A QUARTERLY PUBLICATION OF THE MCHENRY COUNTY BAR ASSOCIATION

February 2018

In Brief

Framework for Freedom

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2017/18

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Board Meeting Minutes

November Meeting Minutes

December Meeting Minutes

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Upcoming Events

Date	Event	Location	Time
February 8	Criminal Law Section Meeting	MCBA Office	Noon
February 13	Family Law Section Meeting	MCBA Office	Noon
February 20	Board of Governors Meeting	MCBA Office	Noon
February 27	General Meeting	Woodstock Event Center	Noon
March 1	Criminal Law Section Meeting	MCBA Office	Noon
March 13	Family Law Section Meeting	MCBA Office	Noon
March 20	Board of Governors Meeting	MCBA Office	Noon
March 27	General Meeting	Woodstock Event Center	Noon
April 5	Criminal Law Section Meeting	MCBA Office	Noon
April 10	Family Law Section Meeting	MCBA Office	Noon
April 13	Law Day High School Pro-gram	MCC	8:30-Noon
April 17	Board of Governors Meeting	MCBA Office	Noon
May 4	Law Day Ceremony & Luncheon	Courthouse/ Mia Passione	11:00—1:00

President's Page

By Rhonda L. Rosenthal

2017/18 MCBA President

I have often wondered why people are so invested in sports teams. They pay hundreds of dollars for an official jersey for a player on "their" team, get tweets about every move the team makes, have specific website alerts, and game day rituals. Their entire day or week even, can be dictated by their team's performance, which will be debated and criticized. Some people talk about their team more than their children.

Admittedly, I am not completely immune to this, as I have my team. Notice that I said "my" team and not "a" team. A win by them is my win and I celebrate as if I was on the field. A loss, or even a bad play causes me to utter exclamations and sometimes profanity. And I did mourn the injury of "my" best player, (and some explicative were uttered) but I did move on. I have even forgiven (mostly) the team that took him out for the rest of the season, whereas my husband refuses to utter that team's name.

It turns out that being a sports fan can chemically affect our brain. In the book, The Secret Lives of Sports Fans: The Science of Sports Obsession, Eric Simons hypothecates that when your team wins, your brain releases dopamine through the same transmitters that reward us in our daily lives. Your team wins, you feel good, your brain remembers how it happened, so you keep watching.

That got me wondering if the same can be said for lawyers. I often speculated as to why we talk about our client cases as if they were our own. We rarely, if ever, say "My client lost his case" or "my client did not get everything she asked for." We tend to make "I" statements such as "I lost"; "I won"; "The judge ruled against me;" and the like. I see many arguments where the attorney gets emotional and perhaps uncivil and seems to take the opposing attorney's argument or the judge's ruling as if it is a personal affront. Sometimes the conflict floods into the courthouse hallway and disintegrates into personal insults and gestures being exchanges between attorneys, or attorneys and the opposing client. Court security personnel become involved to separate professionals, who are not living up to the moniker at that moment.

Perhaps attorneys also get an endorphin rush from a "win" for our client and the coinciding low from a loss. Maybe that is why we make it our own.

Although it may be healthy to a point to take ownership of our favorite sports team, it is not as healthy for our profession. Especially since the loss for us seems so much more severe than for sports fans. Which makes sense. When your team loses, you can add some distance from it because it is completely out of your control. Apart from patented pregame rituals, a fan has no hands-on involvement in the process or the outcome.

As attorneys, we do have some control (or think we do), based upon our personal efforts in our client's case. Often, we put in more time and thought than our client does. It is no wonder that we take ownership of the result and take it to heart. And that dopamine rush for a win is addictive. However, being overly invested in our client or their case can result in a personal emotional reaction to a perceived loss. That can damage our attitude, health, and relationships in our legal community. It is counter to civility and respect for our fellow attorneys, judges and the court system. We are not doing our client any favors either, as we have lost the clinical legal analysis that they pay us for.

So how do we pull ourselves back from our client's case super-fandom? Redirect our brains to another, more rewarding affection, of course. Law Day and the MCBA celebrations does that for me. Seeing the children read their law related article summaries at the courthouse celebration, awarding deserving individuals for their service to the law and hearing the luncheon speaker jubilate our legal system puts things back into perspective and reminds me that I am a fan of the entire legal process. It stokes my love of the law, and reminds me why I became an attorney in the first place. Perhaps attending a Continuing Legal Education course does that for you. I hope that all of us can find and keep what is truly rewarding to us about practicing law and can revel in the dopamine rush without the harsh crash.

