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Into Post-Decree Dissolution of Marriage Proceedings

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**The Possible Interjection Of The New Spouse's Finances
Into Post-Decree Dissolution Of Marriage Proceedings**

BY: TIMOTHY M. DAW¹

In domestic relations practice, an issue that occasionally arises is the implication of remarriage and the interplay of the new spouse's finances on the obligations imposed upon the parent as a result of the dissolution of his or her prior marriage. Under the current law, the "first family" has priority in that the existence of the "second family" does not lessen obligations as a result of the break-up of the "first family". The common sense theory, especially as it relates to child support and related obligations, is that the children of the first marriage should not be penalized because of the post dissolution marriage choices of a parent. This issue most frequently occurs when one of the parents remarries and the obligations which result because of the second family impinges upon the ability of that parent to fulfill his or her obligations to the first family. One of the principals of section 505 of the Illinois Marriage and Dissolution of Marriage Act ("IMDMA")² is that children have the right to live in the lifestyle (where practicable) that they would have lived had their parents marriage not dissolved. Had the parent's marriage not dissolved, the obligations of the second family would not exist so that the Court should not consider these obligations. Further, in determining net income for purposes of setting guideline child support, section 505 of the IMDMA only allows the court to deduct prior obligations of support paid by court order.³

A less frequent scenario that also occurs is a remarriage that improves a parent's financial resources in light of his or her new spouse's financial resources. If the theories were applied consistently, had the first marriage not been dissolved, the children of the first marriage would not have benefited from any improved financial position of one of their parents as a result of his or her remarriage.

¹ The author had the benefit of having immediate access to, and obtaining the insight and perspective of his new partner, former Appellate Court Justice Michael R. Galasso. In addition, one of his other partners, Sarane C. Siewerth, provided invaluable assistance in the defense of an attempt to use *Drysch* to involve a client's new spouse in a child support dispute. Much of the research and thought process is a result of collaboration with Ms. Siewerth. Any errors of interpretation, grammatical errors or misguided thoughts are that of the authors. All credit, however, must be shared with Michael R. Galasso and Sarane C. Siewerth.

² 750 ILCS 5/505(a)(2)(c)

³ 750 ILCS 5/505(a)(3)(g)

While the above principals have historically been uniformly applied, in a recent Second District Appellate decision, *In Re The Marriage of Drysch*⁴, the second district may have drastically departed from the other districts on these issues. As a result of certain implications and possible extensions of the logic of this opinion, it is likely the Illinois Supreme Court will eventually be called upon to resolve the conflict that may exist between the Appellate Court decisions in the different districts concerning statutory interpretation involving different obligations. Further, the implications to the domestic relations practitioner and the Court's will be to increase and further complicate what is already a litigious arena.

Pre-Drysch Child Support Decisions

Prior to the enactment of the IMDMA, the interplay between the new spouse's financial resources and the payment of child support was addressed in *Robin v. Robin*⁵. In *Robin*, the recipient of child support ("payee") filed a petition seeking an increase in child support from her former spouse ("payor"). At the time of the initiation of the action, the payee had remarried. In defense of the requested increase, the payor argued that the court should consider the funds received by the payee from her new spouse in determining the payee's ability to support the child. The Appellate Court summarily rejected this proposition holding " . . . the financial status of a divorced parent's current spouse should not be considered in determining the ability of that spouse to fulfill his or her duty to support."⁶

Following the enactment of the IMDMA, sections 505 and 513⁷ have similar enumerated factors for the court to consider in deviating from guideline child support (section 505) or in determining the parents' contributions to college expenses (section 513). Section 505(a)(2)(b) and (e) allows the Court to consider " . . . the financial resources and needs of the custodial parent . . . " and " . . . the financial resources and needs of the non-custodial parent . . . " in determining whether guideline support should be deviated from.

⁴ 314 Ill.App.3d 640, 247 Ill.Dec. 409, 732 N.E.2d 125 (2nd Dist. 2000)

⁵ 45 Ill.App.3d 365, 3 Ill.Dec. 950, 359 N.E.2d 809 (1st Dist. 1977)

⁶ *Id.* 45 Ill.App.3d at , 3 Ill.Dec. at 955, 359 N.E.2d at 814 (*citing: Edwards v. Edwards*, 125 Ill.App.2d 91, 259 N.E.2d 820 (4th Dist. 1970))

⁷ 750 ILCS 5/505 and 510

Section 513(b)(1) allows the Court to consider “. . . the financial resources of both parents . . . ” in apportioning post high school education and related expenses.

