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Family Law

The newsletter of the Illinois State Bar Association's Section on Family Law

Chair's Column

BY SUSAN W. ROGALINER

Greetings from your chair as I enter the fourth month of my appointment as chair of the Family Law Section Council. I hope you are all enjoying the spectacular fall weather and I hope it continues for all of us well into the holiday season. The topic of my column this month has to do with parental coordination. In my September column, I mentioned that the Council is working on a statute pertaining to parental coordination to be made a part of the IMDA. Although the use of parenting coordination has been in effect primarily in Cook County for quite some time and, in fact, Cook County has local court rules relative to parental coordination, the process has been little utilized outside of Cook County and, based upon questions and comments I have heard, I believe there may be some confusion about what parental coordination is and what

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When Wanting Out Can Be Held Against You: *In re the Marriage of Prill* and the Unconscionability of Postnuptial Agreements

BY MICHAEL LEVY

It is no secret that by the time a client decides to hire an attorney and commence a dissolution proceeding it is often at the conclusion of many months of emotional and mental anguish. The decision to divorce their spouse, whom they previously committed to spend the rest of their life with, is never an easy one, however sometimes they are left with no other option. One or both spouses may have been wrestling with this decision for years and it is not unheard of that, as a last-ditch effort to keep their marriage intact, the parties negotiated an agreement of how they are going to proceed either while they stay married and/or if they proceed with a divorce. They may have even gone as far as to memorialize their terms in a formal postnuptial agreement. Illinois common law and public policy provides that an amicable settlement agreement is the preferred method of resolving marital disputes as it gives the parties more

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parental coordinators do. Given the Section Council has been involved in working on legislation in this regard and given the fact that I personally had the opportunity to attend parental coordination training at the University of Baltimore Law School, I wish to devote this column to discussing parental coordination, its uses and benefits.

Following the entry of a parenting plan, or prior thereto with the court's approval, a parental coordinator may be appointed in a dissolution, parentage or post-judgment case when the court deems said appointment to be in a child's best interest. A parental coordinator, however, is prohibited from serving as a court's professional evaluator. The court may adopt its own rules governing the qualifications, appointment, duties and training of parental coordinators who shall possess a juris doctor or a master's degree in social work, psychology, or counseling.

What, then, does a parenting coordinator do? In my own words I can say that a parenting coordinator acts as a sort of hybrid mediator/guardian ad litem. First of all, it is important to state that the parenting coordinator does not act as a mediator in the sense that the parenting coordinator does not mediate the terms of a parenting plan or the modification of a parenting plan relative to major decision-making where the children are concerned or the parenting time schedule. The parenting coordinator is typically appointed in high-conflict cases in which the parents have little ability to make regular day-to-day decisions concerning their children pursuant to the terms of their parenting plan, decisions such as, for example, when a child would be scheduled for medical procedures, when and where a child may attend day-camp this summer, whether or not a child will join a traveling baseball team. Matters such as these are important for the children and the parents; however, taking matters such as these to court clogs the court system. The purpose of parenting coordination is to help families move forward with their day-to-day lives without litigating every parenting decision on which the parties cannot agree.

Practically speaking, parental coordination begins as a mediation process with the parental coordinator assisting the parties in mediating their disputes. Hopefully, the parties will reach an agreement which can then be prepared by the parenting coordinator for entry by the court. If, however, the parties are unable to reach an agreement on a disputed issue, the parenting coordinator has the authority to "investigate" the dispute, much as a guardian ad litem would, and to make recommendations concerning a resolution of the dispute for acceptance by the parties. The recommendations of the parenting coordinator shall be complied with by the parents. Should a party disagree, however, with the parenting coordinator's recommendation, the matter may be presented to the court for either acceptance of the parenting coordinator's recommendation by the court or, after hearing on the Motion, the recommendation at issue may be found by the court to be in contravention of the child's best interest or outside the scope of the authority of the parenting coordinator.

Thus, parenting coordination is an out-of-court process for the resolution of conflict in decision-making between the parties concerning the minor children. The parenting coordinator facilitates resolution of conflict. Recommendations regarding a parenting plan may include matters concerning pick-up and drop-off of a child for designated parenting time, a child's participation in educational and extra-curricular activities, very minor alterations of the parenting time schedule to accommodate the availability of a child for a family wedding or reunion, for example, and any other specific issues assigned to the parenting coordinator by the court or as agreed to by the parties. To be even more specific, a parenting coordinator should not make recommendations concerning allocation of parental responsibilities

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or parenting time, relocation, or the establishment of visitation by a non-parent.

