DECEMBER 2021

In Brief

McHenry County Bar Association

Quarterly Newsletter

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2021/22

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McHenry County Bar Association

Date	Event	Location	Time
JANUARY 25	General Meeting	Virtual	Noon
FEBRUARY 3	Criminal Law Meeting	Virtual	Noon
FEBRUARY 8	Family Law Section Meeting	Virtual	Noon
FEBRUARY 10	Civil Law Section Meeting	Virtual	Noon
FEBRUARY 15	Board of Governors Meeting	Virtual	Noon
FEBRUARY 22	General Meeting	Virtual	Noon
MARCH 3	Criminal Law Section	Virtual	Noon
MARCH 8	Family Law Section Meeting	Virtual	Noon
MARCH 10	Civil Law Section Meeting	Virtual	Noon
MARCH 15	Board of Governors Meeting	Virtual	Noon
MARCH 22	General Meeting	Virtual	Noon

Board Meeting Minutes

Sept. Meeting Minutes

Oct. Meeting Minutes

Nov. Meeting Minutes

Dec. Meeting Minutes

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President's Page

By Peter Carroll

2021/22 MCBA President

THE GOSPEL ACCORDING TO WILL ROGERS

William P. A. Rogers was an American stage and film actor, vaudeville performer, cowboy, humorist, newspaper columnist, and social commentator from Oklahoma.

Known as "Oklahoma's Favorite Son", Rogers was born in 1879 to a Cherokee family in Indian Territory (now part of Oklahoma). As an entertainer and humorist, he traveled around the world three times, made 71 films (50 silent films and 21 "talkies"), and wrote more than 4,000 nationally syndicated newspaper columns.

By the mid-1930s, Rogers was hugely popular in the United States for his leading political wit and was the highest paid of Hollywood film stars. He died in 1935 with aviator Wiley Post when their small airplane crashed in northern Alaska. *(Quoted from Wikipedia*).

He was famous for saying: "I'm not a member of any organized political party. *I'm a Democrat*." He also said something to this effect: "It wasn't what I *didn't* know that done me in. It was what I *thought* I knew – that's what done me in."

My "platform" as Bar Association President this year is to encourage practitioners to stick with what they know, or to get direction from a colleague who does. In so doing, we improve the performance in our legal work, and improve the public perception of attorneys as a whole.

Many of us have seen self-represented litigants assume that they know how to handle a matter in the courtroom. ("After all, I've watched Judge Judy enough to manage this.") But what they *thought* they knew definitely did them in. We lawyers can do the same when we venture into unknown territory.

Why am I on this soap box? As Will Rogers would say: "Everybody is ignorant, only on different subjects."

(continued on page 4)

About a year ago, I pursued a Stalking-No Contact Order on behalf of my client. The matter went to hearing before Judge Zalud. Counsel for the Defendant (not mentioned here by name) missed the whole point of the complaint. Instead of addressing the allegations against their client, they went on the attack and tried to introduce evidence of my client's misbehavior. It was, essentially, no defense at all. I was forced to conclude that they had never handled such a matter, didn't do their homework, and certainly did not consult with a more experienced practitioner in that field. Their performance was, honestly, an embarrassment.

Let us not fall into that trap. Seek advice when needed, and have your radar out to identify *when* advice is needed. Your clients will appreciate a job well done, and the public image of our profession will benefit.

Will Rogers always ended his routine with, "I never met a man I didn't like." Let's hope someday we can say, "I never saw a hearing that was handled unprofessionally."

PRAIRIE STATE LEGAL SERVICES

2021 Outstanding Pro Bono Community Honoree award

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HAPPY 2 YEAR ANNIVERSARY HELPDESK

With the help of the very generous bar members below who have donated their time to assist, the Helpdesk has consulted with over 1058 self-represented litigants in the past two years to help them with procedural guidance for their cases. We could always use more volunteers. If you are interested, please go to the link below or contact the Bar office at (815) 338-9559 to sign-up. The time commitment is 2-hours on Mondays from 9:30—11:30. Each caller is allowed 15 minutes for phone consultation. The caller's contact info will be emailed to you. https://www.signupgenius.com/go/8050f48afad2fa1f85-attorney

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A Summary of Changes to the Illinois Residential Real Property Transfer on Death Instrument Act

By Doreen T. Paluch

A Transfer on Death Instrument, or TODI, is a document that will transfer interest in real estate to a designated beneficiary upon the death of the property's owner without requiring prove up and admission in a probate proceeding. In order to be effective, the TODI must be in proper form, properly executed and timely recorded. TODIs were first introduced to Illinois when the Illinois Residential Real Property Transfer on Death Instrument Act (codified as 755 ILCS 27/1et seq.), took effect on January 1, 2012.

On July 9, 2021, Governor Pritzker signed into law Public Act 102-0068. Said Act took effect on January 1, 2022 and amends the Illinois Residential Real Property Transfer on Death Instrument Act (hereinafter "the Act"). This article is not intended as a comprehensive analysis of the amendments, but is intended to highlight some of the changes to the Act. To view all legislative changes to the Act in its entirety, visit www.ilga.gov and click on "Public Acts".

One of the most notable changes to the Act is evident in the name of the Act itself. The short title of the Act has been changed to the Real Property Transfer on Death Instrument Act. The change in the title reflects that the Act no longer applies only to residential real estate. Instead, it applies to "real property" which is defined in Section 5 of the Act as "an interest in realty located in this State capable of being transferred on the death of the owner."

As defined by the Act, a designated beneficiary is a person designated to receive real property under a transfer on death instrument. As amended, under Section 21 of the Act, eligible beneficiaries have been expanded to include trusts. The trust to which ownership is to be transferred can be one that is already in existence at the time the owner executes the TODI and is identified in the TODI itself. It can also be a trust that is created in the owner's will or it can be a trust that is created by the TODI. Furthermore, it can be a trust created in the will of a third party, if that individual predeceased the owner. When a trust is the designated beneficiary, unless the TODI provides otherwise, a revocation or termination of the trust before the owner's death causes the transfer to the trust to pass to the owner's estate.

As indicated above, in order to be effective, a TODI must be properly executed. Section 45 of the Act requires signing and attestation by credible witnesses and acknowledgment thereof by a notary. As amended, this section has been substantially revised. Under Section 45(b), if the TODI is not witnessed by at least 2 credible witnesses, the instrument is void. Under Section 45(c) if a .

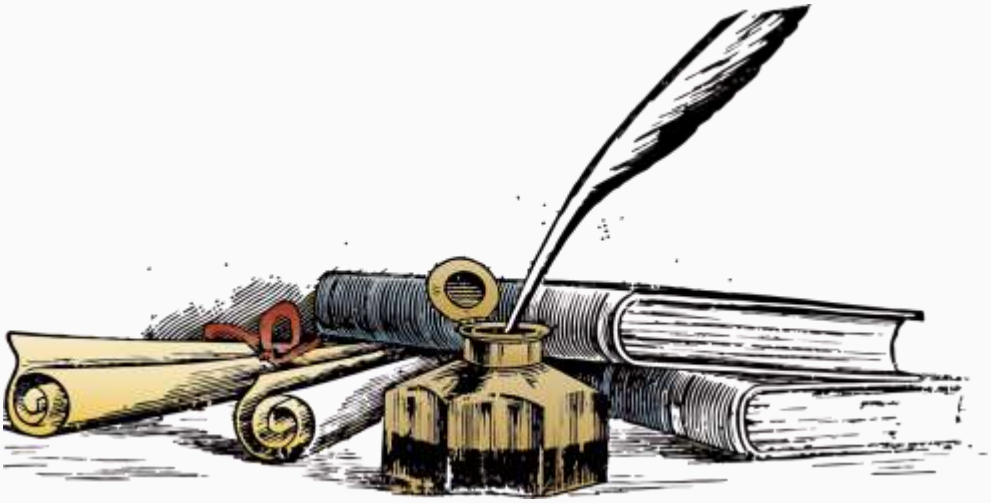
beneficiary or his or her spouse witnesses the execution of the TODI, then the interest transferred to that beneficiary, and all persons claiming under them, is void unless the instrument is also attested to by at least 2 other credible witnesses. This suggests that, in order to be "credible" witnesses, the witness must not only be legally competent to testify, but must be one without an interest in the transaction.

Section 65 concerns the effect of the TODI at the owner's death. Section 65(a) has been substantially rewritten. Under Section 65(a)(2), unless otherwise provided in the TODI, if 2 or more designated beneficiaries are to receive concurrent interests in the real property, they take title in equal undivided shares with no rights of survivorship. Under Section 65(a)(3), except as otherwise provided in the TODI, if a single beneficiary is designated, and that beneficiary fails to survive the owner, or is not in existence on the date of the owner's death, then the real property shall pass to the owner's estate. Likewise, under Section 65(a)(4), if there are two or more designated beneficiaries to receive concurrent interests, and one or more, but less than all designated beneficiaries predecease the owner, the interest of the deceased beneficiary is transferred to the remaining beneficiary or beneficiaries in proportion to the other remaining interests. However, both Sections 65(a)(3) and 65(a)(4) provide for an exception under Section 65(a)(5), which provides that if the designated beneficiary who dies before the owner is a descendant of the owner, the descendants of the deceased designated beneficiary living at the time of the owner's death take the deceased designated beneficiary's share of the real property per stirpes.