LAP ANNOUNCES NEW LAP BOARD OF DIRECTORS PRESIDENT – TIM BERTSCHY

Tim Bertschy, the Managing Partner of Heyl, Royster, Voelker & Allen, P.C., began his term as President of the Illinois Lawyers' Assistance Program's Board of Directors on November 15. Having served in numerous esteemed positions within the Illinois legal community, LAP is honored to have the privilege of Bertschy's leadership and continued support of its mission.

"Tim's dedication to the Illinois Legal Community is extraordinary. LAP as it is today would not exist without his advocacy. He was one of the original architects of the funding that LAP receives from the Illinois Supreme Court. We're excited to have Tim as the President of the LAP Board of Directors to continue promoting wellness for the Illinois Legal Community," said Robin Belleau, LAP Executive Director.

Bertschy's experience includes past President of LAP, serving on the ABA House of Delegates for over 15 years, past president of the Illinois State Bar Association, chairing the ABA Standing Committee on Publishing Oversight, United States District Court Advisory Committee on Local Rules (Central District, Illinois), Commissioner of the Attorney Registration and Disciplinary Commission (ARDC), Board member of the Illinois Bar Foundation, co-chair of the Illinois Legal Needs Study II, and former President of the Illinois Equal Justice Foundation, Illinois Chapter of the American Judicature Society, Illinois Coalition for Equal Justice, Illinois Township Attorneys Association, and American Counsel Association, and co-chair of the Prairie State Legal Services Campaign for Legal Services committee.

"The practice of law can be extremely stressful," Bertschy said. "We know that anxiety, depression and substance abuse are especially prevalent in the legal profession. During my term as LAP president, I will first focus on spreading the word that LAP is here to help lawyers, judges, and law students around the state, and I will make a special effort to reach downstate lawyers now that we have a Bloomington location. Second, I would like to use my position as a pulpit to encourage people to take that first step, which is to overcome the stigma of seeking treatment."

Check out LAP's latest news, events and well-being updates online at illinoislap.org, Facebook, LinkedIn or stop by our office – LAP can help you on the path to wellness.

Pictured L to R: Justice Jesse Reyes, Tim Bertschy, Francis Patrick Murphy, Justice Mary K. O'Brien, Judge Daniel Kubasiak

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"Forcible Entry and Detainer" Goes the Way of the Dodo

By: Michael G. Cortina

Many new laws will take effect on January 1, 2018. Public Act 100-0173 amends the Illinois Code of Civil Procedure, as well as multiple other laws, to replace the phrase "forcible entry and detainer" with the much simpler term, "eviction." While that seemingly innocuous change moves the language of eviction law out of the Dark Ages and into the 21st Century, failure to note the change in language could be problematic for some practitioners.

One of the statutes that was changed is a subsection in the Illinois Mortgage Foreclosure Law ("IMFL"). Specifically, 735 ILCS 5/15-1504.5, which requires certain information be attached to foreclosure summonses for residential foreclosure actions, changes the phrase on the notice from "The lawful occupants of a home have the right to live in the home until a judge enters an order for possession[,]" to "The lawful occupants of a home have the right to live in the home until a judge enters an eviction order." The form that contains this language must be attached to all residential foreclosure summons in English and in Spanish.

replace the phrase "forcible entry and detainer" with the much simpler term, "eviction."

This minor change in language does not substantively alter the information provided, and also ensures that the information given comports with the current law that uses the term "eviction" rather than "forcible entry and detainer." An argument could be made, however, if a mortgagee fails to change its form to use the term "eviction" rather than "order for possession," that the form does not comply with the IMFL and thereby subjecting the entire foreclosure filing to attack.

The statute that requires the form specifically states that the information provided in the notice can be substantially similar to the Spanish translation that is to be provided by the Illinois Attorney General's Office, but the substantially similar qualification is not mentioned for the English version of the form. The IMFL in general, and subsection 1504.5 in particular, is a statute in derogation of the common law, and must be strictly construed. The only logical extension is that the Spanish version can waiver a little from the Attorney General's form, but the English version must be an exact duplicate of the information required by statute.

Failure to adhere to this small change from "forcible entry and detainer" to "eviction" could have other consequences as well. Many evictions are residential, or "consumer" evictions, which therefore could trigger the Fair Debt Collection Practices Act. It is possible that attorneys representing plaintiffs in eviction cases could find themselves being named as defendants in federal Fair Debt Collection Practices Act cases for using the confusing and improper term "forcible entry and detainer" instead of "eviction" with consumers. Whether such a case would be successful is an article for another day, but successfully defending such a suit is no substitution for avoiding the suit in the first place.

