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Critical changes in child related domestic relations law

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On January 1, 2016, multiple legislative amendments to the Illinois Marriage and Dissolution of Marriage Act take effect. The practical result of each modification will vary. Some provisions will require a significant change in required courtroom procedure. Others codify existing case law and practice. This article examines several critical changes in light of courtroom and litigation practice. The analysis addresses the following: (1) Court ordered 604(b) reports; (2) removal actions; (3) custody and visitation proceedings; as well as (4) parenting plans.

I. Formerly 604(b) reports, now 604.1(b) reports

Courts immediately will need to address the issue of admitting into evidence reports of appointed professional opinion witnesses. Under the former 750 ILCS 5/604(b), and the new 750 ILCS 5/604.1(b), Courts appoint professionals to aid in determining the best interests of minor children. The law regarding these reports is changing.

Previously, the Court was able to admit 604(b) reports into evidence over a party's objection without the report's author testifying. The Court then examined the document, weighed the information contained therein, and entered appropriate orders. These orders were often temporary pending further hearing or trial. The new statue, 604.1(b), has changed this procedure.

Section 604.1(b) requires the professional authoring the report to submit it under seal to the Court and counsel. It specifically prohibits the Court from examining the report prior to its admission into evidence. Significantly, 604.1(b) changes the rules regarding admission. It prohibits the Court from admitting the report into evidence over a party's objection without the author testifying. Upon objection, the professional is to testify as the Court's witness subject to cross-examination. Only then can the Court rule on the issue of whether the report is admissible. If admitted, the Court can then consider the content of the 604.1(b) report.

For example, the Court could appoint a mental health professional for advice regarding the best interest of a minor child regarding parenting time. Upon appointment, the professional would interview the parties, the minor child or children, any treating mental health professionals, school personnel, and other collateral witnesses. The professional also may conduct psychological testing, observe the interaction between the child and each parent, scrutinize documents, and/or examine photographs. He or she would then create a report that includes detailed facts, analyses, and recommendations. Previously, the Court was able to admit the report into evidence over either party's objection. Generally, a party who did not agree with the professional's recommendation would object to the report's admission. Under the new 604.1(b), upon objection, the report cannot be admitted into evidence without the professional coming to Court and testifying subject to cross-examination. Although not specifically stated, the professional should be qualified as an expert, and render any opinions to a reasonable degree of certainty in his or her filed of expertise.

Additionally, Section 604.1(b) dictates certain required content. The reports are to contain the following: (1) a description of the procedures employed during the evaluation; (2) a report of the data collected; (3) all test results; (4) any conclusions of the professional relating to the allocation of parental responsibilities; (4) any recommendations concerning the allocation of parental responsibility or the child's relocation; and (6) an explanation of any limitations in the evaluation or any reservations of the professional regarding the resulting recommendations.

II. Formerly Removal, Now Relocation

Another significant change to the

law is the issue of removal. The new sections, 750 ILCS 5/600(g) and 750 ILCS 5/609.2, refer to "removal," as "relocation." Previously, for the statute to apply, a parent would attempt to change a minor child's residence to a location outside of Illinois. Unless the parents agreed to "remove" the child from Illinois, he or she would was required to obtain leave of court. No Court permission, however, was required if the change of residence was within Illinois state boundaries. Moving a minor child anywhere within Illinois was not regulated, and Courts were left with addressing the resulting custody and visitation issues. For example, without leave of Court, a parent was able to take the minor child over 300 miles away from Chicago to Carbondale. Of course, this would be problematic in maintaining the relationship between the child and the parent who remained in Chicago. The new statute, however, addresses this issue. It examines a minor child's change of residence in terms of miles, and not solely in regard to Illinois state boundaries. Specific protocols apply when a parent seeks to change a child's residence to a distance greater than 25 miles away from his or her current residence.

Section 609.2, provides that a parent who has parenting time greater than or equal to that of the other parent, may change the residence of the minor child subject to certain restrictions. These restrictions apply under the following circumstances: (1) The child's primary residence is located in Cook, DuPage, Kane, Lake, McHenry, or Will counties, and one parent desires to change the child's residence to more than 25 miles away while remaining in Illinois; (2) the child's primary residence is located in any other Illinois county, and the parent desires to change the child's residence to more than 50 miles away while remaining in Illinois; or (3) the change in the child's primary residence is outside of Illinois, and more than 25 miles from the child's current Illinois residence. Under any of these circumstances, the new relocation statute will apply.

Notice

Under the above circumstance, the parent seeking relocation must provide written notice to the other parent regarding the proposed change in residence. He or she is to file a copy of the notice with the Clerk of the Court. The notice is to be provided 60 days prior to the relocation, unless it is impracticable. The notice must set forth the following: (1) the intended date of the relocation; (2) the address of the parent's intended new residence, if known; and (3) the length of time that the relocation will last.