Section 66 of the Act is new, and allows for renunciation of a transfer on death instrument by the owner's surviving spouse. This right may be waived by executing a waiver as part of the TODI itself. If renounced, the surviving spouse is entitled to a one-third interest in the real property transferred by the TODI if the owner leaves a descendant, or a one-half interest if the owner leaves no descendant. However, a surviving spouse does not have the right to renounce a TODI that transfers the owner's interest in real property to a trustee of a trust created under the owner's will or otherwise that is for the sole benefit of the surviving spouse during his or her lifetime. In order to renounce a TODI, the surviving spouse must record a renunciation in the recorder of deeds office where the TODI is recorded within seven months of the owner's death or within such additional time as may be granted by a court having jurisdiction under Section 2-8 of the Probate Act (755 ILCS5/2-8).

Section 95 of the Act previously provided that a transfer on death instrument or its revocation shall be prepared only by an Illinois licensed attorney. The amendment to the Act deletes the requirement that the attorney be licensed in Illinois. Nothing in this section prevents an owner from preparing his or her own TODI, and, as now amended, further provides that a TODI is not rendered void for failing to be prepared by a licensed attorney.

Drafted well, and properly executed and recorded, a transfer on death instrument can be an effective probate avoidance tool. Practitioners should be cautious in preparing and overseeing the execution of the instrument to ensure that their client's intent will come to fruition upon the client's death. An understanding of the amendments to the Act is essential to this goal.



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On the first issue, to the best of our knowledge, *In Brief* is a responsible legal source. On the second issue, each author needs to review Rule 795(d)(7) and, considering the content of the article, determine whether the article is a "law-related article" that "deal[s] primarily with matters related to the practice of law, professionalism, diversity issues, mental illness and addiction issues, civility, or ethical obligations of attorneys." For example, an article on a recent fundraiser or networking event would not qualify for MCLE credit. Likewise, a non-substantive news-type feature, such as an article reporting on another speaker's presentation or another attorney's accomplishments, would not qualify for MCLE credit.

If your article was published in *In Brief* and you choose to claim hours you spent writing it toward your MCLE requirement, please keep the following elements of Rule 795(d)(7) in mind:

· Authors must keep contemporaneous records of the time they spend preparing an article.

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· Authors can only earn credits for the reporting period in which an article was published, regardless of when it was written.

· Republication of any article entitles to the author to no additional CLE credits unless he or she made substantial revisions or additions.

For more information, visit the MCLE Board's Web site at http://www.mcleboard.org.

McHenry County Bar Association

Welcomes our newest members....

Donald C. Stinespring, Jr.

Robert Windon

McHenry County State's Attorney's Office

Marcus Kranz

Michael Belica

Matthew Morrow

Kathleen Laughlin

Brendan Pierard

A Primer on Telecommuting Agreements

By: Patrick Gorman

The most striking effect of the pandemic on our work force has been the significantly increased numbers of employees working at home, either entirely or on some part-time basis. Remote work or telecommuting, unheard of scant decades ago, has seemingly become the rule more so than the exception.

It is therefore surprising to this practitioner how few Remote Working Agreements or Telecommuting Agreements I have encountered. While such a document is unlikely to advantage an employee, it can be instrumental in clarifying the terms of employment and insulating the employer from liability.

Here we will address concerns of the "right" to work remotely; job expectations; equipment and supply concerns; work area as it relates both to safety and confidentiality; worker's compensation and other liability issues; local ordinances; taxation; and confirming other broad corporate policies.

Absent a formal agreement that an employee's work will take place remotely, there is no contractual right of an employee to work remotely. If remote working is part of a new employment, it would be worthwhile to clearly define where and how the work will occur. Employees may also assert that they have a "right" to work remotely if remote working is an accommodation, perhaps in light of a religious belief which forbids them to be vaccinated in offices where vaccinations are required, or, in the case of a disability, where medical or psychological circumstances suggest a need for such an accommodation. Generally, however, there is no right to remote working and, should an employer decide to discontinue the opportunity, the employee will be left without recourse.

As a preliminary matter, and it may go without saying, the Agreement should be appropriately titled and signed by at least the employee and counter-signed by a manager or human resources professional. Recommended titles for the Agreement would include Remote Working Agreement, Remote Worker Agreement or Telecommuting Agreement. Title is always important for ease in managing the document and because some people do not read past the title.

On behalf of an employer (and this should be the rule regardless of whether an agreement with an employee relates to compensation, confidentiality or telecommuting), their status as employee at will should be affirmed: the agreement should indicate that nothing herein changes the status of their employment from at will to otherwise. Obviously, if the employee in question has an actual employment contract (which does establish employment other than at will) or if the employee is a member of a union, these features must be considered.

It is important to state that the fact of the remote work arrangement will not change the duties, obligations, responsibilities and conditions of the employment, nor is it likely to alter the salary, benefits, paid time off (PTO), and the like. Work hours, overtime compensation, use of sick leave, and approval for use of PTO should be stated as conforming to present policies and procedures, unless specifically agreed otherwise.

One of the obvious consequences of remote working is that the employee can no longer walk to the supply closet to obtain pencils or to the IT department to fix his laptop. Unless the employer intends to deliver supplies to the employee (and some do), arrangements need to be made for reimbursement to employee for business related expenses, including basic supplies, maintenance and repairs of equipment, and potentially charges for phone and internet use. Such reimbursement may be governed and mandated by applicable law.

The employer may also wish to include in the agreement that the employee will not use their personal vehicle for employer business. While employer liability for automobile accidents caused by their employees probably stops and starts at the parking lot to the office facility; when an employee is not coming to that facility and chooses to travel "for business," a broader spectrum of liability for the employer presents. Of course, some of this begs the questions: why does the work-at-home employee need to leave home for work anyway?

To the extent there are employer owned equipment and materials that are entrusted to the employee, the employee must agree to keep them safe and not permit others (presumably family) to use them. With respect to, for example, a company owned computer, such restriction will tie into issues of confidentiality discussed later. Provisions should also be made for the return of the company owned equipment and materials at the end of the employment and employer's access during the employment to the equipment and materials.

It is generally presumed that the remote worker has a designated office area, separate and apart from the activities of the rest of his family. While this ideal may be seriously unrealistic, some measures of precaution do need to be taken to ensure that the work area is safe and secure in order to ensure an accident-free environment and one where confidentiality of business records can be maintained. An employer may reserve for themselves a right to inspect the remote work area. While it is unlikely that an employer will "rent" the space for its employee in its employee's own home, some employers will reimburse the expense of phone and high-speed internet. Generally, those expenses are left to the employee, and it is highly unlikely that if an employee chooses to use his personal equipment that the employer will cover those costs as well.

The remote work area must also be secure so that the employer's confidential information remains protected. If Grandma and the kids can wander into the remote working area, switch on the company laptop, and review customer's sales records, there is a problem with security. If, on the other hand, a lock is installed on the study door, the computer is password protected, and the employee actually uses the lock and the password when out of the remote working environment, worries of confidentiality are considerably less. It is not uncommon, in evaluating whether information is subject to trade secret protection, to evaluate the efforts that were undertaken to maintain secrecy. In the first scenario above, it is easy to imagine statutory trade secret protection slipping away from the employer because of an outright failure to treat the information as confidential.

The work area should be safe to avoid any issues arising out of injury to the employee. As the remote working site has now become the place of employee's business, he may suffer a "work related injury" or worker's compensation-able injury in the employee's own home! While an employer can control physical circumstances easily in its own offices, it has virtually no control (absent that granted to it in a remote working agreement) over the physical circumstances in a remote employee's environs.

(continued page 14)

Care must also be taken to ensure that the employer does not create any liability with third parties for itself due to employee's conduct within the remote working environment. The remote employee should be forbidden from having co-employees, customers or vendors visit the remote location. The employee may have individual concerns about related liability as the employee's home insurance policy may not cover the problematic business activities. Obviously, issues of professionalism also dictate not inviting business relations into one's home. And let's not forget that the setting of a home could create a nightmarish possibility in the context of claims of sexual harassment. The setting and the lack of any likely witnesses to rebut the harassment would create a precarious setting for sexual harassment liability and claims.

In the rare instance, working at home may be regulated by local or municipal ordinance. Some municipalities may strictly forbid business activities in a residential setting. In all likelihood, the remote activity would never be identified, much less prosecuted, but it is likely the employer would shift any responsibility on this issue to the employee, by requiring the employee to investigate and confirm that there are no local or municipal ordinances that restrict or forbid the remote work.

Remote workers should be especially careful on the issue of state income tax. Generally, one pays state income tax to the state of residence. A tax rate can swing markedly from state to state and a worker may be able to select a location with lower tax rates. Each state has its own tax code that will affect tax liability for remote workers and remote workers will need to involve their tax professionals and their employers to make sure that appropriate taxes are paid. The possibility even exists that a remote worker could be taxed in two states: both the state of the remote working location and the state of the company office. Generally, credit amounts are offered, but may not be a one-to-one credit. Employees should seek tax advise early and often.

Employees with remote working agreements should carefully review such documents to ensure their understanding of and compliance with the agreement. Based on the experience of this practitioner, employers would do well to institute more careful remote working policies, including the execution of appropriate written agreements. If ignored and undocumented, the simple circumstance of "working from home" can create a myriad of problems for the employee and/or the employer.

A Bison

By: Attorney Elizabeth Ellis

A bison, an “American Buffalo” has been on the loose in southwest McHenry and western Lake counties since September. “Tyson” as she has been media-dubbed, has caused quite the commotion. She appears to have recently inspired an awakening of bovine affection. The wild west pages of the Cary-Grove Facebook page are full of platitudes in her honor, inspiring painting, song, and a Christmas ornament or two. Jokes about bison burgers aside, the pesky fact that Tyson’s owners’ would appreciate their property returned is nothing other than an aside in the public’s fantasy of the Old West. Tyson is on her walkabout and her adventures currently include taking-up residence in local conservation district prairies in the area and no one seems to mind. The public, in fact, is cheering her on in her quest to reclaim what was rightfully hers. Calls for her capture were few and far between; even the owners haven’t garnered much press time. People can’t help but cheer for the underdog, the law be damned.