Any attorney that practices in foreclosure or evictions needs to know about this change in the law, and make the necessary changes to any form documents that they possess. While this is a minor change, and one that is easily made to forms, failure to make the change could have negative consequences down the road.

What's an Heir to Do?

By: Keith Sloan

More frequently than I would expect, I receive phone calls from heirs and relatives of deceased homeowners who have been named in a foreclosure suit, even though they have not signed the note or the mortgage. The questions posed to me are either: "do I have any liability?" or "how can I save the home, because I have nowhere to go?"

Before the above questions are answered, let us review why a non-borrower heir would be named as a defendant in a foreclosure suit. Pursuant to Illinois Supreme Court Rule 113(i): "In all mortgage foreclosure cases where the mortgagor or mortgagors is or are deceased, and no estate has been opened for the deceased mortgagor(s), the court shall, on motion of a party, appoint a special representative to stand in the place of the deceased mortgagor (s) who shall act in a manner similar to that provided by section 13-209 of the Illinois Code of Civil Procedure (735 ILCS 5/13-209)." As the committee comments state, Rule 113 (i) was in response to the subject matter jurisdiction issue raised in ABN Amro Mortgage Group, Inc. v. McGahan, 237 Ill. 2d 526 (2010).

As a result, quite often heirs of the deceased homeowner/borrower will receive a summons and complaint, in which they are named defendants. Often times, the heirs have a level of anxiety because they believe they are now exposed to personal liability. This brings us back to the first question posed above. Do the heirs have any personal liability on the underlying note and mortgage? The simple answer is no. If the heirs did not sign the note, then they are not responsible for any payments under the subject note, and an in personam judgment cannot be sought against them. However, a question still lingers: what affect, if any, will a foreclosure judgment, or an in rem judgment have on the credit of the non borrower heir? In short, none. Such a judgment should not be reported to any of the credit bureaus, and in my experience this has been true.

Having discussed the liability issue, we move to the home retention efforts of an heir who was not an original borrower (I am not discussing the options of an heir who is already a borrower, as their options are like any other living borrower). Early in the foreclosure landslide which began almost a decade ago, a majority of lenders would not entertain a loan modification of a non-borrower heir. After all, the heir was not part of the original loan application, and for all intents and purposes, is a stranger to the transaction.

However, over the last six years, and through the efforts of the U.S. Department of Treasury and the Consumer Financial Protection Bureau, non-borrower heirs may be eligible under the Home Affordable Modification Program (HAMP). Specifically, under Chapter 2, Section 8.8 of the Making Home Affordable Program Handbook for Servicers of Non-GSE (Government Sponsored Enterprise Loans) Mortgages Version.5.1 (effective May 26, 2016), "non -borrowers who inherit or are awarded sole title to a property may be considered for HAMP even if the borrower who previously owned the property was not already in a TPP (trial period payment)." Furthermore, under Section 8.9, if an original borrower is in a TPP, and then passes away, it is possible that a non-borrower heir may be able to assume the subject note, subject to approval. Id.

The above demonstrates that in Illinois, non-borrowers heirs are provided notice and opportunity in certain foreclosure cases, both of which serve an equitable function.

Trial Call

Case Number: 14LA179
Plaintiff: Terence Knott
Defendant: Blain Supply Inc
Plaintiff's Attorney: Breen Goril Law
Defendant's Attorney: Lindsay, Stuart & Postel
Trial Dates: October 30—November 1, 2017
Judge: Thomas A. Meyer
Verdict: Defendant

Case Number: 16AR23
Plaintiff: Adrienne Karlson
Defendant: James Runtz
Plaintiff's Attorney: Franks & Rechenberg
Defendant's Attorney: Law Offices of Steven A. Lihosit
Trial Dates: November 13—November 14, 2017
Judge: Thomas A. Meyer
Medical: $6179
Pain & Suffering: $20,000
Emotional Distress: $50,000
Loss of Normal Life: $100,000
Gross Verdict: $176,179
Plaintiff's Contributory Negligence: 0%
Net Total Verdict: $176,179
Last Demand: Withdrawn

Case Number: 17SC1234
Plaintiff: Alan Schafer
Defendant: Olumide Ojelade
Plaintiff's Attorney: Pro Se
Defendant's Attorney: Wein & Assoc.
Trial Date: January 8, 2018
Judge: Thomas A. Meyer
Verdict: Plaintiff
Medical: $25.00
Damage to Property: $1727.36
Lost Wages: $1,153.44
Net Total Verdict: $2905.80

