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By Abigail M. Chiesa¹

Introduction:

When a spouse transfers an interest in property to a third party in contemplation of (or during) dissolution of marriage proceedings, a useful tool in protecting a divorcing party's rights is the right to join the recipient as a party to the proceedings. Although the Illinois Marriage and Dissolution of Marriage Act² (IMDMA) contains no specific provision allowing the filing of third party actions to determine divorcing parties' rights in alleged marital or non-marital property held by a third person or entity, neither does it prohibit it.³ Authority to join a third person as a party to dissolution of marriage proceedings exists under section 2-406 of the Illinois Code of Civil Procedure, which provides, in pertinent part, as follows:

If a complete determination of a controversy cannot be had without the presence of other parties, the court may direct them to be brought in. If a person, not a party, has an interest or title which the judgment may affect, the court, on application, shall direct such person to be made a party.⁴

Since section 503 of the IMDMA⁵ provides that the court “shall” assign each spouse’s non-marital property to that spouse, and “shall” divide marital property between the parties, interests of non-parties in alleged marital or non-marital property may be affected by the court’s judgment, thereby triggering the mandatory provisions of section 2-406 requiring the court to make persons whose interest or title may be affected by the judgment a party to the proceeding.

Once a person holding an interest in the alleged marital or non-marital property is joined as a party, the next step is to ensure that the asset at issue remains intact for division by the court. This goal can be accomplished through a temporary restraining order or a preliminary injunction, including a mandatory injunction, all of which are authorized under section 501 of the IMDMA⁶, upon satisfaction of common law requirements for each such remedy.

Despite the advantages outlined below of bringing third parties into dissolution of marriage

proceedings, this tool is not frequently used in practice. In 1980, the First District Appellate Court in *In re Marriage of Peshek*,⁷ noted that the issue of whether the wife's parents, to whom the parties deeded their residence during the marriage, should be joined as parties to the dissolution of marriage proceedings was a question of first impression in Illinois. In *Peshek*, the court stated that previously, Illinois courts had recognized the right to file third party actions in a dissolution proceeding only where an alleged marital asset was held in trust.⁸ In *Peshek*, the wife's parents loaned the parties money to build their home, and when the parties began having marital problems, the home was deeded to the wife's parents. Although the reason for this transfer was unclear, after the transfer the home was placed in trust with the parents as beneficiaries. The appellate court determined that the trial court's denial of the husband's request to join the wife's parents and the bank serving as trustee as third party defendants constituted reversible error. The appellate court further determined that a third party holding marital property should be brought into the dissolution proceedings when it is unclear how the third party came into possession of the marital asset. The validity of the trust and the parties' interest in the marital home should have been ascertained at trial and considered by the trial court in its division of the marital estate and in its support award. It is noteworthy that the trial court in *Peshek* gave no reason for refusing to allow the filing of the third party complaint, but it may have incorrectly believed that it had no jurisdiction over the issue or that administrative convenience dictated that it abdicate its jurisdiction to the chancery division.⁹

Jurisdictional Basis for Joining Third Parties:

The judicial article in the Illinois Constitution of 1970 abolished the distinction between courts of law and equity so that our courts now operate in a unified court system with original jurisdiction of all justiciable matters.¹⁰ The allocation of judicial responsibility to various divisions of the circuit court does not reflect any constitutional barriers to jurisdiction, but rather only administrative convenience.¹¹ Therefore, divisions of the circuit court have equal and concurrent subject matter jurisdiction.

It is clear that a trial court judge in the domestic relations division of the circuit court constitutionally has jurisdiction to hear all justiciable matters and may therefore entertain all issues related to the dissolution of the marriage.¹² Accordingly, permitting a party to file a third party complaint and

conducting a full and complete hearing as to the extent and division of the parties' marital and non-marital assets avoids piecemeal litigation and is consistent with the unified court system.

How to Bring a Third Party Into The Dissolution of Marriage Proceedings:

The first step in bringing a new party into a dissolution of marriage proceeding is to request leave to file a third party complaint pursuant to section 2-406(a) of the Illinois Code of Civil Procedure. That section provides two bases for joining a third party: 1) When a complete determination of the controversy cannot be had without the presence of other parties; and 2) When a third party has an interest or title that the judgment may affect.¹³ When a litigant seeks leave to bring a new party into the proceedings on the basis that a complete determination of the controversy cannot be had without his or her presence, the Court has discretion whether or not to grant the request. However, upon a showing that a person has an interest or title that the judgment may affect, the statute requires the court to join the person as a party.

