ILLINOIS STATE BAR ASSOCIATION

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# Family Law

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



## Chair's Column

BY JESSICA PATCHICK

This month I simply wish everyone a joyous holiday season. Enjoy.

### A Lawyer's Night Before Christmas

(Author Unknown)

**WHEREAS, ON OR ABOUT THE** night prior to Christmas, there did occur at a certain improved piece of real property (hereinafter "the House") a general lack of stirring by all creatures therein, including, but not limited to, a mouse.

A variety of foot apparel, *e.g.* stockings, socks, etc., had been affixed by and around the chimney in said House in the hope and/or belief that St. Nick a/k/a/ St. Nicholas a/k/a Santa Claus (hereinafter "Claus") would arrive sometime thereafter.

The minor residents, *i.e.* the children, of the aforementioned House were located in their individual beds and were engaged in nocturnal hallucinations, *i.e.* dreams, wherein visions of confectionery treats, including, but not limited to, candies, nuts and/or sugar plums, did dance, cavort, and otherwise appear in said dreams;

Whereupon the party of the first part (sometimes hereinafter referred to as "I"), being the joint-owner in fee simple of the House with the party of the second part (hereinafter "Mamma"), and said Mamma had retired for a sustained period of sleep. (At such time, the parties were clad in various forms of headgear, *e.g.* kerchief and cap.)

Suddenly, and without prior notice or warning, there did occur upon the

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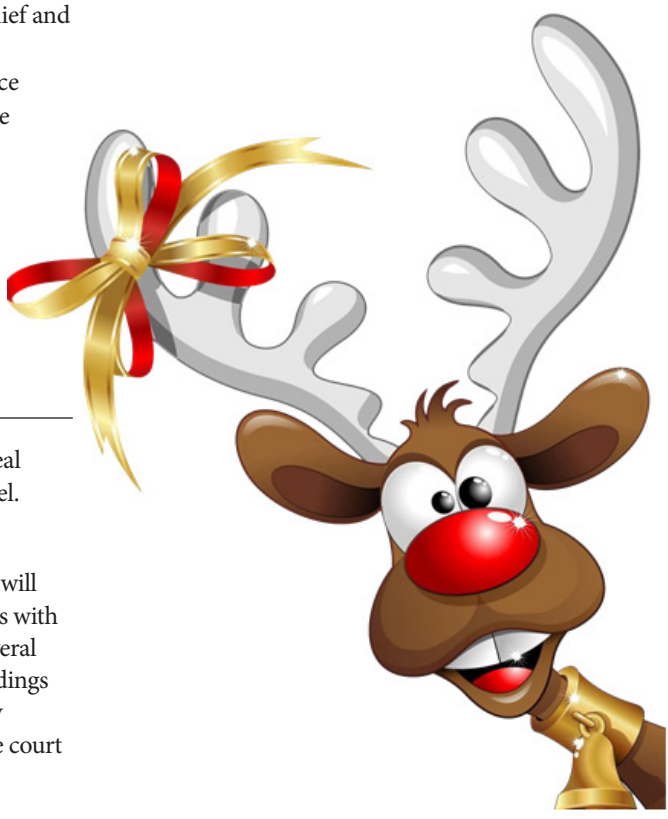

## Effectively Transitioning Your Matter for Appeal

BY JULIE A. JOHNSON

**FAMILY LAW LITIGATORS WHO** routinely try cases or conduct full evidentiary hearings, whether pre- or post-decree, inevitably face the prospect of appealing decisions that did not favor your client. Most family law attorneys routinely practice in either the circuit courts or the appellate courts but rarely both. Employing the following strategies will save you time, your client money, and enable a smooth transition of your matter for an appeal handled by separate appellate counsel.

### Hire a Court Reporter

If there is any chance your matter will be appealed, preserve the proceedings with a transcript. In Cook County and several other Illinois judicial circuits, proceedings are not automatically and perpetually recorded. Attorneys must provide the court

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## Chair's Column

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unimproved real property adjacent and appurtenant to said House, *i.e.* the lawn, a certain disruption of unknown nature, case and/or circumstance. The party of the first part did immediately rush to a window in the House to investigate the cause of such disturbance.

At that time, the party of the first part did observe, with some degree of wonder and/or disbelief, a miniature sleigh (hereinafter "the Vehicle") being pulled and/or drawn very rapidly through the air by approximately eight (8) reindeer. The driver of the Vehicle appeared to be and in fact was, the previously referenced Claus.