Case Number: 14LA35
Plaintiff: John Miceli
Defendant: Jack Parzatka
Plaintiff's Attorney: Balke & Williams
Defendant's Attorney: Kopka, Pinkus, Dolin & Eads
Trial Dates: January 8—January 11, 2018
Judge: Kevin G. Costello
Verdict: Defendant
Last demand: Unknown
Last offer: $25,000

Case Number: 15LA141
Plaintiff: Gustavo Alanis
Defendant: Adrian Porcayo
Plaintiff's Attorney: Kugia & Forte
Defendant's Attorney: Steven A. Lishosit
Trial Dates: January 22—January 23, 2018
Judge: Thomas A. Meyer
Verdict: Defendant
Last demand: $20,000
Last offer: $4781

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Who gets the dog?[1]

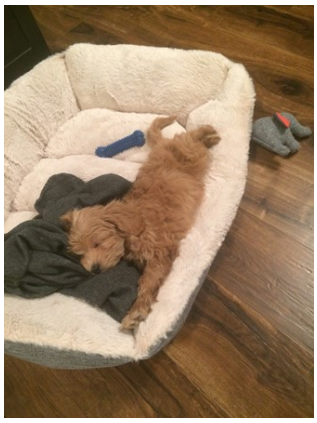
By: Jennifer M. Chiappetta, Esq.[2]

To many, our pets are members of our family. We have a special attachment to our furry companions, who listen without talking back (sometimes), keep us warm in bed, follow us around the house, and know when we aren't feeling our best.

Taking effect January 1, 2018, [3] is a provision for the allocation of possession and responsibility for companion animals in divorce proceedings. The law also contemplates joint custody of the animal. Alaska was the first state to create such a law (effective January 17, 2017) requiring courts to take into consideration the "well-being" of companion animals in divorce actions. [4] Historically, pets were not specifically addressed by the legislature and were simply allocated in the division of property similar to vehicles, bank accounts, and furniture.

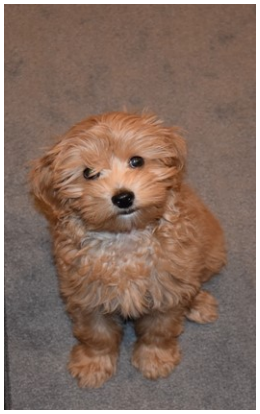
As one New York judge put it, "a companion dog is not a fungible item, equivalent to other items of personal property"…while on the other hand "it is impossible to truly determine what is in a dog's best interests." *Travis v. Murray,* 977 N.Y.S.2d 621, 627-29 (N.Y. Sup. Ct., 2013).

So, how will the courts determine who gets to keep Fido? It will be interesting to see as the Illinois law does not specifically state how judges are to determine "custody," other than taking into consideration the "well-being" of the animal in making its decision. As with other matters of first impression, we look to decisions of courts from other states.



In a Vermont case in which the only contested issue was who would receive the family dog, Belle, the judge indicated to the attorneys the court would consider which spouse was "most active in caring for the dog." *See Hament v. Baker,* 97 A.3d 461, 462 (Vt. 2014). Vermont did not have a companion animal statute and therefore the statutory factors, which applied to the equitable distribution of Belle, were similar to those of Section 503. *See id.* at 463-64. The court also considered other factors not set out such as welfare of the animal and the emotional connection between the animal and each spouse. *Id.* at 464. Husband testified he was a veterinarian and the dog usually came with him to work. *Id.* at 462. Wife testified she routinely took the dog for walks in the woods near their house. *Id*. The court awarded the dog to Husband in an effort not to disrupt the dog's lifestyle and the appellate court affirmed. *Id.* While wife would have preferred a shared ownership agreement, the family court did not have authority to make such an allocation under the distribution of property statute. *Id*

In *Travis v. Murray,* the court determined the appropriate standard to be applied in determining which party should be awarded the dog, was the "best for all concerned" standard. 977 N.Y.S. 2d 621, 631 (N.Y. Sup. Ct., 2013). Factors to be considered included testimony from the parties as to why the animal would have a "better chance of living, prospering, loving and being loved in the care of one spouse as opposed to the other" as well as "who bore the major responsibility for meeting [the dog's] needs (i.e., feeding, walking, grooming and taking him to the veterinarian) when the parties lived together?" *Id.*



Unlike the court in *Hament,* Illinois' companion animal statute will allow for a shared ownership agreement. However, absent enforcing an agreement of the parties to do so, I do not foresee many judges allocating joint ownership of pets. It seems this would only lead to endless post decree litigation and result in unnecessary continued interaction of the parties where children are not involved. See *Travis v. Murray,* 977 N.Y.S.2d 621, 631-32*,* citing *Prim v. Fisher*, 2009 WL 6465236 (Vt. Super. Ct. 2009).