To demonstrate the necessity for bringing in a third party, the litigant must show that the third party's presence in the suit is required for *any one* of three reasons:

- (1) To protect an interest that the absentee party has in the subject matter of the controversy that would be materially affected by a judgment entered in his absence;
- (2) To reach a decision that will protect the interests of those who are before the court; or
- (3) To enable the court to make a complete determination of the controversy.¹⁴

Often, all three reasons are present in a dissolution proceeding. In *Peshek*, the Appellate Court found that the husband's third party complaint against his in-laws and the bank trustee satisfied all three requirements. First, a judgment entered concerning the marital residence would obviously affect all of the proposed third party defendants because they all held either equitable or legal interests in the property. Second, because support and maintenance awards are based on the parties' respective property holdings, all marital property must be considered to protect the interests of the parties already before the court. Third, section 503 of the IMDMA requires the consideration of all of the parties' marital property for a complete determination of the just proportion of property to be awarded to each party.¹⁵

Once leave to file a third party complaint is granted, an action is commenced against the new

party by the entry of an order naming the person or entity as a party and the filing of an appropriate pleading against the third party, such as a petition for a preliminary injunction. Proper service of process on the new party is required by section 2-406.

Protecting The Interests Of The Third Party:

Both section 2-406 of the Illinois Code of Civil Procedure and Illinois case law make clear that the interests of third parties in property to be divided by the court in dissolution of marriage proceedings are to be determined and protected. When a third party has a valid claim to a marital or non-marital asset, they are a necessary party and must be joined in the dissolution proceeding regardless of whether either party seeks leave to join them. In *In re Marriage of Olbrecht*,¹⁶ the trial court ruled that because it found the parties' former home to be non-marital property, there was no need to determine what if any interest belonged to the husband's aunt. The Appellate Court held this ruling to be erroneous. In *Olbrecht*, the parties' home was owned in joint tenancy by the husband and his aunt. The husband's aunt had paid the down-payment and lived in the home with the parties. Although neither party sought to join the aunt as a party to the dissolution proceeding, the Appellate Court remanded the case to the trial court, holding that the classification and subsequent distribution of the home inevitably affected the aunt's interest in the home, thereby making her a necessary party in a complete determination of the interests of the parties in the home and the third party claim of the aunt.

Protecting The Interests Of The Divorcing Spouse:

The interests of divorcing spouses in marital and non-marital property may also be protected from diminution through joinder of third parties in order to reverse sham transactions, preserve marital assets, and resolve claims against the parties' assets within the dissolution of marriage proceedings.

When a spouse transfers property and/or property rights to another person or entity in contemplation of dissolution of marriage proceedings, the non-transferring spouse is left with three primary options:

- (1) Accept the appropriateness of the transfer and the associated reduction in the value of the marital and/or non-marital estate;

- (2) Present evidence sufficient to prove dissipation by the transferring spouse (i.e. the transfer occurred at a time when the marriage was undergoing an irreconcilable breakdown and was for a purpose unrelated to the marriage), and then request the court to make a dollar-for-dollar adjustment to the marital and/or non-marital estates when dividing the property between the spouses; or
- (3) Seek to join the recipient of the property as a party to the dissolution of marriage proceedings in an effort to recover the property for the benefit of the marital and/or non-marital estate. While section 503 of the IMDMA provides that the court shall consider dissipation when dividing the marital estate,¹⁷ there is no guarantee the court will find a dollar-for-dollar adjustment for the dissipated asset appropriate. This is especially important in cases where your client is already entitled to a significantly greater share of the marital estate, e.g., if the other spouse possesses significant non-marital property or a superior capacity to accumulate assets in the future.

In *In re Marriage of Pahlke*¹⁸ the husband “sold” the marital residence to a female friend without informing his wife and then moved his wife and children into an apartment. The wife subsequently filed a petition for dissolution of marriage naming the female friend as an additional party defendant. The trial court conducted a hearing regarding the alleged fraudulent transfer and received testimony from both the husband and his female friend in order to evaluate whether the husband intended to convey a present interest in the home or to retain complete ownership. The trial court found, and the Appellate Court agreed, that the sale was a sham transaction intended to defraud the wife of her share of the proceeds of the marital residence. The trial court entered an order restoring possession of the home to the wife and children and creating a constructive trust over the home for the benefit of the husband and wife. Although the Appellate Court in *Pahlke* agreed that the sale was a sham, it vacated the portion of the trial court’s order that purported to create a constructive trust over the marital residence on the basis that the trial court’s ability to grant relief available under the IMDMA is governed by the provisions of the Act.¹⁹ Since the IMDMA does not give the court authority to distribute property until after the dissolution of

marriage has been granted, the trial court had no authority to create a constructive trust. However, the Appellate Court held that it was proper for the trial court to issue a preliminary order granting the wife and children possession of the marital home pending the dissolution of marriage, because such an order was a form of temporary relief designed to maintain the status quo pending a full hearing to determine the rights of all parties involved. The holding in *Pahlke* further expounds upon the scope of section 501 of the IMDMA,²⁰ which section grants the court authority to provide injunctive relief proper under the circumstances, as well as appropriate temporary relief, with respect to all parties before the court.