Said Claus was providing specific direction, instruction, and guidance to the approximately eight (8) reindeer and specifically identified the animal co-conspirators by name: Dasher, Dancer, Prancer, Vixen, Comet, Cupid, Donder, and Blitzen (hereinafter "the Deer"). (Upon information and belief, it is further asserted that an additional co-conspirator named "Rudolph" may have been involved.)

The party of the first part witnessed Claus, the Vehicle, and the Deer intentionally and willfully trespass upon the roofs of several residences located adjacent to and in the vicinity of the House and noted that the Vehicle was heavily laden with packages, toys, and other items of unknown origin or nature. Suddenly, without prior invitation or permission, either expressed or implied, the Vehicle arrived at the House, and Claus entered said House via the chimney.

Said Claus was clad in a red fur suit, which was partially covered with residue from the chimney, and he carried a large sack containing a portion of the aforementioned packages, toys, and other unknown items. He was smoking what appeared to be tobacco in a small pipe in blatant violation of local ordinances and health regulations.

Clause did not speak, but immediately began to fill the stockings of the minor children, which hung adjacent to the chimney, with toys and other small gifts. (Said items did not, however, constitute "gifts" to said minors pursuant to the applicable provisions of the U.S. Tax Code.)

Upon completion of such task, Claus touched the side of his nose and flew, rose and/or ascended up the chimney of the House to the roof where the Vehicle and Deer waited and/or served as "lookouts." Claus immediately departed for an unknown destination.

However, prior to the departure of the Vehicle, Deer, and Claus from said House, the party of the first part did hear Claus state and/or exclaim: "Merry Christmas to all and to all a good night."

Or words to that effect. ■



Family Law

This is the newsletter of the ISBA's Section on Family Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are $35 per year. To subscribe, visit www.isba.org/sections or call 217-525-1760.

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## Effectively Transitioning Your Matter for Appeal

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reporter. The advanced cost of a court reporter and transcript preparation is worth it when compared to the alternatives.

Appellants (the party requesting the appeal) are responsible for providing a complete record for the appellate court. The complete record on appeal consists of three parts: 1) the Common Law Record (all filings and orders maintained by the clerk of the circuit court), 2) all Exhibits considered at trial, and 3) the Report of Proceedings (transcripts).

With limited exception, failing to provide a report of proceedings is a fatal blow to the appellant. The Supreme Court decision *Foutch v. O'Brien* controls the issue and states, "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391–92, 459 N.E.2d 958, 959 (1984).

An acceptable alternative to a transcript is a bystander's report. See Illinois Supreme Court Rule 323. Bystander's reports are prepared from memory and are less reliable. Bystander's reports must either be stipulated by agreement or certified by the trial judge for inclusion in the record on appeal. Newly hired appellate counsel cannot prepare the bystander report. Only the trial attorneys or unrepresented parties present can sufficiently recollect the proceedings. A quality bystander's report looks similar to a transcript and should read like a verbatim recount of what happened in court. It should not be a summary. The process of preparing and securing approval or court certification of the bystander's report is time-consuming, costly, and exponentially more difficult and expensive than hiring a court reporter to prepare transcripts.

Rule 323 allows the appellant one final option. If the issue is simple and straightforward or on the rare occasion when both parties are aligned against a judicial error, the trial attorneys may stipulate to an Agreed Statement of Facts for inclusion in the record on appeal if no transcript of the proceedings is available. All opening appellant's briefs must include a section titled Statement of Facts. An appellant's Statement of Facts in the brief should not vary from the stipulated version provided for the record. So, if you choose this route, you are effectively handcuffing your appellate counsel to your stipulation, eliminating any opportunity for reframing the facts when briefing.

### Organize and Save Your Trial Exhibits Electronically

We all do our best to provide complete and correctly marked exhibits in advance of trial. Nevertheless, undoubtedly something gets switched out or added during trial. Use an exhibit list that includes a chart to record when exhibits are stipulated, offered, admitted, or denied. Leave several rows open at the end for additional exhibits and update the exhibit list during trial in real-time. At the end of trial, upload a copy of the annotated exhibit list and save PDF copies of all exhibits organized in the chronological order as they are marked. Exhibits organized in this manner allow appellate counsel to easily review and understand the evidence considered by the trial court and will streamline preparation of the record on appeal with limited additional cost to the client.

