

PERSONAL INJURY AND DIVORCE:
THE HISTORY, ANALYSIS AND EVOLUTION OF THE STANDARD
TO BE APPLIED IN ILLINOIS

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Divorce and personal injury, while separate and distinct areas of the law, share many common traits:

- They often come unexpectedly and without warning;
- They have direct consequences to each spouse;
- They usually find each spouse unprepared on how to deal with the fallout;
- The timing of one can often cause the other; and
- They almost invariably result in the hiring of attorneys.

Illinois Courts have long struggled in determining which area of the law takes priority when these two worlds intersect. Questions that commonly arise include

- Are the proceeds of a claim an asset to be divided as property, or alternatively as a stream of income to be used to support the injured spouse?
- Are the proceeds of a claim subject to claims for maintenance and/or child support for the non-injured spouse and children?

In order to understand these issues, it is incumbent upon the practitioner, as well as the parties to the divorce, to have a clear understanding of the current laws and case precedent which have shaped these decisions over time.

The first place to start is an understanding of the underlying statutes in divorce which define the relevant terms and set the parameters for these determinations by the courts.

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DEFINITION OF MARITAL PROPERTY AND INCOME

In the context of a divorce, the definition of “marital property” is expressly defined pursuant to 750 ILCS 5/503(a) as follows

§ 503. Disposition of property and debts

(a) For purposes of this Act, “marital property” means all property, including debts and other obligations, acquired by either spouse subsequent to the marriage...¹

Similarly, the factors the Court must consider in determining how such marital property is to be divided is also governed by statute, expressly within 750 ILCS 5/503(d) as follows

(d) In a proceeding for dissolution of marriage or declaration of invalidity of marriage or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse’s non-marital property to that spouse. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors... (EMPHASIS ADDED)²

These definitions must be read in conjunction with the meaning of income for purposes of providing family support, as set forth within 750 ILCS 5/505 (for child support)³ and as adopted within 750 ILCS 5/504 (for maintenance)⁴, and have historically relied upon the general and open-ended definition as “**income from all sources.**”

Though many of the specific line items within the statutes have recently been modified and refined, the core principles of “equitable distribution” for division of property and “income from all sources” for payment of family support have remained the cornerstones of Illinois law and continue to be the starting points for any analysis when the two worlds of personal injury and divorce intersect.

PERSONAL INJURY SETTLEMENTS AND WORKERS' COMPENSATION PAYMENTS ARE CONSIDERED MARITAL PROPERTY AND INCOME

In **In Re the Marriage of Gan**, 83 Ill.App.3d 265, 404 N.E.2d 306 (5th Dist., 1980), the Court addressed the issue of whether a *personal injury settlement* for one spouse constituted marital property. In *Gan*, the Court acknowledged that

“The issue of whether property received by a spouse as the result of an action for personal injury constitutes marital property has not been addressed by an Illinois Court. There is no indication in the record that the personal injury settlement was apportioned in any way so as to compensate the Husband expressly for his pain and suffering, for example for out-of-pocket expenses or for the loss of his future earnings.”⁵

The Husband, while acknowledging that a personal injury settlement does not fit within any of the statutory exceptions to marital property, argued in *Gan* that

“It is hard to rationalize how an award to an individual to compensate him for pain, suffering or disability can belong to his spouse. The theory on the award to the injured party is that the monetary award is designed to make the injured party whole. It is to compensate him for a loss of the use of his body. Are the divorce laws of this state now going to allow the Wife in effect to take a part of the Husband’s being? If this theory is followed to its extremes, then the non-injured spouse would be entitled to a portion of the other spouse’s artificial leg or arm. This is clearly not intended by the statute.”⁶

The Court in *Gan* disagreed with the Husband’s analysis and found

¹ 750 ILCS 5/503(a)(LexisNexis 2018)

² 750 ILCS 5/503(d) (LexisNexis 2018)

³ 750 ILCS 5/505 (LexisNexis 2018)

⁴ 750 ILCS 5/504 (LexisNexis 2018)

⁵ In Re the Marriage of Gan, 83 Ill.App.3d 265, 404 N.E.2d 306 (5th Dist., 1980)

⁶ Id.