Young bison sell for a few thousand dollars. The relative lack of concern for a neighbor’s financial loss is of note, even with general recognition that the animal belongs to *someone*. To the public, Tyson’s relative freedom strikes a chord. Over the last 24 months, every aspect of society has been challenged. Pandemic restrictions, school closings, public closings, political tension, public violence, courtroom drama, supply chain woes, inflation, school shootings, racism, sickness, and death; everyone is screaming for peace, normalcy, and a sense of freedom. The world is hurting, as it often does, but as we round the corner into 2022, the pressures on society feel perhaps heavier than in years past. The public is not yearning for law and order, they are yearning to break free from the weight of the past two years.

Those of us in the legal profession are often looked to, when folks are feeling generous with assumptions, as upholders of the law. In our day-to-day practice, however, we are called on more often to lighten the load of our clients. It is a humbling endeavor, given the tools of our trade. As legal practitioners we cannot cure disease, guarantee safety, or put a stop to political fighting. We can only advise, advocate, and decide within the context of the laws our society has handed us. As a society, as constrained as we may all feel at times, our collective freedoms are enormous. We have run the natural inhabitants off our prairie lands away and can welcome them home. We can recognize needs in our society and meet them. And although we cannot solve every problem with which we are presented, we can acknowledge our collective humanity and work with empathy and understanding that we are all in need of a little better “everything” right now.

Is it “right” that Tyson is allowed to roam free? Should more be done to return her to her owners? It’s a question no one seems to really want to answer though she is, of course, property and her owners are entitled to keep her. According the Lake County Sheriff’s Office, the owners are hoping to track her when the snow falls and bring her home. As a legal professional I must acknowledge it’s entirely correct and proper that she be returned, but as her neighbor on this land, I can’t help but hope she runs free.

Need a Mediator in McHenry County?
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Hon. Margaret Mullen, ret.

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MCBA OUTREACH COMMITTEE UPDATE

The McHenry County Bar Association's outreach committee and new Chair, LIllian G. Gonzalez, were busy this holiday season shopping, wrapping and delivering presents for high school students in need and senior citizens residing at the Hearthstone Manor Retirement Community.

High School students in need:

Over 75 items of clothing were purchased, wrapped and delivered to high school students needing warm clothes for the winter. McHenry County Bar Members - without your donations this would not have been possible! Your generosity is greatly appreciated!!! Thank you!

Hearthstone Manor Retirement Community:

Woodstock Rotary Christmas Clearing House provided our committee with funds to shop for 30 residents of the Hearthstone Manor Retirement Community. These items were shopped for, wrapped and delivered the week before Christmas. I am told there was much happiness on Christmas morning while the seniors were opening their gifts.

Once again everyone - thank you and Happy New Year!

We are always looking for volunteers to join the outreach committee. Should you be interested please contact Lillian G. Gonzalez at lilliangonzalez.glo@gmail.com or Noel at mchenrycountybar@gmail.com. **Many hands make light work!**

LAW DAY 2022 SCHEDULE OF EVENTS

March 13, 2022—Middle School Essay Contest deadline

April 5-23, 2022—Elementary School Visits

April 22, 2022—High School Law Day Program at MCC

May 6, 2022—Law Day Ceremony

MCBA ANNUAL HOLIDAY PARTY

Trees shimmer with light

Festive glow brings warmth to heart

Toes remain frozen

Second District Appellate Decision Digest

Quarter 3, 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.

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Criminal Law

People v. Rosalez, 2021 IL App (2d) 200086

County: Kane

Date Filed: 9/15/2021

Facts: In 2009, Defendant was charged with first degree murder. In 2017, Defendant, represented by counsel, filed a postconviction petition. Presented with the petition was an affidavit from another individual who attested that, in the midst of a gang-related shooting, he, rather than the Defendant, committed the fatal shooting.

Immediately after the incident, the group dropped Defendant at his house. Affiant told everyone in the car that, if questioned about the incident, they were to identify Defendant as the shooter. He repeated these instructions later. Another affiant signed two affidavits, one hand-written and one typed and signed, containing substantively similar information.

The State moved to dismiss the petition, which the trial court granted. The court determined that only a small portion of the information contained in the affidavits was newly discovered, specifically, the statement from the affiant as to conspiring to blame the defendant for the shooting. The remaining information was already known or reasonably discoverable at the time of trial.

Issues on Appeal: Whether the Defendant made a substantial showing of actual innocence based upon newly discovered evidence.

Holding: Reversed; Remanded.

Analysis: For a freestanding claim of actual innocence to survive the second stage, the petition and supporting documents must make a substantial showing that the evidence supporting actual innocence is (1) newly discovered, (2) material and not merely cumulative, and (3) of a conclusive character. Newly discovered means that the evidence was not available at trial and could not have been discovered earlier through the exercise of due diligence.

When a petition alleges recantation of an earlier identification, it meets the requirement of presenting newly discovered evidence only if the defendant did not have evidence available at the time of trial to demonstrate that the witness was lying. In this matter, Defendant's knowledge that there was another shooter is not *per se* fatal to a claim of actual innocence. Since the affiant was unavailable for trial and no amount of diligence could have forced the affiant to testify at trial, Defendant showed the evidence was newly discovered.

As to the final prong of conclusiveness, the new evidence is of a conclusive character if, when considered alongside the trial evidence, a trier of fact would probably reach a different result. The question is whether the evidence supporting the postconviction petition places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt. In this case, it did. The affiant's statements are consistent with the evidence at trial.

The court rejected the State's position that a defendant who is convicted as the principal/shooter cannot make an actual innocence claim by showing that another person shot the victim, notwithstanding that the defendant might have been prosecuted under a theory of accountability. Every defendant has a constitutional right to defend against the theory of guilt upon which he was actually convicted.

Administrative Law & Proceedings

Chaudhary v. Dep't of Human Services, 2021 IL App (2d) 200364

County: Du Page

Date Filed: 9/16/2021

Facts: Chaudhary came to the United States from Pakistan in 2007 or 2008. On August 7, 2018, DHS sent Chaudhary a notice of overpayment for $21,821.00 in SNAP benefits. The parties disputed and the Administrative Law Judge (ALJ) heard the appeal.

The ALJ required Chaudhary to prove error by a preponderance of the evidence. The ALJ found that Chaudhary failed to report household income because, although she and her former spouse were divorced at the time, they were still living together and, as such, were obligated to each report income. Based on Secretary of State records indicating that the individuals were still operating a company together out of their home (an apartment complex), a response by the USPS verification request indicating that both parties lived at the address, and vehicle records indicating that both parties lived at the address, the ALJ concluded that Chaudhary had been overpaid in benefits because her partner had received SNAP benefits in a different case when they were required to be in the case together, and that Chaudhary had not reported the income.

The Secretary's charge of overpayment was deemed proper. Chaudhary then sought review in the circuit court. After reversal of the decision, by the trial court, Defendants timely appealed.

Issues on Appeal: Whether the Secretary properly placed the burden of proof at the administrative hearing on Chaudhary to prove that DHS's overpayment determination was wrong. Whether the Secretary's decision upholding the determination was against the manifest weight of the evidence.

Holding: Affirmed.

Analysis: An administrative agency's findings and conclusions on questions of fact are considered *prima facie* true and correct, and will only be reversed if those findings are against the manifest weight of the evidence.

As to the issue of the burden, the burden should have been on DHS to establish SNAP overpayment by a preponderance of the evidence. While the Illinois Administrative Code is silent about allocating the burden of proof in an appeal from a SNAP overpayment determination, the default rule is that the plaintiff bears the burden of proof in an administrative proceeding. DHS was the plaintiff in this matter.

DHS initiated the proceeding to determine if there was an overpayment. Furthermore, consistent with this case's posture, DHS never designated Chaudhary as the plaintiff in its overpayment proceedings. The ALJ referred to her as appellant, and the Secretary's order designated her as the appellant in the caption and throughout the disposition. As such, the burden was improperly placed upon the "defendant" in this matter.

Nevertheless, the proceedings were inconsistent with the purported allocation of the burden of proof to Chaudhary. DHS presented its evidence first, and Chaudhary was given opportunity to cross- examine. Chaudhary presented nothing in her case. Such a proceeding was consistent with DHS having the burden of proof, not Chaudhary, as the party with the burden would have to present at least some evidence at the hearing to meet its burden. The appellate court then reviewed whether the Secretary's decision was against the manifest weight of the evidence.

A "SNAP household" or "SNAP unit" is defined generally as any of the following: (1) an individual living alone, (2) an individual living with others but who customarily purchases food and prepare meals for home consumption separate from others, or (3) a group of individuals who live together and customarily purchase food and prepare meals together or who are otherwise required to qualify for SNAP as a household or unit. It is undisputed that Chaudhary was divorced from her former partner during the overpayment period. The evidence that the Secretary relied on in reaching her decision was largely from outside the overpayment period. Furthermore, while the evidence showed that the former partner lived at the address, it could not be established in which unit they resided. What is more, the Secretary gave scarcely any consideration in her written decision to Chaudhary's evidence submitted following the appeal hearing. The appellate court thus affirmed the reversal of the judgment by the trial court.