In situations involving a payor of child support, the courts have equitably departed from the holding in *Robin*. In the case of *In Re The Marriage of McBride*⁸, the First District of the Illinois Appellate Court addressed the relevancy of the payor’s new spouse’s finances relative to child support. The payor filed a petition to modify his child support obligation after the payee filed a petition for rule to show cause because of the payor’s failure to pay child support. The payor had remarried and his current spouse was earning an income. Citing the *Robin*⁹ case as precedence, the Appellate Court again affirmed that that financial status of the new spouse should not be considered in determining whether the payor has the ability to fulfill his child support obligation.¹⁰ However, the Appellate Court went on to note, through an equitable theory, that the trial court considered the payor’s new spouse’s income in order to determine whether the imposition of the modified child support obligation would endanger the payor’s or his current spouse’s financial circumstances.¹¹ In justifying a seeming departure from the *Robin*¹² decision, the Appellate Court held that the trial court “reached an equitable conclusion” and there was no indication that the trial court had based the child support award “. . . solely on the combined salaries of (the payor) and his present wife.”¹³

The Fourth District of the Illinois Appellate Court thereafter considered the question as to the relevancy of the payor’s new spouse’s finances on at least three (3) occasions. In the case of *In Re The Marriage of Keown*¹⁴, the payor filed a petition to reduce child support. The payor again contested the ability of the trial court to consider her current spouse’s income in determining the child support. The Appellate Court again affirmed that the new spouse’s financial status may not be considered to ascertain the

⁸ 166 Ill.App.3d 504, 116 Ill.Dec. 880, 519 N.E.2d 1095 (1st Dist. 1988)

⁹ 45 Ill.App.3d 365, 3 Ill.Dec. 950, 359 N.E.2d 809 (1st Dist. 1977)

¹⁰ 166 Ill.App.3d 504, ___, 116 Ill.Dec. 880, 885, 519 N.E.2d 1095, 1100 (1st Dist. 1988)

¹¹ *Id.*

¹² 45 Ill.App.3d 365, 3 Ill.Dec. 950, 359 N.E.2d 809 (1st Dist. 1977)

¹³ 166 Ill.App.3d 504, ___, 116 Ill.Dec. 880, 885, 519 N.E.2d 1095, 1100 (1st Dist. 1988)

¹⁴ 225 Ill.App.3d 808, 167 Ill.Dec. 375, 587 N.E.2d 644 (4th Dist. 1992)

payor's ability to fulfill a child support obligation.¹⁵ However, recognizing the logic of the *McBride*¹⁶ decision, the Appellate Court also held that the trial court may consider the new spouse's financial status "...to determine whether the payment of child support would endanger the ability of the support-paying party and that party's current spouse to meet their needs."¹⁷

Pre-Drysch College Expense Decisions

Prior to the decision of *In Re The Marriage of Drysch*¹⁸, the First District of the Illinois Appellate Court decided the case of *Greiman v. Friedman*¹⁹. The *Greiman* decision is instructive in understanding the *Drysch* decision. The *Greiman* decision is the only case law cited to in *Drysch* to justify the result. In *Greiman*, the issue was not child support; rather the issue was college educational expenses. Pursuant to section 513 of the IMDMA, both parents are potential payors with respect to college education expenses. Both parents had remarried in *Greiman*. The former husband contested the level of his contribution to the college expenses of a child of his first marriage in light of his obligations to his second family. In *Greiman*, the Appellate Court held that the trial court should have considered the financial circumstances of the second family in assessing the ability of one of the parent's (a payor) to contribute to the college educational expenses of a child from the first marriage in accordance with section 513.²⁰

After *Greiman*, three²¹ additional decisions cited to this aspect of the *Greiman* case. In the case of *In Re The Marriage of DiVarco*²² the issue before the trial court was the non-custodial parents (payors) failure to pay child support and a motion brought by the custodial parent for contribution towards college expenses. The payor sought to introduce the obligations of his new family in connection with the college