*“The application of section 503(b) in this instance is neither illogical nor harsh; rather it is in keeping with the public policy of Illinois. * * * Here the Husband as a result of his personal injury was rendered unable to earn a living and thereby satisfy his obligations of support. Like the disability benefits he became entitled to receive, the settlement to some extent enabled him to provide for his family as he would presumably have done in accordance with the law had he been healthy and able to work and as he had in fact done before his injury. * * *. The proceeds of the personal injury settlement, having been properly declared to be marital property, are subject to disposition, along with the other marital property, pursuant to the provisions of section 503(c) and (d) of the Act.” (emphasis added)⁷*

This principle was extended to workers’ compensation claims by the Court **In Re the Marriage of Dettore**, 86 Ill.App.3d 540, 408 N.E.2d 429 (3rd Dist., 1980) stating

“It is clear that section 503 of the Illinois Marriage and Dissolution of Marriage Act offers no special refuge for workman’s compensation awards and funds of that genre.”⁸

EQUITABLE DOES NOT MEAN EQUAL

While personal injury and workers’ compensation proceeds are considered marital property, it is clear that the funds do not need to split evenly between the spouses depending on the circumstances and the nature of the claim.

The Court in **In Re the Marriage of Burt**, 144 Ill.App.3d 177, 494 N.E.2d 868 (4th Dist., 1986) made this abundantly clear, finding

“By the terms of section 503(d) in dividing marital property, the court is expressly directed to

⁷ Id.

⁸ In Re the Marriage of Dettore, 86 Ill.App.3d 540, 408 N.E.2d 429 (3rd Dist., 1980)

*consider “the age, health * * * employability * * * and needs of the parties together with the opportunity of a spouse to secure future income. Thi,s of itself, authorizes the court to consider the disability of an injured spouse and award a larger portion of marital property, including proceeds of a cause of action to that spouse. Moreover, the factors expressed in section 503(d) are not the only factors that can be considered. * * * The pain and suffering and disability of an injured spouse would be relevant considerations.”⁹*

In **In Re the Marriage of Debow**, 236 Ill.App.3d 1038, 602 N.E.2d 984 (5th Dist., 1992), the Husband had sustained substantial debilitating injuries while he was incarcerated in prison.¹⁰ The Wife, while they were married, and as the Husband’s guardian on behalf of his estate, filed a claim against the city of East St Louis, and his estate received a settlement of \$3,400,000.¹¹ The court in *Debow*, after finding that the full \$3,400,000 was marital property, awarded the sum of \$1,500 per month to the Wife for child support, and then divided the balance of the remaining proceeds 75% to the Husband and 25% to the Wife.¹² The Court upheld the allocation on appeal, reasoning:

*“In the present case, the trial court’s main concern was “to insure that * * * petitioner * * * receive all the medical and rehabilitative care and treatment necessary not only to treat him for the permanent injuries that he sustained but to prepare him, to the greatest extent available, for life as independent from institutionalized setting as possible. * * *.”¹³*

A similar analysis and conclusion was reached in **In Re the Marriage of Murphy**, 259 Ill.App.3d 336, 631 N.E.2d 893 (4th Dist., 1994), in which the dispute centered around the allocation of a personal injury settlement that arose from the Husband being shot in the parking lot of a restaurant during the parties’ marriage.¹⁴ As a result, a lump sum settlement payment of \$800,000 was received as well as annuity payments of \$90,000 per year for 20 years.¹⁵ The Court in *Murphy* allocated the sum of \$300,000 to the Wife and the remainder

⁹ In Re the Marriage of Burt, 144 Ill.App.3d 177, 494 N.E.2d 868 (4th Dist., 1986)

¹⁰ In Re the Marriage of Debow, 236 Ill.App.3d 1038, 602 N.E.2d 984 (5th Dist., 1992)

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ In Re the Marriage of Murphy, 259 Ill.App.3d 336, 631 N.E.2d 893 (4th Dist., 1994)

¹⁵ Id.

to the Husband, again referencing the Husband’s pain and suffering and future needs for medical and rehabilitative care.¹⁶ The Husband was also ordered to pay the Wife \$600 per month as, and for, child support from said sum.¹⁷ The Court relied heavily on the Court’s reasoning in *Burt* in reaching this disproportionate allocation of settlement proceeds, even though finding that all of it was marital property.¹⁸

The case of **In Re the Marriage of Waggoner**, 261 Ill. App.3d 787, 634 N.E.2d 1198 (5th Dist., 1994) was the next case in this historical progression which seemingly altered the analysis entirely and created new terms for delineating the approach to be used by the Court in making such decisions of marital and non-marital property and allocation.

In *Waggoner*, the Husband had injured his back at work and had a pending worker’s compensation claim which had yet to be resolved at the time of divorce.¹⁹ The trial court awarded 50% of said claim to each party, notwithstanding that it had not yet been determined.²⁰ The Husband claimed that his injury was distinguishable from other case precedent because his injury was permanent rather than a temporary disability.²¹

MECHANICAL VS ANALYTICAL APPROACH

Until *Waggoner*, the Courts in Illinois had universally used what was known as a **mechanical approach**, namely using the time of the accrual of the claim as the sole basis of classification of marital or non-marital property. In *Waggoner*, the Court adopted the **analytical approach**, focusing instead upon the purpose(s) of the award rather than solely on the time of the injury and claim.²² Under the *analytical approach*, the Court must separate the awards into at least two potential elements of damages, namely (1) those compensating

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ In Re the Marriage of Waggoner, 261 Ill. App.3d 787, 634 N.E.2d 1198 (5th Dist., 1994)

²⁰ Id.