Parenting coordination is another tool that can help families, especially those involved in high conflict cases. Additionally, parental coordination serves to keep the courts free of conflict relative to day-to-day parental decision-making as said decisions relate to the parties' parenting plan. Hopefully, we will soon be introducing legislation regarding parental coordination for use by parties and the court. ■

When Wanting Out Can Be Held Against You: *In re the Marriage of Prill* and the Unconscionability of Postnuptial Agreements

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autonomy in the outcome of the divorce and generally leaves the parties more satisfied than if the disputes were resolved by a judge. It also generally leads to a lower level of post decree litigation which is also preferred by any court.

Boiled down to its most basic level, a postnuptial agreement is no different than any other contract. It requires an offer, acceptance, and consideration. But what is unique about a postnuptial agreement is the frequency in which the parties entering into the agreement are coming from drastically different bargaining positions. Because of this fact, when a trial court is asked to enforce a postnuptial agreement (after determining that a valid agreement was reached between the parties), they need to look at the formation and terms of the agreement to ensure that it is not unconscionable to either party. A finding of unconscionability can be made on either procedural (how the postnuptial agreement was negotiate/obtained) or substantive (the terms of the agreement) grounds. But does an agreement that favors one party make it unconscionable? What if one party desires a divorce more than the other and that influences their willingness to accept a less than equitable share of the marital estate? Should that be considered when determining the conscionability of an agreement. This was exactly the situation that occurred in recent decision of the First District of the Appellate Court of Illinois, *In re the Marriage of Prill* 2021 IL App. (1st) 200516.

Facts/Procedural History

The parties were married in 1994. The husband was a CPA and majority source of income for the family as the wife worked intermittently, but mostly stayed home to care for the parties' children. In June 2017, the wife informed husband that she wanted a divorce and in September 2017, the parties executed a post-nuptial agreement and parenting agreement drafted by the husband's counsel. The agreement consisted of 19 items including a waiver of maintenance for both parties, a $240,000 settlement payment to wife, payment of children's expenses, and the allocation of marital assets and debts. There were no asset valuations attached to or incorporated into the agreement nor any descriptions of any debts, mortgages, or liens encumbering said assets. In November 2017, the wife filed a petition for dissolution of marriage and the husband answered and filed a motion to enforce the post nuptial agreement. Wife responded stating that the agreement was both procedurally and substantively unconscionable. Wife claimed that the husband dissuaded her from hiring her own independent counsel, threatened to kick her out of the home, and cut her off from the children if she did not sign the agreement. Wife met with two attorneys but was told if they made any material changes to the agreement the husband would no longer agree and would make good on the aforementioned threats. The first attorney did not agree to represent her with said instructions and the second attorney, who was never retained but consulted with (and was primarily a real estate attorney), suggested that she not sign the agreement either. Nevertheless, she signed the agreement anyway after a couple of non-material revisions were made.

During the hearing on the enforceability of the agreement, the wife testified that in addition to making threats about kicking her out of the house and cutting her off from the children, the husband called her parents during the negotiation to get her to agree and bombarded her with texts and emails with charts and other break downs of the parties' finances. He also repeatedly asked her to confirm in front of the parties' children that she would not touch his retirement assets. The parties agreed that the value of the marital estate was approximately $3.8 million and per the terms of the agreement Wife believe she received 13.5 percent of the estate, which included $750,000 in three accounts held in trust for the parties' children.

After hearing and the parties submitting written closing arguments, the trial court found that the post-nuptial agreement was enforceable. The court noted that the wife consulted with an attorney who made changes to the agreement which were accepted by husband, and despite being advised not to sign the agreement by said attorney, signed anyways because she "wanted a fresh start." The court specifically noted that although the agreement was "not fair" that does not mean the agreement is unconscionable and the wife knew what she was doing. The wife subsequently appealed claiming that the agreement was both procedurally and substantively unconscionable.

Appellate Analysis

The appellate court commenced its analysis by stating that the determination of whether a contract is unconscionable is a question of law and thus the *de novo* standard of review applies, but the review of a trial court's factual findings (which were not argued by Wife) is reviewed against the manifest weight of the evidence. In addressing the wife's unconscionability

arguments, the majority found that the trial court's determination that the agreement was not unconscionable was a sound decision and specifically noted as follows.

Procedural Unconscionability: The determination is fact dependent and typically deals with improprieties during the formation of the agreement that deprive a party of a meaningful choice… This includes duress... fraud… interference with a party's ability to secure meaningful legal advice. *In re Marriage of Richardson,* 237 Ill App. 3d 1067 (1992)**.** Wife relied primarily on *Richardson*, which the appellate court distinguished from the case at bar. In *Richardson*, where it a post-nuptial agreement was found to be unconscionable, the court noted that the wife in that case did not want the divorce, roughly eight months before the agreement was signed the wife's father was hospitalized and she spend a great deal of time at the hospital which affected her mental state, and the agreement was signed a week after her father passed. Further, the Husband made promises that if the wife signed the agreement, they would be a family again and there would be a two-year moratorium on the ability to file for divorce. Additionally, the husband's attorney was tasked with finding the wife an attorney which ended up being a former associate of his and the wife's attorney had very little experience with family law and spent about 20 minutes reviewing the parties' financials before encouraging her to sign. Finally, there was testimony that just 10 days prior to signing the agreement the wife was crying and upset and stated she didn't want the divorce.