Attorney & Client

People v. Diaz, 2021 IL App (2d) 191040

County: Kane

Date Filed: 9/30/2021

Facts: In October 2008, Defendant was charged with several offenses related to a shooting that arose during an drug robbery including murder, robbery, and unlawful possession of a controlled substance. In 2012, Defendant agreed to plead guilty to first degree murder. At the guilty plea proceedings, where defendant had a Spanish interpreter's assistance, the State recited the plea agreement the parties had reached. In doing so, the State asserted: "[D]efendant would be sentenced to serve 23 years in the Illinois Department of Corrections plus 15 years mandatory add on for a total of 38 years in the Illinois Department of Corrections." Both Defendant and his counsel concurred with the statement. After hearing a factual basis for the plea, the trial court accepted the negotiated plea, finding it knowingly and voluntarily made.

Defendant then, via a letter timely sent, sought to withdraw the guilty plea, citing coercion by their attorney. The trial court appointed an attorney to represent the Defendant in the motion. The trial court held a hearing, but ultimately denied the postplea motion. On appeal, the appellate court reversed.

On remand, the same attorney was appointed, but Defendant filed a *pro se* motion to withdraw guilty plea. Appointed counsel adopted the motion to withdraw but made no amendments thereto. The trial court held a second hearing, but denied Defendant's motion.

Issues on Appeal: Whether, by filing a facially valid certificate pursuant to Supreme Court Rule 604(d), but not amending the original motion to withdraw the guilty plea, the Defendant's counsel was ineffective.

Holding: Affirmed.

Analysis: At the outset, there was no dispute that the Defendant filed the proper motion. Rule 604(d) requires that postplea counsel file a certificate with the trial court affirming certain actions were taken. If a certificate is facially valid, the cause will only be remanded if the record refutes the averments in the certificate. In addition, a facially valid certificate cannot be rebutted solely by a defendant's spurious claim of ill-advisement by their counsel. Here, the record does not refute the certificate. The transcript from the guilty plea hearing reflects Defendant, whose plea the trial court found was knowing and voluntary, was properly admonished.

Rojo v. Tunick, 2021 IL App (2d) 200191

County: Du Page

Date Filed: 9/29/2021

Facts: Plaintiff retained Defendant to represent him in a criminal case. Defendant withdrew as Plaintiff's counsel, and the case eventually went to a jury trial, resulting in Plaintiff's conviction. Plaintiff objected to the withdrawal at hearing. The parties discussed whether, if Defendant withdrew, Plaintiff was entitled to any type of refund. The Defendant did not issue any refund, although the motion to withdraw as counsel was allowed.

After trial and conviction, Plaintiff filed a complaint against Defendant for legal malpractice. The trial court dismissed the complaint under sections 2-615 and 2-619(a)(5) of the Code of Civil Procedure, but gave no reason as to the dismissal. Defendant timely appealed.

Issues on Appeal: Whether dismissal of the complaint was proper.

Holding: Affirmed in Part, Reversed in Part.

Analysis: The bases for Defendant's section 2-615 motion were that Plaintiff did not allege either (1) a breach of duty that was a proximate cause of injury to Plaintiff or (2) that Plaintiff was actually innocent of the charges in the criminal case. Plaintiff alleged that (1) Defendant's representation was deficient and that this led to Plaintiff's conviction and (2) Defendant owed Plaintiff compensation for withdrawing from the case prematurely, refusing to refund fees paid, and forcing plaintiff to pay for new counsel.

The absence of an actual-innocence allegation barred the claim that Defendant's deficient performance led to Plaintiff's conviction but not the claim seeking reimbursement of fees. That claim, unlike the deficient-performance claim, did not blame defendant for plaintiff's conviction.

As to case under section 2-619, Defendant alleged that the statute of limitations of two years had run. Defendant would be correct if the cause of action for legal malpractice accrued when Defendant withdrew from the criminal case and, at that time, breached his fiduciary duty to the Plaintiff. The record, however, did not reflect that Defendant refused to give Plaintiff a refund upon withdrawing. The cause of action, therefore, accrued at some point after the withdrawal. Specifically, the cause of action for legal malpractice does not accrue until the client discovers or should discover the facts establishing the elements of his cause of action. Because the record did not indicate that the Defendant proved at what time the action accrued (their burden because of their motion being based upon an "affirmative matter"), the dismissal was improper.

Civil Rights

Hobby Lobby Stores, Inc. v. Sommerville, 2021 IL App (2d) 190362

County: Illinois Human Rights Commission

Date Filed: 8/13/2021

Facts: Respondent worked for Petitioner for several years. Respondent was designated male at birth. Respondent began transitioning from male to female and, in 2009, disclosed her female gender to some staff employed by Petitioner. She used her female name and appeared in feminine dress and makeup. She legally changed her name in 2010. Respondent formally informed Petitioner of her transition and intent to use the women's bathroom at the store. The store refused, demanding that Respondent produce "legal authority" requiring it to allow her to use the women's bathroom. Petitioner, despite knowledge of the Act, enforced its policy, ordering employees to report Respondent if she tried to use the women's restroom. Respondent was given a written warning, and subsequently faced further harassment by Petitioner.

Petitioner filed an action with the Illinois Human Rights Commission, who found in her favor and awarded damages of $220,000 for emotional distress and attorneys' fees.

Issues on Appeal: Whether the Commission misinterpreted and misapplied the Act.

Holding: Affirmed.

Analysis: The Human Rights Act reflects the public policy of the State of Illinois that individuals should be free from discrimination because of their sex or sexual orientation in connection with employment. It is a violation for any employer to segregate or discipline an employee based upon the foregoing, and that, in places of public accommodation, to deny or refuse to another the full and equal enjoyment of the facilities. "Sex" is the status of being male or female. "Sexual orientation" encompasses several aspects, including gender-related identity.

There was no real dispute that, in this case, Petitioner barred Respondent from using the women's bathroom solely because she is a transgender woman. Petitioner's conduct thus fell squarely within the definition of unlawful discrimination under the Act, as it treated Respondent differently from all other women who work or shop at its store.

Given the interrelationship between "sex" and gender identity in Illinois law, the record established that Respondent's sex is unquestionably female. She had undergone years of effort and expense to transition, and she appeared to be and comported herself as a woman. Of even greater significance, her status of being female has been recognized not only by the governments of this state and the nation but also by Petitioner itself, all of which have changed their records to acknowledge her female sex. The denial of her access to the women's restroom was discrimination.

Constitutional Law

Fazekas v. City of DeKalb, 2021 IL App (2d) 200692

County: De Kalb

Date Filed: 9/29/2021

Facts: Before the City enacted an ordinance that amended the City Code, the city clerk could appoint one or more deputy clerks. The City then changed the position of clerk to part time and created the office of executive assistant, a position chosen by the city manager. The ordinance retained the office of city clerk but provided that the duties of the executive assistant duplicate those of the city clerk. The ordinance also removed the provision for the city clerk's appointment of deputy clerks.

Plaintiff filed under declaratory judgment and sought injunction against the effects of the ordinance. After hearing on a TRO, the injunction was denied. The City then filed a motion to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure. The trial court granted the motion, finding that the creation of the executive assistant office was authorized by law. The court also found that the ordinance did not frustrate or prevent the electorate, including plaintiff, from voting for city clerk. Plaintiff timely appealed.

Issues on Appeal: Whether the complaint was improperly dismissed as the Plaintiff stated a cause of action.

Holding: Affirmed.

Analysis: A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint, based on defects that are apparent on its face. The office of city clerk is an elected position under the City Code. Statutes are presumed constitutional.

In this case, the City was granted the authority to choose its form of governance and how officers were selected. It was also empowered to create offices. Reviewing courts will not interfere with a legislative judgment merely because they would reach a different conclusion or question the wisdom of the decision. As such, this decision was not be disturbed.

Corporations and Business Organizations

John Doe Corp. 1 v. Huizenga Managers Fund, LLC, 2021 IL App (2d) 200513

County: Du Page

Date Filed: 8/16/2021

Facts: The trial court vacated and dissolved a temporary restraining order and entered a request for sanctions and damages, pending discovery and an evidentiary hearing "to determine the scope, against whom, the amount, and nature of sanctions and/or damages."

In subsequent discovery, Plaintiffs raised various objections, including that certain information was protected by the attorney-client privilege. Plaintiffs then filed a combined notice of tender of judgment, motion to dismiss the remaining proceedings, and motion to stay discovery pending a ruling on the motion to dismiss. Plaintiffs asserted that the case had no remaining purpose other than defendants' generation of attorney fees and that Plaintiffs had tendered to Defendant the entire amount sought in damages in their last affidavit. Their contention was that the issues were, therefore, moot.

The trial court denied Plaintiffs' motion to dismiss and stay discovery. Discovery continued with the same objections to attorney-client privilege. Defendants filed a motion to pierce the attorney-client privilege and related privileges, based upon the crime-fraud exception and the lack of privilege for defunct entities. The court eventually ordered the documents to be turned over.

Plaintiffs refused and was found in contempt. The court refused to find that the contempt was made in good faith, and therefore instituted a fine of $1,000 per day until the documents were turned over, with the fine stayed until the issue was resolved by the appellate court.

Issues on Appeal: Whether the attorney-client privilege survives a corporation's dissolution.

Holding: Remanded; Affirmed in Part, Reversed in Part.

Analysis: Whether a dissolved corporation may assert the attorney-client privilege has not yet been addressed in Illinois, but some other state and federal courts have examined this subject. The attorney-client privilege is available to both individuals and corporations. It also extends beyond the death of an individual. This is not true, however, for a corporation. Typically, a dissolved corporation has no assets or directors left, making the protections of the attorney-client privilege less meaningful. Limiting the duration of the attorney-client privilege to the life of a corporation is consistent with the principle that the privilege is to be construed narrowly because it withholds relevant information from the judicial process.

In this case, Defendant admits that Plaintiffs have been dissolved and have no officers, directors, or employees, with this lawsuit comprising their only remaining function. Therefore, the attorney-client privilege no longer exists for them.

