

# SCHILLER DUCANTO & FLECK

*Spring/Summer 2020 | Family Law Newsletter*

## DON'T LET COVID-19 STOP YOU FROM ADVANCING YOUR DIVORCE

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We are presently in the midst of something never experienced by our state. All of us have had to adjust to a new normal which has included working from home, homeschooling our children and living in a socially distant world. In the legal world, we have had to rearrange how we practice as most court houses are operating remotely only and will

continue to do so for the uncertain future. Despite this shutdown and change, however, there are still options available to move forward with your divorce proceeding. Due to both an anticipated flood of litigation when courts reopen, and the long term prospect of remote court hearings, many judges are encouraging parties and attorneys to do what they can now to advance cases. To that end, the following is a brief summary of the options that presently exist:

### **Emergency Matters:**

Emergency matters can still be handled. If there are exigent circumstances regarding your children, finances, domestic violence, and the like, the courts have options to file the appropriate motion to seek relief on an emergency basis. Depending on the county your case is in, hearings have been taking place via written submission, video conference or in person.

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### **Contested Motions:**

Most counties have established a process to resolve contested motions. Similar to emergency matters, the process may be handled by ruling on the written submission or conducting a video conference. To date, in-person hearings have not been available. The catch with contested motions is that, generally speaking, the parties need to agree to participate in the process since the process and format is not the same as it would have been in normal court operations and thus may result in a truncated proceeding and may limit the amount of evidence that will be heard.

### **Pretrial Settlement Conferences with your Judge:**

A pretrial conference is a non-binding settlement conference where the attorneys meet with the judge and discuss the resolution of all (or some) of the issues incident to your case and obtain recommendations regarding same from the judge who your case is assigned to. Most counties have established a process to conduct a remote pretrial conference with your judge, which are typically taking place via video or phone conference. Like contested motions, however, they also require an agreement by the parties to proceed.

### **Finalization of an Agreed Divorce (Prove-up):**

If an agreement has been reached on all issues, you are able to finalize your divorce through a prove-up hearing where the divorce decree will be entered. Some courts are conducting electronic prove-ups and others are providing an option to proceed to prove-up without the formal hearing but in those instances require additional agreements/documentation.

### **Agreed Orders:**

Courts are still entering agreed orders. The orders need to be agreed to and generally signed minimally by the parties; however, as always the entry of the order is still subject to the judge's approval of its terms.



### **Alternative Dispute Resolution:**

Alternative dispute resolution refers to options to resolve a case outside of the court system, which may include mediation or arbitration. The principal difference between mediation and arbitration is that in mediation a mediator tries to facilitate the parties reaching an agreement and in arbitration an arbitrator makes the decision similar to what a judge would do. Mediations and arbitrations are continuing to take place via video conference and phone. Cases can also still proceed collaboratively, where a judge is not involved, also via video conference.



### **New Matters:**

Courts are still accepting new filings for divorces, as well as, post-divorce filings (i.e. modifications of existing support/maintenance/parenting orders, enforcement actions, etc.). In addition to starting the process, the benefit of filing now is that so you can position yourself for a better hearing date as courts reopen since typically hearing priority is in part based on the age of the case/filing when court calendars are full.

It is important to know that each county has elected to handle things a bit differently. As a result, most counties have established procedures to address the items set forth above. Therefore, you and your attorney should carefully check the specifics of what your county allows for and its correlating procedures.

While these are trying and sensitive times for everyone, there are also plenty of opportunities to advance your case. Speak with your attorney about what options may be best suited for your case so you may keep the momentum moving forward and minimize the disruption these difficult and different times may be having on your unique circumstances.

# SCHILLER DUCANTO & FLECK RECENT HIGHLIGHTS

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Kimberly Cook became the **first African American member** of the Illinois chapter of the Academy of Matrimonial Lawyers



Jason Sposeep named **"Alumnus of the Year"** by Chicago-Kent College of Law



Michele Jochner named **Top 50 Most Influential Women in Law** by inaugural *Salute!* Awards



Adam Zebelian was elected **Vice President of LAGBAC**



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## SDF ATTORNEYS RECOGNIZED BY 2020 ILLINOIS LEADING LAWYERS

### IL Leading Lawyers – 2020:

Kimberly Cook  
Jay Dahlin  
Timothy Daw  
Jennifer Dillon  
Meighan Harmon  
Burton Hochberg  
Jessica Bank Interlandi  
Joshua Jackson  
Michele Jochner  
Michelle Lawless  
Gregory Maksimuk  
Carlton Marcyan  
Claire McKenzie

Andrea Muchin  
Eric Pfanenstiel  
Karen Pinkert-Lieb  
Patrick Ryan  
Karen Schetz  
Donald Schiller  
Eric Schulman  
Jason Sposeep  
Tanya Stanish  
Arnold Stein  
Anita Ventrelli  
Thomas Villanti  
Evan Whitfield  
Erika Wyatt

### IL Emerging Lawyers – 2020:

Allison Adams  
Jacqueline Stephens Breisch\*\*  
Brett Buckley  
Jennifer Enloe  
Kara Francis-Berry  
Brittany Heitz Goodlett\*  
Amy Schiller  
Adam Zebelian