In the case at bar the trial court found that there was ample evidence showing that the wife wanted out of the marriage, that she consulted with an attorney who advised her not to sign the agreement but signed anyways. The appellate court also noted that she did not contest these findings on appeal, and it was her burden to prove that duress as part of her unconscionability argument which she failed to do. Since the wife failed to challenge these findings and considering all the factors surrounding the execution of the post-nuptial agreement the appellate court did not find that the circumstances supported a finding of procedural unconscionability.

Substantive Unconscionability: A substantive unconscionability analysis requires that a contract be so unfair that the court cannot enforce it consistent with the interests of justice, however not every unfair agreement is unconscionable. The appellate court found that the wife received approximately 28 percent of the marital estate, excluding consideration of the stock options in the husband's company, the value of which the appellate court found to be unclear and never established by the wife. The appellate court also noted that in the husband's appellate brief he argued that he incurred liabilities after the execution of the agreement to pay Wife her settlement but failed to provide any evidence of same at the trial court and when pressed at oral argument, his attorney admitted that was not the case. Husband also included a "Net Balance Sheet Summary" to his brief, which was never admitted into evidence, nor contained any citations to the record.

The parties also disputed the value of Husband's stock options per the agreement, but the appellate court notes that the record is bereft of any evidence as to their value nor that the wife sought a value determination by the appellate court. The only evidence was a text from husband to Wife claiming the options were worth $2.3 Million and Husband's testimony that they were worthless, and the text was a lie.

The wife again relied on *In re the Marriage of Richardson,* which the appellate court distinguished from the case at bar because unlike in this case, the Husband in *Richardson* undervalued the value of his stocks by about $30 Million and that the wife only received 7.55 percent of the value of the marital state per the terms of the agreement. The wife also relied upon *In re the Marriage of Callahan* 2013 IL App (1st) 113751 where the appellate court found a postnuptial agreement to be substantively unconscionable because in *Callahan*, after a 29-year marriage the husband made multiple misrepresentations about the value of law and fact at the prove-up hearing, and the wife did not read the agreement herself due to medical issues. Per that agreement, the Husband received almost the entire marital estate including the marital residence and all the parties' retirement, while the wife received monthly maintenance and health insurance provided by the husband. In the case at bar, the wife received nearly a quarter of the marital estate (including cash, five vehicles, and some retirement savings. Since there was no evidence about the value of Husband's stock options in his company the appellate court cannot conclude they affected the property division. As such, the trial court properly exercised its discretion finding the agreement enforceable.

What is of particular note of *Prill* is the ferocity at which Justice Hyman penned his dissent (which is actually longer than the opinion). He seemed to take extreme umbrage with the majority's decision in finding that the agreement was neither procedurally nor substantively unconscionable. His concern at the precedent this matter could set is best summed up by his dissent's first paragraph, where he states, *"If left to stand this case sets a precedent imperiling the prospects of an equitable postnuptial agreement for the financially insecure spouse. They now will have a heavier burden to show substantive and procedural unconscionability. This represents a step backward for gender equality, as it principally affects women."*

Justice Hyman's also noted that the typical factors (duress, fraud, interference with a party's ability to secure meaningful legal advice, inconspicuous contact terms, and unequal bargaining power) discussed by the majority in determining the unconscionability of a contract do not adequately apply to postnuptial agreements. Justice Hyman believes that additional factors should apply and be assessed when determining the unconscionability of such an agreement. Specifically, proposed a 10-factor test to determine the unconscionability of postnuptial agreements, which is as follows:

1. a meaningful opportunity to retain independent counsel;
2. threats regarding children, marital assets, and prolonged litigation in the absence of agreement;
3. duress, fraud, overreaching, misrepresentation, deception, or

non-disclosure of material facts;
4. disparity in earning power;
5. control of finances;
6. full and accurate disclosure by each party of liabilities and assets;
7. each party's understanding of and free agreement to the terms;
8. length of marriage;
9. physical or emotional abuse; and
10. disparity in allocation of marital assets and debt.

In applying his test to the case at bar Justice Hyman concluded that the postnuptial agreement was both procedurally and substantively unconscionable as the factors weighed heavily in favor of the wife's unconscionability arguments.