However, sanctioning counsel when the issues involving sanctionable activity predating their involvement does not comport with existing law. In addition, this was an issue of first impression and, therefore, a finding of friendly contempt would have been more appropriate. A person may expose themselves to a contempt finding as an appropriate method to test the validity of a court order, and refusing to comply with a court's order may constitute a good faith effort to have a reviewing court interpret an issue without direct precedent.

Criminal Law

People v. O'Brien, 2021 IL App (2d) 210060

County: De Kalb

Date Filed: 9/29/2021

Facts: Defendant was indicted on four counts, all of which arose from an altercation between Defendant and his 80-year-old stepfather. The court found Defendant guilty on all counts, entered judgments of conviction on only count I (aggravated battery) and count II (aggravated domestic battery), and sentenced Defendant to concurrent five-year prison terms. In a prior appeal, the appellate court determined that under the one-act, one-crime rule, the convictions merged because they were based on the same physical act.

On remand, Defendant, who was then serving his term of mandatory supervised release, argued that aggravated battery was the more serious offense because it was nonprobationable. The State, however, argued that aggravated domestic battery was the more serious offense because, although it was probationable, it carried a longer term of mandatory supervised release. The trial court agreed with the State and found that aggravated domestic battery was the more serious offense. The court vacated the aggravated battery conviction.

Issues on Appeal: Whether aggravated battery is a more serious crime than aggravated domestic battery. Also, which takes precedence in determining the seriousness of the offenses: the minimum possible sentence or the maximum possible sentence,

Holding: Affirmed.

Analysis: Under the one-act, one-crime rule, a defendant may not be convicted of multiple offenses that arise from a single physical act. When a defendant has been convicted of such offenses, the less serious offense must be vacated.

Here, both aggravated battery and aggravated domestic battery require proof that the defendant knowingly caused great bodily harm. An important distinction between the two offenses, however, is that a person convicted of aggravated battery is potentially only required to serve 50% of his sentence. Conversely, a person convicted of aggravated domestic battery is required to serve at least 85% of his sentence due to the truth-in-sentencing statute.

Common sense dictates that the maximum possible sentence controls because it subjects a defendant to a longer period in custody. Furthermore, the legislative intent regards aggravated domestic battery as a more serious offense than aggravated battery. Thus, the trial court correctly vacated the aggravated battery charge.

People v. Trejo, 2021 IL App (2d) 190424

County: Lake

Date Filed: 9/27/2021

Facts: Defendant was found guilty of first degree murder. During jury selection, the State used peremptory challenges against four prospective jurors. When the State made its fourth challenge, defense counsel objected that the State made three challenges (including that one) against Hispanic prospective jurors. The trial court inquired as to whether Defendant was making a *Batson* challenge based upon ethnicity or minority. The court asked the State, "Is there an ethnicity or background or race neutral answer that you have to your challenge?" The State noted that the prospective juror had indicated that he had been the victim of domestic violence by his ex-wife. The trial court indicated that it accepted the State's explanation, and it overruled the objection to the peremptory challenge.

Defendant then mentioned the previous Hispanic jurors against whom the State had already used preemptory challenges. The trial court refused to "go back" for those challenges. The court also stated that, in order for there to be a proper *Batson* challenge, there must be a pattern of discrimination.

After conviction, Defendant moved for a new trial. The trial court denied the motion, finding that three Hispanic individuals seated on the jury and concluding that a systematic method of excusing Hispanic jurors was "preposterous."

Issues on Appeal: Whether the trial court conducted a proper *Batson* hearing.

Holding: Remanded.

Analysis: In this case, it did not appear that the trial court properly considered whether Defendant had established a *prima facie* case.

Rather, the court focused improperly on the single factor of whether there was a pattern of discrimination. However, proof of a *Batson* violation does not invariably depend on the existence of a pattern of discrimination.

Furthermore, the trial court allowed the peremptory challenge without giving Defendant the opportunity to rebut the State's explanation. This was outside the procedural norm.

In view of the procedural irregularities in the conduct of the *Batson* proceedings, a remand for a proper *Batson* hearing was necessary.

People v. Singer, 2021 IL App (2d) 200314

County: Kane

Date Filed: 9/2/2021

Facts: Following a bench trial, Defendant was convicted of disorderly conduct. In ruling on Defendant's posttrial motion, the trial court found that the evidence against Defendant was insufficient. The court nevertheless granted a new trial, giving the State leave to amend its complaint. Defendant filed a motion to dismiss the charge on double-jeopardy grounds, which the court denied. The court rescinded its order granting a new trial, and sentenced defendant to 12 months' court supervision.

Issues on Appeal: Whether the Defendant was placed in double jeopardy.

Holding: Reversed.

Analysis: While the State had argued that it was not bound by the timeline pleaded in the complaint, the court found the matter of the timeline was "still an open issue." This could mean only that whether the State had proved the date on which the offense occurred was still an "open issue" in the court's mind. By granting a new trial, the court gave the State a second opportunity to present evidence as to the date of the offense and several elements of the offense. Common sense dictated that additional evidence would be unnecessary at the second trial if the court were convinced that the evidence at the first trial was sufficient beyond a reasonable doubt. Therefore, because the evidence presented was ruled insufficient, the granting of a new trial violated Defendant's right against double jeopardy.

Despite the fact that the State proved its case beyond a reasonable doubt, and, therefore, the court's acquittal was erroneous, an erroneous acquittal is still an acquittal. As such, the court abused its discretion when it denied defendant's motion to dismiss on double-jeopardy grounds.

People v. Williman, 2021 IL App (2d) 200188

County: Kane

Date Filed: 8/31/2021

Facts: Defendant was accused of failing to report child abuse. Upon a motion for a directed finding, the trial court noted that, viewing the evidence in the light most favorable to the State, the evidence showed that there was some report of some inappropriate behavior. In addition, the trial court noted that a mandated reporter did not have discretion in determining whether to call DCFS. The trial court found Defendant guilty.

Issues on Appeal: Whether the mandatory reporting statute gives any discretion to mandated reporters as to whether to file a report with DCFS regarding alleged abuse or neglect.

Holding: Reversed; Remanded.

Analysis: The record shows that the trial court treated the failure to report as a strict liability offense. Yet, the statute states that a mandated reporter "having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child shall immediately report or cause a report to be made to DCFS." The term "reasonable" implies that some exercise of judgment should occur. Because the trial court considered the inappropriate standard, the conviction was reversed.

People v. Petrie, 2021 IL App (2d) 190213

County: De Kalb

Date Filed: 8/25/2021

Facts: Defendant was arrested and charged with aggravated battery of a child. Defendant filed a motion for substitution of judge (SOJ). The parties appeared, but no mention of a substitution occurred. This same pattern occurred at many subsequent appearances. However, Judge Stuckert presided over multiple proceedings in the case after the point that the motion had been filed. This included presiding over the entry of a jury waiver.

During trial, the proofs came down to a battle of expert witnesses, both doctors. Defense counsel, on cross-examination of the State's expert, did not fully cross-examine the expert on the issue of the brain injuries sustained. The trial court believed the testimony of the State's expert over that of the defense, and therefore concluded that the Defendant was the only individual who could have caused the injuries sustained.

Issues on Appeal: Whether a jury waiver entered by a judge who is subject to a pending motion for SOJ is valid. Whether Defendant received effective assistance of counsel.

Holding: Reversed; Remanded

Analysis: As to the SOJ issue, it is the responsibility of the party filing a motion to bring it to the trial court's attention and have it resolved. Here, by not resolving the motion or bringing it before the court, Defendant abandoned the motion. As Defendant was present at several subsequent court dates, and had every opportunity to object to the judge presiding, even at the point of her jury waiver, Defendant has acquiesced to those actions.

As to the issue of counsel's performance, there is a strong presumption that counsel's actions or inactions, such as the decision not to present certain arguments, or not to call witnesses, including the client herself, constitute sound strategy. To prove otherwise, a party must show that counsel's conduct was "so irrational and unreasonable that no reasonably effective defense attorney, facing like circumstances, would pursue such a strategy."

In this case, although defense counsel realized the significance of certain facts, counsel did not demonstrate the understanding of brain injuries in infants so as to frame a cogent alternate explanation of facts. Furthermore, counsel did not advance the theory of alternative explanation through their own witness.

Counsel also missed the opportunity to point out findings that contradicted the expert's own explanations. Therefore, counsel provided deficient performance. And because the trial court relied explicitly on the State's expert, Defendant was prejudiced.

People v. Kastman, 2021 IL App (2d) 210158

County: Lake

Date Filed: 8/19/2021

Facts: Defendant was committed as a sexually dangerous person. After his conditional release, Defendant sought an injunction compelling the director of IDOC to pay, in part, for Defendant's sex offender treatment and housing.

The Department of Corrections filed a motion to dismiss arguing that, even though the Department was Defendant's guardian, they were not financially responsible for him. Further, the Department argued that it had no continuing duty to provide for the Defendant's housing and treatment as Defendant was no longer in an institutional setting.

After hearing arguments, the trial court granted the motion, and ordered the Department to pay part of the Defendant's expenses. This appeal followed.

Issues on Appeal: Whether the Department was, under the Sexually Dangerous Persons Act, required to contribute financially to the Defendant.

Holding: Affirmed.

Analysis: Case law establishes that a sexually dangerous person remains under the jurisdiction of the court which initially committed him until that court expressly finds that he is not sexually dangerous. This distinction clarifies that the Director's guardianship extends to conditionally released sexually dangerous persons and is not limited solely to those in the Department's custody.