### Learn Rule 304(a) and Use It Liberally

We litigate post-decree matters more frequently than any other area of law. Sometimes we litigate multiple different post-decree issues simultaneously. Sometimes we resolve the main issue but leave attorney fee allocation for another day. In these instances, be mindful of Illinois Supreme Court Rule 304(a). The recent Supreme Court decision *In re Marriage of Crecos*, controls the issue and states, "[F]or purposes of appellate jurisdiction, unrelated postdissolution matters constitute separate claims, so that a final order disposing of one of several claims may not be appealed without a Rule 304(a) finding." *In re Marriage of Crecos*, 2021 IL 126192, ¶ 45, 183 N.E.3d 67, 78. A Rule 304(a) finding is simply adding the following phrase to any final order. "There is no just reason to delay the enforcement or appeal of this order."

The order still must be a substantively final order. Adding this language alone is insufficient to make a temporary order suddenly eligible for appellate review. However, an otherwise final order that leaves any other pending issue unresolved, even those totally unrelated to the issue on appeal, will not be eligible for appellate review without this express finding. Appellate jurisdiction does not vest in the reviewing court without it. When in doubt, request Rule 304(a) language.

### Consult and Collaborate With Appellate Counsel Early

Do not just refer your disappointed client to an appellate lawyer and leave them to their own devices. Parties are inadequately equipped to fully provide everything their appellate counsel needs to determine whether to challenge the final order. Attend the consultation with your client so that appeal viability can be efficiently ascertained. The transition of the case from trial or appeal will require collaboration between the attorneys at both levels. Appellate counsel will need your assistance in preparing the record. Collaborate with appellate counsel to decide whether to file a Motion to Reconsider before the Notice of Appeal. The appellate court will not entertain new arguments made for the first time on review. A Motion to Reconsider can bridge that gap. Appellate counsel can "ghostwrite" it with you to protect the viability of your appeal. Collaborating at this stage may even perfect your compelling legal argument sufficient to sway the trial court on reconsideration and avoid an appeal altogether. ■

# When the Child Brings a Parentage Case: The Applicable Authority

BY STACI BALBIRER

**I WAS RECENTLY RETAINED BY A** client who currently resides in Canada and is a Canadian citizen but was attempting to obtain dual citizenship in the United States. The client was a woman in her 30s who believed her biological Father resided in the Chicagoland area and was a United States citizen. The woman wanted very little to do with her alleged biological Father except to obtain either by agreement or court adjudication the establishment of a father-child relationship in order to move forward with her dual citizenship application.

Despite handling numerous parentage cases during my career, I had never handled a parentage matter where the movant was the child or in this case the adult child. So, as any good lawyer does—I checked the statute to make sure I was on solid ground.

The applicable statutes when determining standing:

## *750 ILCS 46/602*—Standing

"A proceeding to adjudicate parentage may be maintained by:

*a. The child;*
*b. The mother of the child;*
*c. A pregnant woman;*
*d. A man presumed or alleging himself to be the parent of the child;*
*e. A woman presumed or alleging herself to be the parent of the child;*
*f. The support-enforcement agency or other government agency authorized by other law;*
*g. Any person or public agency that has physical possession of or has custody of or has been allocated parental responsibilities for, is providing financial support to, or has provided financial support to the child;*
*h. The Department of Healthcare and Family Services if it is providing, or has provided, financial support to the child or if it is assisting with child support collection services;*
*i. An authorized adoption agency or licensed child welfare agency;*
*j. A representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor; or*
*k. An intended parent."*

When determining child standing, there are two relevant portions of the Parentage Act to review depending on your client.

**A Minor Child**—Section 602(a) allows a minor child to bring a parentage proceeding, but the inclusion of Section 602(j) requires a personal representative to bring the action on the child's behalf.

**An Adult Child**—750 ILCS 46/607—No Limitation; Child having no presumed, acknowledged, or adjudicated parent

*"A proceeding to adjudicate the parentage of a child having no presumed, acknowledged, or adjudicated parent may be commenced at any time, even after:*

*A. The child becomes an adult, but only if the child initiates the proceeding; or*
*B. An earlier proceeding to adjudicate parentage has been dismissed based on the application of a statute of limitations in effect."*

To refresh your recollection as to a presumed, acknowledged, or adjudicated parent see the definitions below:

Acknowledged Father defined by *750 ILCS 46/103(a)*—"A man who has established a father-child relationship under Article 3."

Adjudicated Father defined by *750 ILCS 46/103(b)*—"A man who has been adjudicated by the court of competent jurisdiction or authorized under Article X of the Illinois Public Aid Code, to be the father of the child."

Presumed Parent defined by *750 ILCS 46/103(p)*—"An individual who, by operation of the law under Section 204 of this Act, is recognized as the parent of a child until that status is rebutted or confirmed in a judicial proceeding."