Rarely are lawyers afforded an opportunity to review such a thorough and well-analyzed dissent and perhaps it is the tone and force with which it was penned that makes it as convincing as it is. I cannot help but agree with Justice Hyman in his opinion that the majority missed the mark in its ruling. In reviewing the facts, it is difficult to conclude that the psychological and emotional warfare employed by the husband in *Prill* was anything but procedural unconscionability, and that does not even take into account his receipt of a substantially greater portion of the marital estate. It seems that the determining factor held against the wife was that she wanted the divorce, yet neither the trial court nor the majority considers why she wanted a divorce and the oppressive conditions she appeared to be living under. In every divorce proceeding at least one, if not both parties, are desirous to end a marriage, otherwise the case would never be filed. For it to carry such significant weight, especially in this case, seems to be a miscarriage of justice.

Finally, one must take Justice Hyman's opening concern about the impact this may have on future challenges to the conscionability of a postnuptial agreement to heart. If the facts of this case do not justify a finding of unconscionability, then we are left to wonder what facts will. ■

Family Law Ethics

BY LESLIE WOOD

How often do family law practitioners get in trouble with the ARDC? In 2020, the ARDC docketed 3,116 charges, 17 percent of which domestic relations (528), or adoption (4).[1] Of all of the complaints made in 2020, only 16 resulted in Supreme Court petitions for discipline.[2]

For which type of misconduct are family law attorneys usually disciplined? In general, most attorneys (81 percent) who were actually charged with misconduct, were disciplined for fraudulent or deceptive activity. Another 24 percent were disciplined for criminal misconduct or conviction, and 22 percent for improper handling of trust funds and/or failure to communicate with a client.[3]

Most attorneys sanctioned in 2020 were solo practitioners (46 percent) between the ages of 50-74 years (66 percent) and male (92 percent).[4]

A review of 2020 and 2021 dispositions of ethics violations, as listed on the ARDC website, lists 17 cases pending or concluded. Family practitioners under suspension include the following:

In re Anthony R. Chi, 2019PR00042, suspended until further order for neglecting four divorces, failure to communicate with clients, and failure to cooperate with the ARDC's investigation.

In re Debbie M. Schell, 2019PR00070, suspended for a specific period of time for agreeing to represent a client for a divorce but failing to file the petition for dissolution, and then lying to the client about the status of the case.

In re Howard Randolph Baker, 2020PR00061, suspension stayed pending adherence with conditions of probation, for neglecting a client matter by failing to comply with discovery in a divorce, resulting in the client being barred from presenting evidence at trial, and lying to the client about the status of the case.

What does the ARDC do to help attorneys in crisis? All family law practitioners hate the dreaded letter from the ARDC, advising us of an ethics complaint. Although most malpractice carriers now assist in crafting a response, the experience of responding to a complaint is nerve-wracking and time-consuming. The ARDC itself can also be a helpful resource for attorneys, and is often overlooked and underused by members of the Illinois Bar.

The mission of the ARDC is to assist the Illinois Supreme Court in regulating the legal profession through attorney registration, education, investigation, prosecution and remedial action.[5] As of September 23, 2021, the ARDC website includes 22 free CLE webinars on its website (www.iardc.org), on topics ranging from billing, trust account management, technology, diversity, conflicts, attorney-client relationships, and wellness.

Stressful though the receipt of an ARDC complaint can be, the ARDC does see itself as an intermediary, and a resource for remedial action and help for the lawyer. Among the remedial actions offered by the ARDC is its Diversion Program, through which an impaired attorney may be referred to the Lawyer's Assistance Plan, or to other health and wellness providers, to treat an underlying problem. An attorney may be placed on probation, pending treatment for an impairment.

The ARDC has also activated an Intermediary Program, to attempt to reduce default sanctions, by attempting to locate and engage attorneys who have been non-responsive to a bar complaint. Finally, Remedial Education may be offered to an attorney who has made an ethics mistake, rather than the filing of a formal complaint.

Unhappy people file complaints, and legal practitioners are very familiar with this unfortunate side effect of a family law practice. Very simple, common-sense practice habits can protect against involuntary involvement with an ARDC investigation. Keep records of everything you do, do everything in a timely manner, keep in contact with your client, and don't lie to the ARDC.

Complaints to the ARDC have been steadily dropping over the last 8 years. Though this may be because fewer court cases are being filed, or that more and more litigants are pro se, it is also entirely possible that Illinois attorneys have become better at their jobs, and more ethical, at least in their professional lives. ■

1. Attorney Registration & Disciplinary Commission, Annual Report of 2020 at 49.
2. *Id.* at 21.
3. *Id.* at 25.
4. *Id.*
5. *Id.* at 5.