¹⁵ *Id.* at ___, 167 Ill.Dec. at 378, 587 N.E.2d at 647

¹⁶ 166 Ill.App.3d 504, ___, 116 Ill.Dec. 880, 885, 519 N.E.2d 1095, 1100 (1st Dist. 1988)

¹⁷ *Id.* See also: *In Re The Marriage of Baptist*, 232 Ill.App.3d 906, 174 Ill.Dec. 81, 598 N.E.2d 278 (4th Dist. 1992) and *In Re The Marriage of Boland*, 308 Ill.App.3d 1063, 242 Ill.Dec. 536, 721 N.E.2d 815 (4th Dist. 1999)

¹⁸ 314 Ill.App.3d 640, 247 Ill.Dec. 409, 732 N.E.2d 125 (2nd Dist. 2000)

¹⁹ 90 Ill.App.3d 941, 46 Ill.Dec. 355, 414 N.E.2d 77 (1st Dist. 1980)

²⁰ *Id.* at ___, 46 Ill.Dec. at 361-62, 414 N.E.2d at 83-84

²¹ There is a fourth decision, *In Re The Marriage of Brophy*, 96 Ill.App.3d 1108, 52 Ill.Dec. 236, 421 N.E.2d 1308 (1st Dist. 1981), which cites *Grieman* generically. The issues contained in *Brophy* do not apply to the issues raised in this article.

²² 167 Ill.App.3d 1014, 118 N.E.2d 949, 522 N.E.2d 619 (1st Dist. 1988)

expense issue as affecting his ability to pay. The Appellate Court, citing *Greiman*, agreed this was permissible.²³ and reversed the trial court because it had refused to consider the "...financial status of their new families...".²⁴

In the next decision, *People Ex Rel. Hines v. Hines*²⁵, the non-custodial parent (payor) filed a petition to decrease his child support obligation. An issue arose as the payor's responsibility to a child of a subsequent relationship. In the dissenting opinion, Justice Cook of the 4th District cited to *Greiman* for the proposition that the court cannot ignore a payor's responsibility towards the child of the subsequent relationship in determining the support responsibilities for the child of the first relationship.²⁶

Finally, in *In Re The Marriage of Zakauskys*²⁷, the non-custodial parent (payor) filed an action to reduce child support and the custodial parent filed an action seeking contribution to college expenses. In connection with the child support issue, the Appellate Court excluded a subsequent out-of-state court order setting child support as a result of second relationship.²⁸ The basis for the exclusion was that the out-of-state Judgment was not a "prior" order that needed to be deducted from income pursuant to section 505 to determine net income.²⁹ However, with respect to college expenses, the Appellate Court, citing *Greiman*, held that the payors out of state obligations are not necessarily irrelevant in deciding college expense issues.³⁰

Drysch

The *Drysch* case involves Section 513 of the IMDMA and the apportionment of college educational expenses between parents. Both parents had remarried and the Judgment required both parent's to contribute to the college educational expenses of their child. The primary issue was whether the court could

²³ *Id.* at ___, 118 Ill.Dec. at 954, 522 N.E.2d at 624

²⁴ *Id.*

²⁵ 236 Ill.App.3d 739, 177 Ill.Dec. 7, 602 N.E.2d 902 (4th Dist. 1992)

²⁶ *Id.* at ___, 117 Ill.Dec. at 17, 602 N.E.2d at 912

²⁷ 244 Ill.App.3d 614, 184 Ill.Dec. 367, 613 N.E.2d 394 (2nd Dist 1993)

²⁸ *Id.* at ___, 184 Ill.Dec. at 375, 613 N.E.2d at 402

²⁹ *Id.*

³⁰ *Id.*

consider the income of one of the parent's new spouses in allocating the payment of college expenses. The Appellate Court discussed the child support decisions listed above with approval as to the possible equitable considerations allowing a court to consider the finances of the payor's current spouse.³¹ However, the Appellate Court did not focus upon the limitations of these decisions which was the consideration of the adverse financial ramifications to the payor (and his or her family) if he or she was required to pay support. Rather, the Appellate Court focused on the language in section 513 providing that the court should consider "the financial resources of both parents" and using the principals of statutory construction,³² ruled that the trial court should consider all resources to which a parent has access including ". . . that parent's income, her property and investment holdings, as well as money or property that could be available to her through her new spouse."³³