In this specific case, my client had never commenced a proceeding to adjudicate parentage, and there was never a presumed, acknowledged, or adjudicated parent based on the facts presented. I did confirm with my client's mother the facts surrounding her conception to just ensure we were on solid ground. Once we were able to find and serve the alleged biological father, we ultimately reached an agreement to establish parentage. My client, an adult child, was able to successfully bring a petition to establish a father-child relationship and use this to apply for dual citizenship to the United States. ■

# A Closer Look at *In Re Marriage of Zamudio* and the Potential Impact on the Allocation of Early Retirement Subsidies in Divorce (PART 2)

When dividing a defined benefit plan in divorce, one complex issue is the allocation of early retirement subsidies, such as the "30 and out" provision. This article delves into the implications of the *In Re Marriage of Zamudio* decision on this topic.

**Relevant Cases**

1. *Marriage of Zamudio and Ochoa,* 2019 IL 124676
2. *Marriage of Hunt,* 78 Ill. App. 3d 653, 397 N.E.2d 511 (Ill. App. Ct. 1979)
3. *Marriage of Ramsey,* 339 Ill. App. 3d 752, 792 N.E.2d 337 (Ill. App. Ct. 2003)

**The Issue at Hand**

The *Zamudio* ruling established that service credits purchased during a marriage are marital property, regardless of when the years of service were originally attributable. This raises a critical question! If the purchased years push a participant over the "30 and out" threshold, does this mean:

1. The marital estate owns both the additional purchased years and the entire early retirement subsidy? Or;
2. The marital estate owns the additional purchased years, but the early retirement subsidy should be divided using the "Hunt" formula?

**Insights from *Ramsey***

The *Ramsey* case, cited in *Zamudio,* provides guidance:

- If an early retirement incentive enhances pension benefits and is derivative of the pension as deferred compensation, the marital share of the enhancement mirrors the marital share of the pension.
- However, if the enhancement is not purely derivative, the portion unrelated to the pension is the pension holder's non-marital property.

**Implications for Early Retirement Subsidies**

Ultimately, the apportionment of an early retirement subsidy depends on the court's determination of equity. However, considering the effects of purchased service credits and their impact on early retirement incentives is essential. Open communication on these topics can help both parties understand the potential outcomes.

**The Role of Pension Valuations**

Pension valuations can foster meaningful discussions about the value and security of retirement benefits for both spouses. For instance:

- **Survivor Benefits:** In some plans, a pre-retirement survivor annuity may not be available to a former spouse. If the pension participant dies before retiring, only a fraction of the pension may be payable.
- **Insurable Interest:** A former spouse may have an insurable interest in the pension. Valuations can clarify the potential loss of benefits if the participant dies before retirement.

## Need Assistance?

If you have questions about valuing pensions under Illinois public retirement systems or require a non-marital tracing of defined contribution plans (e.g., 401(k, feel free to reach out to me:

MOON, SCHWARTZ & MADDEN

Pension Valuation & QDRO Experts

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ILLINOIS BAR FOUNDATION

*Champions*

***Dear Future Champions,***

At least twice a year at ISBA Annual and Mid-Year Meetings, we are pitched by colleagues and the Illinois Bar Foundation to become a "Champion." But what is a Champion really, and what's in it for us?

A **champion**, by definition, is a person who fights or argues for a cause or on behalf of someone else. As lawyers, we have the unique opportunity to make a positive impact on society by upholding justice and advocating for those in need. We have the power to shape laws, defend the innocent, and ensure fair resolution of disputes. By definition, we are champions, for our clients, our legal system and for our communities, but through the statewide reach of the Illinois Bar Foundation, we have the opportunity to increase our impact even more.

The Champions of the Illinois Bar Foundation were established more than 40 years ago and are comprised of a distinguished group of attorney and non-attorney Foundation supporters who believe in the value of justice and philanthropy. By committing to a pledge payable over ten years, Champions help create sustainable long-term funding support for more than 50,000 individuals and their families each year statewide. These funds make a direct difference for our colleagues and their families when they struggle with life-changing illness or injury through the support of the IBF's Warren Lupel Lawyers Care Fund, or when our neighbors seek low or no-cost legal aid services to help them stay in their homes, obtain guardianship of a loved one or an order of protection from an abuser, or better understand their rights and responsibilities as workers and citizens in Illinois.

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So while you may already be a champion in your profession, join me in helping to make Illinois an even better place by becoming a Champion of the Illinois Bar Foundation today. To secure your pledge, use this QR code or contact Jessie Reeves at jreeves@illinoisbarfounation.org.

Sincerely,

Jessica Durkin
*Champions Chair*
Illinois Bar Foundation