The court may also join persons and entities as parties to dissolution of marriage proceedings in order to preserve the marital assets and the spouses' equity in them. In *In re Marriage of Devick*,²¹ the wife was awarded, as her sole and separate property, 127,616 shares of unrestricted stock in a corporation of which her husband was a director. After the entry of the judgment, the corporation issued restricted shares to the wife, and the wife filed a petition to enforce the judgment, alleging that the corporation was a necessary third-party defendant. The trial court granted the wife's petition and entered an order allowing the corporation to be named as a third-party defendant. The trial court subsequently entered judgment against the corporation, in favor of the wife, in an amount representing the wife's loss caused by the corporation's failure to issue unrestricted stock. The Appellate Court affirmed the trial court's decision to join the corporation, holding that it was a necessary party in order to determine the validity of transfer restrictions placed on the wife's stock awarded to her in the dissolution proceedings. In summary, because the corporation was, in effect, claiming rights to the asset awarded to the wife in the judgment, it was necessary to join the corporation as a party in order to preserve the marital asset and protect the value of the wife's equity in the stock.

A common example of the court joining a party to protect the spouses' assets from third party claims relates to the claims of mortgagees. In *In re Marriage of Schweih*,²² the trial court permitted the wife to join the mortgagee and then granted her petition to enjoin the mortgagee from initiating foreclosure proceedings relative to the marital home in any proceeding other than the dissolution proceeding. By allowing joinder of the mortgage company, the court preserved the marital asset, and the

parties' equity in it, while also providing a forum for the mortgagee to seek relief. By so doing, the court avoided piecemeal litigation and was able to deal with the property in a manner most equitable to all parties concerned.

Conclusion:

When a non-party holds an interest in or maintains a claim against a marital and/or non-marital asset, a practitioner should always consider the benefit of joining the person or entity as a party to the proceedings. Such a joinder not only can add dollars to the marital estate, but it also protects the parties against future litigation.

Bio Of Abigail Chiesa:

Abigail M. Chiesa is an associate with the firm of Schiller, DuCanto and Fleck. She concentrates her practice in the area of family law. She received her B.A. with Honors from Southwestern University in 1990 and her J.D. from George Washington University Law School in 1993. Prior to joining Schiller, DuCanto and Fleck, she served in the U.S. Army JAG Corps where she practiced family law and tried numerous cases as a prosecutor and defense counsel.

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² 750 ILCS 5/101 *et. seq.*

³ *In re Marriage of Devick*, 315 Ill.App.3d 908, 735 N.E.2d 153 (2nd Dist. 2000).

⁴ 735 ILCS 5/2-406(a).

⁵ 750 ILCS 5/503(d) (2000).

⁶ 750 ILCS 5/501(a)

⁷ 89 Ill.App.3d 959, 412 N.E.2d 698 (1st Dist. 1980).

⁸ See, *Demos v. Demos*, 8 Ill.App.3d 906, 290 N.E.2d 304 (1972); *England v. England*, 223 Ill.App. 549 (1922).

⁹ *Peshek*, 89 Ill.App.3d at 966.

¹⁰ *Ill. Const.* 1970, art. VI, Sec. 9.

¹¹ *In re Marriage of Isaacs*, 260 Ill.App.3d 423, 427, 632 N.E.2d 228 (1994).

¹² *Peshek*, 89 Ill.App.3d at 967.

¹³ 735 ILCS 5/2-406(a).

¹⁴ *Lerner v. Zipperman*, 69 Ill.App.3d 620, 623, 387 N.E.2d 946 (1979).

¹⁵ *Peshek*, 89 Ill.App.3d at 966.

¹⁶ 232 Ill.App.3d 358, 597 N.E.2d 635 (1st Dist. 1992).

¹⁷ 750 ILCS 5/503(d)(2) (2000).

¹⁸ 120 Ill.App.3d 1009, 458 N.E.2d 1141 (1st Dist. 1983).

¹⁹ *Id.* at 1016.

²⁰ 750 ILCS 5/501

²¹ *Devick*, 315 Ill.App.3d at 914.

²² 222 Ill.App.3d 887, 584 N.E.2d 472 (1st Dist. 1991).