The Department appears to have accepted that Defendant is disabled and cannot work, but if Defendant were unable to attend sex offender treatment because he could not afford it, or could not find suitable housing, or lacked electricity to charge his SCRAM bracelet, then he will have blamelessly violated the conditions of his release. His inability to pay for his day-to-day expenses should not result in his (potentially indefinite) recommitment to custody. If the Director wishes not to be responsible for Defendant in such a way, he should make every effort to see that Defendant is not merely released but has truly recovered. Therefore, in this case, the Department is the correct source of payment for the Defendant's essential expenses.

People v. McDaniel, 2021 IL App (2d) 190496

County: Winnebago

Date Filed: 8/17/2021

Facts: Defendant was charged with several counts of sexual abuse of a minor. The victim's testimony was admitted for the purpose of Defendant's propensity and identification. Defense counsel objected to the giving of a jury instruction relating to propensity. The court found omitting a reference to propensity would not give the jury a full, accurate description of the law because it had allowed the other-crimes evidence on the issues of both identification and propensity. The jury returned a verdict of guilty.

Issues on Appeal: Whether the jury was properly instructed that it could consider the other crimes evidence on the issues of Defendant's identity and propensity to commit sex offenses against children.

Holding: Affirmed.

Analysis: Under Section 115-7.3 of the criminal code, in prosecutions for certain delineated sex offenses, including those charged here, evidence that the defendant has committed a sex offense may be admitted for any purpose, including to establish his or her propensity to commit sex offenses.

The trial court did not err in its instructions. Given that the court determined the evidence was admissible to show both defendant's identity and his propensity, a ruling Defendant did not challenge on appeal, omitting from the instruction the reference to propensity would have rendered the instruction incomplete as to the law applicable to the evidence.

People v. Lamonica, 2021 IL App (2d) 200136

County: Lake

Date Filed: 7/26/2021

Facts: The State charged Defendant with aggravated criminal sexual assault. The State put forth three allegations of "force." These were (1) that Defendant placed his fingers inside the victim, (2) that Defendant forced the victim to have sex "doggy style," and (3) that the Defendant forced the victim to have sex in the missionary position. After much testimony proffered by both sides, the jury returned a guilty verdict.

Issues on Appeal: Whether the evidence presented at trial was sufficient to prove guilt beyond a reasonable doubt.

Holding: Reversed.

Analysis: To prove Defendant guilty of aggravated criminal sexual assault, the State was required to prove that Defendant committed an act of sexual penetration by use of force and caused bodily harm to the victim. Because Defendant raised sufficient evidence of consent, the State also was required to prove that the victim did not consent.

The evidence showed the alleged victim invited Defendant to her apartment to have sex. She could not recall how it started, who initiated it, or how her clothes came off. The act of putting his fingers inside her, and stopping when she pushed him back, does not indicate that there was force or threat.

As to the second allegation, there was no evidence that defendant used physical force or the threat of physical force to penetrate the victim. She does not recall how she was "flipped over" and although she told Defendant that it hurt, she did not tell him no or to stop. The alleged victim was also able to move out of the position by crawling away.

As to the third allegation, the alleged victim testified she believed there was a threat as she saw a vein popping in Defendant's neck.

However, there was no testimony of actual threat, and the subjective interpretation of Defendant's neck vein as a threat was insufficient to qualify as an actual threat. The statute requires a reasonable belief that the accused will act upon a threat. Here, there is no evidence of a threat or that any threat perceived was reasonable. The victim was not overcome by superior strength, size, physical restraint, or confinement. Defendant's conviction was reversed.

People v. Ward, 2021 IL App (2d) 190243

County: Kane

Date Filed: 7/7/2021

Facts: At defendant's trial for domestic battery, the State called four witnesses. Testimony by the witnesses was that, following a vehicle accident involving Defendant's child, Defendant arrived on scene and was angry. Defendant's wife also appeared on the scene. Police officers arrived and Defendant began to be rude towards them. Defendant's wife, attempting to "diffuse" the situation, stepped between Defendant and the officer. Defendant then pushed his wife to the side and continued to argue with the police. The testifying witness was then asked, "how did that make you feel?" to which she responded as being "surprised" and "startled." She never told others that she was "startled" or "shocked" but that she may have used the word "surprised."

Defendant's wife testified about the incident, and, when asked whether defendant shoved her "out of the way," she responded "No," and said that the contact was similar to passing someone in a hallway. Defendant's wife also testified that she stumbled, and Defendant grabbed her to keep her from falling.

At trial, at the close of the State's evidence, defendant made a motion for a directed verdict. This motion was denied. The jury returned a verdict of guilty.

Issues on Appeal: Whether the trial court abused its discretion in denying Defendant's motion for a directed verdict.

Holding: Reversed.

Analysis: A motion for directed verdict asks whether the State's evidence could support a verdict of guilty beyond a reasonable doubt, not whether the evidence does in fact support the verdict. In this matter, while it is true that the victim is not required to explicitly testify that he or she felt insulted or provoked, the State is required to prove that the physical contact insulted or provoked the victim, not some third party.

Here, Defendant's wife, the charged victim, testified that she was not offended by the particular touch. While testimony of offense by the victim is not required, there must be evidence presented from which a trier of fact could logically infer that the victim was insulted or provoked.

Viewing the evidence in the light most favorable to the State, Defendant's wife's testimony showed that Defendant was involved in a heated argument when she intervened. Defendant told her to "shut up" and pushed her to the side. Defendant held on to her arm to keep her from falling while he continued to argue with the officer. This point was unimpeached.

The most damaging testimony for Defendant was that the arresting officer informed the court that they had, on countless occasions, handled calls with the Defendant. The evidence showed that the officer, in some way, was biased against the Defendant. Because the evidence overwhelmingly favored Defendant such that a jury could not have concluded otherwise, the trial court erred in denying Defendant's motion for a directed verdict.

Justice Zenoff concurred in part and dissented in part, disagreeing with the majority's finding that the State's proof must include evidence of the victim's emotional reaction to the contact.

Custody

Hernandez Camberos v. Palacios, 2021 IL App (2d) 210078

County: Winnebago

Date Filed: 7/12/2021

Facts: Mother, located in the State of Washington, gave birth to a child who was later established as the child of the Petitioner. Petitioner filed in Winnebago County seeking to establish temporary and permanent parental responsibilities as to the child. The court dismissed the petition due to lack of jurisdiction.

The Washington court entered an order establishing a parenting plan. Petitioner then filed in the Washington court to modify the parenting plan. Prior to that being resolved, Petitioner then filed in Winnebago County seeking to modify custody. The Winnebago court dismissed the petition, explaining that the Washington, not Illinois, was the child's home state and, therefore, Washington should resolve the disputes regarding parentage.

Following hearing, the Washington court dismissed the petition to modify, finding that Utah, where Mother and child had moved to, was now the child's home state.

Petitioner then filed another petition in Winnebago County to modify child custody, asserting that the child had resided in Illinois for a period of time. Mother received a TRO in Utah and filed a motion to dismiss in Winnebago County. The Winnebago court dismissed the petition for lack of jurisdiction.

Issues on Appeal: Whether Illinois courts had jurisdiction over the petition to modify child custody.

Holding: Affirmed.

Analysis: Washington had original jurisdiction over the matter as that was the child's home state. Later, because mother and child had moved to the Utah, Utah became the home state and thus had "continuous" and "exclusive" jurisdiction over the matter.

As Utah is the child's home state, the only other basis on which Illinois could make an initial custody determination is if the child lived six consecutive months in Illinois prior to Petitioner filing his custody petition. In determining if that threshold is met, the court will not apply a "strict physical-presence test" but will, instead, consider the totality of the circumstances.

Here, the only reason that Petitioner had custody of the child for six consecutive months was because he refused to comply with court orders obligating him to return the child to the mother. This unjustifiable and reprehensible conduct was not a basis on which to invoke the Winnebago court's jurisdiction.

Divorce

In re Marriage of Sinha, 2021 IL App (2d) 191129

County: Du Page

Date Filed: 9/30/2021

Facts: The parties married in September 2004. In December 2015, Petitioner filed her petition for dissolution of marriage. The trial court found that it could not determine the date on which the marriage was irretrievably broken. As such, the court determined that "the parties marriage suffered an irreconcilable breakdown" on the date petitioner filed her petition for dissolution of marriage. The court denied the petitioner's dissipation claims in large part but found that Respondent committed dissipation of $19,068.

The trial court also imputed income of $125,000 upon the Respondent, even though he was unemployed, because of its finding that Respondent was voluntarily unemployed, attempted to evade support obligations, and failed to reasonably take advantage of an employment opportunity.

After review of income and work status, the Court issued support orders. The court later issued a rule to show cause against respondent for failure to, inter alia, obey the court's orders requiring him to pay child support and medical and daycare expenses. Respondent timely appeals.

Issues on Appeal: Whether the trial court computed the right date for analyzing dissipation. Whether the trial court properly imputed income upon the Respondent.

Holding: Affirmed in Part, Reversed in Part, Remanded.

Analysis: Dissipation is to be calculated from the time the parties' marriage begins to undergo an irreconcilable breakdown, not from a date after which it is irreconcilably broken. The spouse alleging dissipation must make a preliminary showing before the burden shifts to the other spouse to refute the accusations.

The trial court, in this matter, failed to apply the correct standard by stating the time of dissipation occurred when the parties' marriage had completed the process of breaking down. This finding was against the manifest weight of the evidence. Respondent provided ample testimony that the marriage began to irretrievably break down at an earlier date. Petitioner also testified that the marriage broke down years earlier.