Agreement

If the other parent agrees and signs the notice, and the relocating parent files it with the Clerk of the Court, the relocation can take place. The Court, however, will still need to address modification of the parenting plan or allocation judgment. This includes the issues of parenting time and important decision making which often will be affected by the relocation. To accommodate an agreed relocation, Section 609.2 requires the Court to approve agreed upon modifications to the parenting plan or allocation judgment. Court approval, however, is subject to one important condition. The proposed modification must be in the minor child's best interest. The Court does not have to accept modifications that are detrimental to a child.

No Agreement

If the parties disagree to relocation and any modification of the parenting plan or allocation judgment, the party seeking relocation must file a petition seeking permission to relocate. The Court then is to consider the following: (1) the circumstances and reasons for the intended relocation; (2) the reasons, if any, as to why a parent is objecting to the intended relocation; (3) the history and quality of each parent's relationship with the child, and specifically the issue of whether a parent has substantially failed or refused to exercise the parental responsibilities allocated to him or her under the parenting plan or allocation judgment; (4) the educational opportunities for the child at the existing location and at the proposed new location; (5) the presence or absence of extended family at the proposed new location; (6) the anticipated impact of the relocation on the child; (7) whether the court will be able to fashion a reasonable allocation of parental responsibilities between all parents if the relocation occurs; (8) the wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to the relocation; (9) possible arrangements for the exercise of parental responsibilities appropriate to the parents' resources and circumstances and the developmental level of the child; (10) minimization of the impairment to a parent-child relationship caused by a parent's relocation; and (11) any other relevant factors bearing on the child's best interest.

Home State

Section 609.2 also address jurisdiction in regard to the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA). Section 609.2 provides that when a parent moves a minor child 25 miles or less from the current primary residence to live outside of Illinois, Illinois continues to be the child's "home state." This addresses relocation outside of Illinois under the circumstances when Section 609.2's protections are inapplicable. Court approval for relocation outside of Illinois only is required when the move is greater than 25 miles away from the Illinois primary residence.

Significantly, the UCCJEA generally vests the title of "home state," in the State where a minor child has lived for a period of six (6) months. It will be interesting to see if Illinois' neighboring States agree that Illinois remains a child's "home state" after the minor child has resided in the neighboring State for a six-month period. Section 609.2 does not apply to out-of-state moves that are 25 miles or less from the original primary Illinois residence. In these situations, accordingly, there will be no Court order that expressly retains jurisdiction.

Importantly, residential changes that are more than 25 miles from the original residence and into another State require Court approval. Under these circumstances, Illinois Courts can explicitly provide in their orders that "Illinois retains

jurisdiction."

Additionally, Section 609.2 provides that a subsequent move from the new out-of-state residence that is greater than 25 miles away from the original Illinois primary residence must be in compliance with Section 609.2's protocols.

III. Formerly "Custody," Now "Parental Responsibility; Formerly "Visitation," Now "Parenting Time"

Pursuant to 750 ILCS 5/801, the term "parental responsibility" replaces the term "custody." Likewise, in regard to parents, the term "parenting time," replaces the term "visitation." This, however, is qualified in regard to people other than parents. Grandparents, great-grandparents, sibling, and stepparents have "visitation," and not "parenting time." (750 ILCS 5/602.9). A parent, however, no longer has "visitation" with a child, but has "parenting time" with a child. Although, this often has been the practice, now it is required.

Additionally, the new provisions are to have no effect upon custody and visitation rights that exist prior to January 1, 2016. Of note, 750 ILCS 5/506(b), still provides for the appointment of a child's representative, Guardian *ad litem*, and attorney for the child in proceeding involving "custody." By implication, therefore, "custody," related proceedings still exist. They, however, appear to be limited to issues arising from judgments and orders entered prior to January 1, 2016.

IV. The Parenting Plan

The parenting plan is critical to the new law. It is a written agreement that allocates significant decision making responsibilities and/or parenting time. Subsection 602.10(f) sets forth the contents of said parenting plans. The parties are required to file proposed parenting plans within 120 days of service or filing a petition for allocation of parental responsibilities. For good cause shown, a Court can extend the filing time.

Mediation required

Mediation is required. Section 602.10(c), provides that Courts "shall" order mediation to assist the parents in formulating, modifying, or implementing a parenting plan. This requirement is limited when there is an impediment to mediation. Generally, the accepted impediment to mediation is when domestic violence exists. Some mediators, however, are comfortable and effective even when domestic violence exists. This often is accomplished through the use of the "caucus" or shuttle mediation. In those situations, the parties are kept physically separated.

No plan filed

If no parenting plan is filed, the Court "must" conduct an evidentiary hearing to allocate parental responsibilities.

Agreed plan

The parents may submit an agreed parenting plan. Section 602.10(d) states that the agreed plan is binding upon the Court unless the Court finds the agreement unconscionable based upon the circumstances of the parties and any other relevant evidence. On its own motion, the Court can conduct an evidentiary hearing to determine if the agreed plan is in a child's best interest. If the Court does not approve the agreed parenting plan, it is required to make express findings for its refusal to approve. It would appear that since (1) the Court can only reject an agreed parenting plan if it is unconscionable, and (2) the Court can conduct an evidentiary hearing to determine if the agreed parenting plan is in the child's best interest, then (3) if the plan is not in the child's best interest, it is unconscionable. ■

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