marriage of Fortner*, 2016 IL App (5th) 150246, in which a court analyzed whether Father's wrongful death settlement received on behalf of his father constituted income to Father. The appellate court found the trial court properly modified child support to order a one-time lump-sum payment without finding a substantial change in circumstances based on characterizing the wrongful death settlement as income for the year in which it was received. ■

Adjudicating a Parentage Matter—Without the Parent?

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baby is now desirous of seeking grandparent visitation. It sounds like a law school exam prompt, but real life is stranger than fiction. And unlike a law school exam, I'm going to give you my step-by-step analysis in adjudicating parentage without the parent.

Step 1: Determine the Applicable Section of the Parentage Act

In this situation, man passed away before the birth of the child. Therefore a voluntary acknowledgement of paternity (VAP) was not signed and section 46/305 is not applicable.

Additionally man does not fall within the definition of a presumed parent under 46/204(a). So what's left—Article 6 of the Parentage Act.

Step 2: Determine Who Has Standing to Maintain a Parentage Action

Who can seek to adjudicate parentage is clearly defined in Section 602. You may be wondering if this is where the case ends for my client—and if you stopped your analysis here, you would most likely fail your law school exam as grandparents or relatives are not included as those who may bring a claim to adjudicate parentage. So now what? It was time to get creative.

We filed a probate case having my client appointed as Independent Administrator of her deceased son's estate. And now, under 602(j), she was a representative authorized by law to act for an individual who would otherwise be entitled to

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