As to the issue of imputed income, the amount of income imputed to a payor spouse must be based on his earning capacity. The record reflects, here, no evidence that the respondent had an annual earning potential of $125,000. The only evidence presented was that respondent had gross sales of at least $500,000 in 2015 from the parties' online businesses. Instead of relying on evidence regarding respondent's qualifications, past earnings, or current job opportunities in the area, the court relied on speculation. Thus, the court abused its discretion by imputing an income of $125,000 a year to Respondent.

In re: Marriage of Wehr, 2021 IL App (2d) 200726

County: Du Page

Date Filed: 9/29/2021

Facts: The parties married in 2000. Respondent was a public employee with pension rights. At a time before and during the marriage, he was a municipal employee and contributed to the Illinois Municipal Retirement Fund (IMRF). However, he was not a municipal employee contributing to the fund for the full duration of the marriage.

The parties appeared for a prove up hearing, at which time the trial court entered judgment for dissolution and a Qualified Illinois Domestic Relations Order. The QILDRO calculation resulted in a payment of just over $800 per month awarded to Petitioner from the pension benefits.

Respondent moved to amend or vacate the calculation of the order "based upon a mutual mistake of fact." Respondent produced a letter from IMRF indicating the period of his participation, and that, under the new calculation that should have been a part of the dissolution order, would result in an award of just over $400 per month to the Petitioner.

At hearing, the trial court disagreed with the new calculation because of the definition of the word "participant." Therefore, Respondent was a "plan participant" even when he was not employed and contributing to the plan. Thus the calculation should use the entire length of the parties' marriage, rather than just the period that Respondent was employed.

Issues on Appeal: Whether an individual who has benefits under the Illinois Municipal Retirement Fund, even when they are not employed or contributed to the plan, is still a "participant" in the plan.

Holding: Reversed; Remanded.

Analysis: The issue turns primarily on the meaning of the Marital Settlement Agreement language using "the number of months married while a plan participant." Other language in the agreement makes clear that Petitioner was to receive 50% of the marital portion of Respondent's accrued benefit under the plan. However, the calculation entered by the QILDRO went against this agreement.

Here, Respondent was not a "participating employee" when he was not employed by a municipality and not contributing to the plan. Nor was he a municipal "employee" at all during those times. When not employed by the municipality, he was not "participating" in "current service." He ceased making contributions and earning service credit. He did not receive a refund of contributions but instead was eligible for a pension annuity, as an "annuitant" instead of as a "participant." Yet, his eligibility for a pension annuity did not equate to his "taking part in" the plan or "having a share in the plan" when he was not earning service credit or making contributions. Those "shares," or "service credits," were already vested from prior service. Respondent was not adding to them or otherwise causing his interest in the plan to grow when he was not employed. As such, the finding that he was a "participant" for purposes of the support calculation was in error.

In re Marriage of Andres, 2021 IL App (2d) 191146

County: Du Page

Date Filed: 8/13/2021

Facts: Pursuant to a marital settlement agreement, Respondent paid support to Petitioner for a period of years. Respondent filed a petition to terminate maintenance asserting that Petitioner had begun cohabitating with another individual. He also sought to modify child support. Respondent also stopped making payments for maintenance and child support provided by the order, but did continue to make the base payments. The trial court eventually found him in contempt.

The circuit court heard testimony at the modification hearing and found that the Petitioner began her cohabitation on the date that the Respondent filed the underlying petition in this proceeding. The trial court also discontinued maintenance as Petitioner was not cohabitating with another individual.

When seeking to avoid attorneys fees, Respondent argues that the trial court erred in finding that the Engagement Agreement was a valid contract, because the minimum billing increments violate the Illinois Marriage and Dissolution of Marriage Act.

Issues on Appeal: (1) Whether the trial court's determination that Petitioner was cohabitating with another individual on a specific date was in error. (2) Whether the trial court erred in holding the Respondent in contempt for violating its prior orders to continue to pay maintenance during the pendency of the trial, when the trial court ultimately decided to terminate maintenance. (3) Whether the trial court applied the right standard in determining past-due child support (4)Whether the minimum billing increment used by trial counsel was reasonable.

Holding: Affirmed.

Analysis: The trial court's decision regarding when the cohabitation began is supported by the record and would not be disturbed unless the finding was against the manifest weight of the evidence. In this case, they were not. Just because a party disagrees with the determination of the court does not give them excuse not to follow an order. Therefore, the contempt finding was proper.

As to the issue of the correct statutory framework regarding child support, the question is whether the motion to enforce addressing child support owed constituted a new cause of action or whether it was a post-judgment action. Petitioner's motion sought only to enforce the terms in the already existing order and, therefore, it was not a new proceeding under modifications made to the Act. The trial court thus applied the appropriate factors in deciding support.

As to the issue of attorney's fees, the Act allows the trial court in a dissolution action to order any party to pay a reasonable amount for his or her or the other party's costs and attorney fees. This includes attorneys seeking fees against their own clients.

In determining whether the fees charged are reasonable, the trial court should consider (1) the number of hours the attorney spent, (2) the skill and standing of the attorneys, (3) the difficulty of the issues, (4) the amount and importance of the subject matter in the field of family law, (5) the degree of responsibility involved in the management of the case, (6) the usual and customary charge in the community, and (7) the benefits to the client.

An attorney has a fair amount of discretion regarding how they bill their clients and what they bill for. Evidence that an attorney exercised restraint and discretion in his or her billing speaks to the reasonableness of the fees, but it is not necessarily required. As such, the trial court did not abuse its discretion in finding that the attorney's fees were reasonable.

In re Estate of Weber, 2021 IL App (2d) 200354

County: Du Page

Date Filed: 7/7/2021

Facts: Petitioner's representation of Client began in 2015 when they filed a petition for dissolution of marriage against Client's spouse. Client's spouse alleged that Client's caregiver was conducting undue influence. The caregiver sought the service of Client's firm, the Petitioner. However, the trial court later found this was an improper conflict and the trial court, therefore, disgorged $16,313 in fees, and caused the Petitioner to forfeit $125,472 in owed fees.

Issues on Appeal: Whether the trial court properly disgorged and forfeited the fees sought by Petitioner.

Holding: Affirmed in Part, Reversed in Part, Remanded.

Analysis: The Supreme Court has exclusive authority to prescribe rules governing attorney conduct and to discipline attorneys who violate those rules, which it has exercised by adopting the Ethical Rules, appointing the Attorney Registration and Disciplinary Commission (ARDC), and creating a procedural framework of enforcement.

While the Rules are mandatory, they simply provide a framework for the ethical practice of law. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The proceedings on discipline go through the ARDC, not through the trial court.

In this matter, though, the Marriage and Dissolution of Marriage Act allows a trial court to enter an order for fees when it finds they are reasonable and necessary. The proceedings in the trial court here were ill-suited to a proper hearing regarding a conflict of interest.

While the trial court referenced the Act and the Rules, its decision subverted both the Act and the spirit and intent of the Rules. It is a decision that no reasonable person can agree with. Such an arbitrary decision is clearly an abuse of discretion that requires the reversal.

Evidence

People v. Golden, 2021 IL App (2d) 200207

County: De Kalb

Date Filed: 9/30/2021

Facts: Following a bench trial, Defendant was convicted of domestic battery. Prior to trial, the State filed a motion *in limine* seeking to admit certain hearsay statements pursuant to the doctrine of forfeiture by wrongdoing. The State alleged that Defendant had induced a witness to avoid service and refuse to appear in the trial, and referenced numerous calls to the witness, who was incarcerated in the county jail. The State also indicated proof of inability to serve at several addresses thought to be associated with the witness. The court granted the State's motion.

The case proceeded to bench trial, at which the State presented the disputed hearsay statements. The court returned a verdict of guilty.

Issues on Appeal: Whether the trial court erred in granting the State's forfeiture motion when the court made no specific findings regarding the elements or, alternatively, whether its findings were against the manifest weight of the evidence.

Holding: Affirmed.

Analysis: The doctrine of forfeiture provides that a hearsay statement is admissible against a party when that party has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. To allow the exception, two elements must be satisfied: (1) that the party against whom the statement is offered has engaged or acquiesced in wrongdoing, and (2) that such wrongdoing was intended to, and did, procure the unavailability of the declarant as a witness.

Here, Defendant argued that the trial court erred in applying the doctrine of forfeiture by wrongdoing, because it did not make specific findings regarding the elements the State needed to prove. However, there is no requirement that a trial court recite specific findings into the record, as it is presumed to know and properly apply the law. Further, the trial court's judgment may be affirmed on any basis supported by the record. Here, the record showed that the trial court had evidence before it to support its position, namely evidence showing Defendant had contacted the witness and ultimately convinced them not to attend any proceedings.

Mandamus

People ex rel. *Jaros v. Illinois Court of Claims*, 2021 IL App (2d) 200397

County: Du Page

Date Filed: 7/23/2021

Facts: In his petition before the trial court, Plaintiff sought a writ of *mandamus* to compel the Court of Claims to expunge certain orders from a court record before the ARDC based upon the ARDC not being an agency of the State of Illinois under the Administrative Procedures Act. Plaintiff sought a writ of prohibition forbidding the Court of Claims from keeping the order on file and from determining that the ARDC is not a commission of the State of Illinois within the meaning of the Administrative Procedures Act.

Defendant filed a motion to dismiss. After hearing argument, the circuit court granted the Court of Claims' motion to dismiss.

Issues on Appeal: Whether, according to the pleadings, Plaintiff would be entitled to a writ of *mandamus.*

Holding: Affirmed.

Analysis: The Court of Claims is not a "court" within the meaning of article VI of the Illinois Constitution of 1970; it is instead a fact-finding body of limited jurisdiction to hear claims against the State. Therefore, decisions of the Court of Claims are generally not subject to external judicial review. This is allowable under very narrow exceptions, none of which applied in this case.