Implications

The *Drysch* court interpreted the statutory factor set forth in section 513(b) of the IMDMA providing that the court is to consider "the financial resources of both parents" in determining a parent's obligation to contribute to college expenses to also potentially allow the consideration of a new spouses finances to the extent the parent has access to such additional finances as a result of remarriage. Section 505 of the IMDMA has similar language as a consideration for a court if the court is considering a deviation from child support guidelines. It could be argued that there is an apparent inconsistency within the *Drysch* decision. In *Drysch*, the Appellate Court cited to the Appellate Court's prior decisions with approval involving the equitable considerations of a payor's new spouse's income in determining whether the imposition of a child support obligation would create financial hardship. Yet when dealing with section 513, interpreting similar statutory language, the *Drysch* court may have expanded this equitable doctrine used in section 505 cases to include either the payor's or payee's new spouses' income in determining a

³¹ *Id.* at, ___, 247 Ill.Dec. at 414, 732 N.E.2d at 130

³² Using an old version of Black's law Dictionary, the 5th addition from 1979, the Appellate Court found the word "resources" to mean "...[m]oney or any property that can be converted to meet needs" as well as the "available means or capability of any kind..." *Drysch* at ___, 247 Ill.Dec. at 413, 732 N.E.2d at 129. Curiously, Black's law Dictionary as of 1990 is on its 7th addition. The word "resources" is not defined in this later addition.

³³*Id.* at ___, 247 Ill.Dec. at 413, 732 N.E.2d at 129

parent's college education contribution pursuant to section 513. No Appellate Court decision could be located by the author that expands the ability of the court to equitably consider both the payor and payee's current spouses finances when dealing with child support issues. Either the *Drysch* decision is poorly worded or the second district of the Appellate Court of the State of Illinois has taken a position inconsistent with (although approving of) the other districts which have been forced to deal with this issue in connection with child support. The *Drysch* court does not distinguish between the "payor" and "payee". Pursuant to section 513 of the IMDMA, both parents are prospective payors while only one parent is a "payor" relative to child support. Unfortunately, the *Drysch* court does not explicitly make this distinction.

The only interpretation of *Drysch* that could rectify the apparent inconsistency is that the expanded consideration only applies to college expense cases because both parents are prospective payors.

Neither Sections 505 or 513 gives the Court the ability to consider a non-party's finances in fashioning an award of child support or college education expenses. The Courts have no jurisdiction to do so. In both Sections 505 and 513, a Court is to consider the lifestyle that the child would have enjoyed had the marriage not been dissolved. Had the marriage not been dissolved, a child would not have experienced the financial strain or benefits of a parent's marriage. Yet the *Drysch* Court only focuses on one factor – financial resources.

Further, because of the similar language in both section 513 to set contribution and section 505 to deviate from guidelines, a practitioner cannot ignore *Drysch* until the decision is clarified.

Unless the implications of *Drysch* are understood, the potential for increased litigation involving new spouses and their responsibility for supporting their stepchildren may drastically increase. Unless carefully read and understood, *Drysch* may only serve to confuse and promote litigation. If the analysis of the *Drysch* court is literally deemed to apply in child support cases, the second district of the Illinois Appellate Court is in direct conflict with the other districts.

Conclusion

A stepparent has no legal obligation to support a child of his or her spouse. The language contained in *Drysch* could be interpreted as appearing to impose such an obligation indirectly if the interpretation of section 513 of the IMDMA is similarly extended to section 505 of the IMDMA. If a stepparent leaves a relationship, his or her spouse has no recourse to obtain support for a child who is not of the marriage. *Drysch* should be carefully read and construed. In a proceeding involving the modification of child support, no Appellate Court has ever allowed the interjection of the payee's spouse's financial resources to be considered in the determination of support. While children of divorce have a right to live the lifestyle that they would have enjoyed had the marriage not been dissolved, the children do not have to suffer because of a parents subsequent marital choices nor do they have a right to benefit.