\*Top 10 Women Emerging Lawyers

\*\*Top 100 Women Emerging Lawyers





## HOW TO SEEK EXCLUSIVE POSSESSION, EVEN DURING A PANDEMIC

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During these unprecedented times of COVID-19, a party who is ready to file for divorce, or parties who have a divorce case pending but have not yet physically separated, may find themselves "stuck" living together in the marital home especially while Illinois' shelter in place order remains in place and also during the aftermath. And not all soon-to-be exes are capable of emulating the peaceful, homey cohabitation that Demi Moore and Bruce Willis have been able to keep up during the pandemic (#divorcegoals). That said, absent an agreement, what options exist for a party who seeks for their spouse to vacate the marital home?

One option is for the party to seek exclusive possession of the marital home in a pending divorce case under the Illinois Marriage and Dissolution of Marriage Act ("IMDMA"). In this situation, a party must file a verified petition and show that the physical or mental well-being of either spouse or his or her children is jeopardized by occupancy of the marital residence by both spouses. Moreover, the party requesting this relief must present concrete and specific evidence of conduct by the other party occurring inside the home, and show how that conduct jeopardizes the physical or mental well-being of them and/or the children. Determination of a request for exclusive possession depends on the particular facts of each case and is often very difficult relief to obtain. Further, the court may only grant exclusive possession upon notice to the other party and after a full hearing, during which the court must balance the hardships to the parties (unless the court waives these requirements for good cause shown). See 750 ILCS 5/501(c-2).

A situation need not rise to the level of physical violence before a court may grant a petition for exclusive possession under the IMDMA. For example, in the case of *IRMO Engst*, one case, the trial court found the wife's testimony that she felt physically afraid, intimidated, bullied and antagonized by her husband, as well as her description of instances when he stood in front of her and blocked her access to other areas of the house, criticized her, swore at her, called her names and threatened to physically hurt her (some of which occurred in front of the parties' children), to be sufficient evidence of "jeopardy" to award her exclusive possession. In that instance, another factor the court considered was the adverse impact this behavior was having on the children. Finding that the parties needed to physically separate so the children would no longer be exposed to a highly negative situation, the court noted that it was not necessary for the wife to have previously sought an order of protection or show a history of physical abuse in order to be granted exclusive possession. See *IRMO Engst*, 2014 IL App (4th) 131078.





Conversely, in another case, the parties were following a “birdnesting schedule” during the divorce case, meaning that the children always stayed in the home while the parties took turns occupying the home during his or her respective parenting time. In seeking exclusive possession, the wife alleged that this arrangement caused her stress and the children were also stressed and confused about the situation. The court-appointed evaluator testified that he disagreed that the birdnesting schedule seriously endangered the mental and emotional well-being of the children. In reversing the trial court’s award of exclusive possession to the wife, the appellate court found that these particular facts were insufficient to constitute “jeopardy” under the statute. See IRMO Levinson, 2012 IL App (1st) 112567.

Another option for a party to obtain exclusive possession, regardless of whether a divorce case is pending under the IMDMA is to seek relief under the Illinois Domestic Violence Act. Similar to the IMDMA, a situation need not rise to the level of physical violence in order to obtain an order of protection granting exclusive possession. The DVA’s definition of “abuse” not only includes physical abuse, but also includes harassment, intimidation of a dependent, interference with personal liberty or willful deprivation. Under the DVA, a party may obtain an emergency order of protection on an ex parte basis (which may last up to 21 days). However, a plenary order of protection under the DVA (which may last up to 2 years) requires that notice of the hearing be given to the other party, they must be formally served (unless respondent voluntarily files an appearance), formally answered the petition or be found in default. See 750 ILCS 60/219.

In considering a request for exclusive possession under the DVA, the court is not bound by the “jeopardy” standard set forth under the IMDMA. Rather, assuming that each party has “the right to



occupancy” of the home (which is specifically defined in the DVA and is not limited to formal title on the home), then the court must balance (1) the hardship to a party (and any minor child or dependent in his/her care) that would result from granting exclusive possession to the other party, against (2) the hardship to a party (and any minor



child or dependent in his/her care) that would result from continued exposure to the risk of abuse in the home or from the loss of possession of the home should a party leave in order to avoid the risk of abuse. Unless the other party rebuts the presumption by a preponderance of the evidence by showing that the hardship to them substantially outweighs the hardship to the asking party (and any minor child or dependent in petitioner’s care), the balance of hardships is presumed to favor the asking party. Alternatively, the court (upon request of a party or on its own motion), may order the respondent to provide suitable, accessible, alternate housing for petitioner. See 750 ILCS 60/214(b)(2).

While a party who has a pending divorce case can still seek relief under the DVA, he or she should do so within the pending Domestic Relations Division case. In conclusion, however, whether exclusive possession is sought under the IMDMA or DVA, the situation need not rise to the level of physical violence in order to obtain exclusive possession during this pandemic. Regardless of which statute the petitioning party moves under, in order to ultimately succeed, that party must be prepared to present specific, concrete evidence of the other party’s conduct.