Furthermore, even assuming that *mandamus* relief is available against the Court of Claims generally, *mandamus* cannot be used to direct a public official or body to reach a particular decision or to exercise its discretion in a particular manner, even if the judgment or discretion has been erroneously exercised. Therefore, the Plaintiff is not entitled to the relief sought, and dismissal of the complaint was proper.

Mental Health

In re Commitment of Hans T., 2021 IL App (2d) 180387

County: Du Page

Date Filed: 8/4/2021

Facts: Personnel from Central DuPage Hospital filed documents seeking involuntary outpatient admission of Respondent. The State filed a motion for the care and custody of Respondent and for community placement alleging a diagnosis of mental illness. The State sought to place Respondent in a residential facility upon discharge from the hospital, as recommended by his treatment team, and have Respondent's mother named as his custodian.

Respondent's attorney moved for a directed finding, arguing that, although the petition was for 180 days of outpatient treatment, the State and the hospital were requesting to place respondent in a secure facility on an inpatient basis for 180 days. The trial court denied the motion.

The trial court ultimately granted the petition. Respondent filed a motion to reconsider, arguing that no reasonable definition of outpatient treatment entailed a person being physically confined to a hospital against his will. This was denied.

Issues on Appeal: Whether Respondent's rights were violated when the trial court granted the petition, ordering the Respondent to 180 days in in-patient care with medications.

Holding: Reversed.

Analysis: A person is subject to involuntary admission, whether on an inpatient or outpatient basis, only if the State proves the statutory criteria by clear and convincing evidence. The involuntary admission that the trial court ordered here falls within the definition of admission on an "inpatient" basis, because Respondent was a patient in a hospital who received lodging, food, and treatment. Conversely, the involuntary admission that the trial court ordered does not fall within the definition of admission on an "outpatient" basis, because that definition excludes overnight hospitalization.

The trial court ordered that Respondent be involuntarily admitted on an inpatient basis, even though the staff at Central DuPage Hospital filed a petition for involuntary outpatient admission. The trial court's amended order stated that, in addition to being in the care and custody of his mother, Respondent was ordered to reside at facility as a community placement, unless otherwise decided by his mother, who could place him in another "intermediate care facility."

Even if the trial court's order was not strictly a community placement because his mother had the authority to remove respondent from the inpatient facility, the placement that the trial court ordered nevertheless violated the Mental Health Code because, as discussed, it required respondent's involuntary inpatient admission based on a petition and the criteria for involuntary outpatient admission.

Mortgages

Freedom Mortgage Corp. v. Olivera, 2021 IL App (2d) 190462

County: Kane

Date Filed: 8/5/2021

Facts: Plaintiff filed an action to foreclose a mortgage against the Defendants. Defendants moved to dismiss, arguing that Plaintiff failed to comply with HUD regulations. Supporting affidavits were filed that indicated Plaintiff never met with or advised them of their eligibility for various FHA or HUD loss-mitigation programs to cure their alleged default; they were never contacted by, nor received a request or communication from Plaintiff to arrange a face-to-face meeting regarding the mortgage; never met with Plaintiff at their home or any other location; and never refused to meet with Plaintiff.

Plaintiff responded by stating it made reasonable efforts to comply by sending a certified letter, which was delivered and signed; that it sent a representative and gave information to the Defendant about arranging a face-to-face meeting, and other actions.

Issues on Appeal: Whether dismissal of the complaint with prejudice was proper.

Holding: Affirmed in Part, Reversed in Part, Remanded.

Analysis: The parties do not dispute that, as Defendants' mortgage was insured by HUD, it was subject to specific servicing requirements. In Illinois, the failure to comply with HUD's mortgage servicing requirements is a complete defense to a mortgage foreclosure action. Illinois law required full compliance, not just substantial compliance, with regulations.

As to the issue of reasonable attempts at compliance, this was not present as Plaintiff did not even attempt to comply with the regulations until five years after the default date alleged in the complaint. To excuse that noncompliance on the basis that, several years after the noncompliance, certain defenses might no longer be available to Defendants would encourage abuse of the regulations by lenders, in the hopes that, with enough time, they would be excused from requirements or defenses might vanish.

Parent and Child

In re: Ja. P., 2021 IL App (2d) 210257

County: Winnebago

Date Filed: 9/29/2021

Facts: Respondent is the mother of three children. Respondent missed several permanency hearings, including a dispositional hearing on November 15, 2019. At that hearing, over objection, the Court entered a dispositional order. The trial court found that Respondent was unwilling to care for, train, or discipline the children and was dispositionally unfit. On April 15, 2021, the court held a best-interests hearing and determined that it was in the best interests of the minors to terminate parental rights.

Issues on Appeal: Whether the appellate court lacked jurisdiction to hear the appeal.

Holding: Appeal Dismissed.

Analysis: Dispositional orders are regarded as final and appealable as of right, and appealing a dispositional order is the proper vehicle for challenging an adjudicatory finding of abuse or neglect. In this case, the time to complain of alleged errors in the neglect proceedings passed long before Respondent filed her notice of appeal, as she failed to file a notice of appeal within 30 days of the November 15, 2019, dispositional order.

While a notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal along with any orders that constitute steps in the procedural progression towards such judgments, it is clear that adjudicatory and dispositional orders are not within the procedural progression of orders terminating parental rights.

Penalties

Williams v. Bruscato, 2021 IL App (2d) 190971

County: Winnebago

Date Filed: 7/21/2021

Facts: Plaintiff sent a notice, pursuant to FOIA, to Defendant seeking documents. Defendant responded that they were denying the request as disclosure was exempt under IL FOIA. The Plaintiff filed suit, alleging that the withholding of documents was willful and against FOIA. The trial court granted Defendant's motion for summary judgment. On initial appeal, the appellate court reversed the trial court's judgment in favor of Defendant regarding a particular count. The cause was remanded and Defendant turned over the documents.

Plaintiff then filed petitions for attorney fees and statutory penalties. After hearing, the trial court found that Defendant did not act in bad faith and it denied Plaintiff's petition for statutory penalties, but the court granted Plaintiff's petition for attorney fees.

Issues on Appeal: Whether the trial court was required to assess a statutory penalty for noncompliance with FOIA.

Holding: Affirmed.

Analysis: Willful and intentional failure to comply with FOIA is not sanctionable unless that failure was itself in bad faith. Accordingly, based upon the plain meaning of these terms, to warrant the imposition of a civil penalty under section 11(j), the public body not only must have intentionally failed to comply with the FOIA but must have done so deliberately, by design, and with a dishonest purpose.

Plaintiff's petition for fees and penalties contained nothing indicating that the Defendant's denial of their request was by design dishonest. The trial court's finding was that there was no bad faith. As such, Plaintiff was not entitled to a statutory penalty.

Ivanhoe Shoppes, LLC v. Bauspies, 2021 IL App (2d) 200582

County: Lake

Date Filed: 9/2/2021

Facts: Plaintiff was the landlord, and Defendants were tenants, under a written commercial lease. Beginning in August 2018, Defendants started paying less than full rent. By August 2019, defendants owed back rent and late fees. Plaintiff sent Defendants several written notices of the rent owed. Plaintiff later filed a motion to accelerate the rent due under the lease. Defendants filed a counterclaim for damages incurred from being constructively evicted from the premises.

When a distress warrant was executed, Plaintiff changed the locks because some equipment was too large and heavy to move. Defendants were never given a key, although they were given access. Because the facility was closed, Defendants violated the franchise agreement with Snap. As a result, Defendants paid Snap liquidated damages. Defendants were also required to refund membership fees to club members.

In its ruling, the trial court found that the Plaintiff, by changing the locks, exceeded their authority under the distress warrant. The court also found that Plaintiff constructively evicted Defendants and that the constructive eviction relieved Defendants of any obligation to pay rent, including accelerated rent. The court further found that Defendants owed Plaintiff, minus credit for their security deposit, back rent. The court, finding for Defendants on their counterclaim liquidated damages paid to Snap and refunds to club members, further reduced the judgment to Plaintiff. Lastly, the court ordered a sheriff's sale of the equipment to satisfy the judgment.

Issues on Appeal: Whether the Plaintiffs had constructively evicted the Defendants/ Whether the Plaintiff was entitled to acceleration of rents.

Holding: Affirmed.

Analysis: A landlord's distress remedy arises under section 9-301 of the Eviction Act, which allowed a landlord to seize for rent any personal property of the tenant found in the tenant's county of residence. Illinois law grants a landlord a common-law lien on a tenant's personal property for the nonpayment of rent, and that lien is perfected by the filing of a distress warrant and an inventory with the clerk of the court.

Plaintiff perfected a lien by filing the warrant and inventory. However, Plaintiff went further and changed the locks, thereby denying Defendants access to the real property. That action exceeded Plaintiff's authority under the distress warrant provisions of the Act. Plaintiff was entitled to seize the exercise equipment and take reasonable steps to prevent Defendants from moving or selling the equipment. However, changing the locks was not a proper remedy. Indeed, it was a form of unlawful self-help.

More importantly, Plaintiff's self-help resulted in a constructive eviction. Constructive eviction is a serious and substantial act done by a landlord with the intent to deprive the tenant of the enjoyment of the premises. Here, by changing the locks, Plaintiff deprived Defendants of their enjoyment and use of the premises to conduct their fitness business. Thus, Plaintiff constructively evicted Defendants.

Furthermore, by constructively evicting the Defendant, Plaintiff lost the right to enforce their lease's acceleration clause. A constructive eviction relieves a tenant of the obligation to pay rent. Because Defendants no longer could access the premises, they were no longer obligated to pay future rent, including any accelerated rent.

Second District Civil Decision Digest

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