The Illinois statute has not yet defined "well-being", but it is reasonable to believe judges will use factors similar to the "best for all concerned" standard recognized in *Travis v. Murray*. Parties will likely

need to show evidence of who regularly cared for the animal, attended veterinary appointments, and paid expenses for the animal's care, etc. If you think the parties may have an argument over their pet, this is documentation and testimony that may help your case.

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1. 'Companion animal' is defined in The Humane Care for Animals Act as: "an animal that is commonly considered to be, or is considered by the owner to be, a pet. 'Companion animal' includes, but is not limited to, canines, felines, and equines." 510 ILCS 70/2.01a

2. Attorney at The Law Office of Martin J. Coonen, Ltd., Jennifer M. Chiappetta earned her undergraduate degree from Illinois Wesleyan University in 2012 and her J.D. from Northern Illinois University College of Law in 2015. She was admitted to the Illinois bar in November 2015.

3. Pub. Act 100-0422 (eff. Jan. 1, 2018)(amending 750 ILCS 5/501(f) and 5/503(n)).

4. Nicole Pallotta, Alaska Legislature Becomes First to Require Consideration of Animals' Interest in Custody Cases, Animal Legal Defense Fund (Jan. 20, 2017), http://aldf.org/blog/alaska-legislature-becomes-first-to-require-consideration-of-animals-interests-in-custody-cases/.

5. 750 ILCS 5/503

TELL US WHAT YOU THINK ABOUT OUR NEW LOOK!!!!!

After years of the same old newsletter, we worked hard to make it fresh. Please let us know your thoughts via email to mchenrycountybar@sbcglobal.net

Law Day 2018

Separation of Powers: Framework for Freedom

The U.S. Constitution sets out a system of government with distinct and independent branches—Congress, the Presidency, and a Supreme Court. It also defines legislative, executive, and judicial powers and outlines how they interact. These three separate branches share power, and each branch serves as a check on the power of the others. "Ambition must be made to counteract ambition," James Madison explained in Federalist 51. Why? Madison believed that the Constitution's principles of separation of powers and checks and balances preserve political liberty. They provide a framework for freedom. Yet, this framework is not self-executing. We the people must continually act to ensure that our constitutional democracy endures, preserving our liberties and advancing our rights. The Law Day 2018 theme enables us to reflect on the separation of powers as fundamental to our constitutional purpose and to consider how our governmental system is working for ourselves and our posterity.

Schedule of Events

March 12, 2018—Middle School Essay Contest deadline

April 13, 2018—High School Program at MCC

April 9—27, 2018—Elementary School Visits

May 4, 2018—Law Day Ceremony and Luncheon

HELP!!

Volunteers are needed to speak to 4th and 5th grade classrooms in McHenry County as part of the 2018 Law Day Celebration. Each volunteer is matched with a class or classes. The volunteer and teacher agree on the topic and time. Visits will take place from Monday, April 9 through Friday, April 27, 2018.

If you wish to volunteer, please send an email to:

MHNader@22ndcircuit.illinoiscourts.gov

The 2018 Law Day Committee would like your help.

1. The McHenry County Bar Association is seeking nominations of **member-attorneys** for the **2018 Distinguished Service Award**. MCBA presents this award each year to a McHenry County attorney in recognition of dedicated service and contributions to the citizens of McHenry County.

2. The McHenry County Bar Association is seeking nominations of **non-lawyers** for the **2018 Liberty Bell Award**. The award is given each year to an individual or organization who:

A. has promoted a better understanding of the rules of law or who has promoted a greater respect of law and the courts; or

B. has stimulated a sense of civic responsibility or contributed to good government and the community.

The awards will be presented at the May 4, 2018 Law Day Ceremony.

To nominate please use the Distinguished Service Award nomination form or the Liberty Bell Award nomination form.

2017 MCBA Holiday Party

The MCBA Holiday Party was held on December 7th at the Crystal Lake Country Club. It was well attended and our big-hearted members filled the Toys for Tots boxes with wonderful gifts. The party would not have been possible without the generous sponsorship of:

Land Surveying Services, Inc.

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Attorney Wanted - Libertyville, IL

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