²¹ Id.

²² Id.

the injured spouse for pain and suffering, disability, and disfigurement or lost limbs; and (2) those compensating the injured spouse for lost wages or lost earning capacity and medical and hospital expenses.²³ As such, the portions of the award which are for wage loss and medical payments incurred during the marriage were classified as marital property; and the portion of an award which is for the purpose of replacing wages lost after dissolution was classified as non-marital property.

Shortly after the ruling in *Waggoner*, the analytical approach was put to the test in **In Re the Marriage of Hall**, 278 Ill.App3d 782, 663 N.E.2d 430 (3rd Dist., 1996). In *Hall*, the Husband was injured at work and filed a worker’s compensation claim against his employer which remained pending at the time of the parties’ divorce.²⁴ The Judgment for Dissolution of Marriage expressly reserved the classification and allocation of any proceeds from said claim until determined.²⁵

The claim was settled shortly thereafter in the amount of \$80,000.²⁶ The Husband argued, under the *analytical approach*, that since the settlement was compensation for his diminished earning capacity in the future, it should be deemed his non-marital property.²⁷ Notwithstanding this reference, the Trial Court simply ruled that each spouse was entitled to 50% of the proceeds, and the Appellate Court affirmed.²⁸ In reaching such conclusion, the Court in *Hall* stated

*“The Court pointed out that Charlotte was in her mid-50’s, had a ninth-grade education, no training, had some physical problems, and had not worked in many years. The court stated that even taking into consideration Raymond’s partial loss of ability to earn future income, he still had substantially greater ability to acquire assets and income than Charlotte. With respect to the duration of the marriage, the court indicated that it would have awarded a larger share of the marital estate to Charlotte, but the length of the marriage weighed in Raymond’s favor.”*²⁹

²³ Id.

²⁴ In *Re the Marriage of Hall*, 278 Ill.App3d 782, 663 N.E.2d 430 (3rd Dist., 1996)

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id

This analysis returned to the mechanical approach in **In Re the Marriage of Pace**, 278 Ill.App.3d 932, 664 N.E.2d 320 (1st Dist., 1996). In *Pace*, the Husband had suffered a catastrophic injury at work that resulted in his leg being amputated.³⁰ He had endured at least five operations and suffered from extreme pain in his legs and shoulders, arthritis and diabetes, and had ceased working entirely.³¹ Shortly thereafter, the parties separated and ultimately divorced.³² The Husband filed a personal injury claim and received a tax-free settlement of \$6,100 per month for life, with 240 monthly payments guaranteed, and was also guaranteed additional payments in the future totaling just over \$300,000.00.³³ The Court determined that the entirety of this settlement constituted marital property and awarded 75% to the Husband and 25% to the Wife.³⁴ The Husband appealed arguing that the Court had failed to apply the analytical approach set forth in *Waggoner*.³⁵ The Court in *Pace* cited, and then rejected, the analytical approach, instead seeking to follow the mechanical approach used by the Court in *Gan* and *Burt* thus creating a different standard in competing districts.³⁶

The Supreme Court weighed in and clarified this analysis with its rationale and holding in **In Re the Marriage of DeRossett**, 173 Ill 2d 416, 671 N.E.2d 654 (1996). In *DeRossett*, during the marriage, the Husband was injured at work.³⁷ While his worker’s compensation claim was pending, the parties were divorced and the Trial Court entered a Judgment, indicating that the resulting settlement of this claim would constitute marital property, and simply reserved the allocation between the parties.³⁸ Ultimately, the Husband received a settlement of \$111,905, and the Trial Court then ordered that the Wife receive 30% thereof.³⁹ The Trial Court and then the Appellate Court both followed the mechanical approach, used in *Dettore* and *Burt*, and disregarded the analytical approach used in *Waggoner*.⁴⁰ The Supreme Court affirmed, focusing almost entirely upon the timing of the injury which occurred during the marriage.⁴¹

³⁰ In Re the Marriage of Pace, 278 Ill.App.3d 932, 664 N.E.2d 320 (1st Dist., 1996)

³¹ Id.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ In Re the Marriage of DeRossett, 173 Ill 2d 416, 671 N.E.2d 654 (1996)

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

A slight wrinkle was added to this analysis by the Court in **In Re the Marriage of Berberet**, 2012 IL App (4th) 110749. In this case, the Husband had been injured in an auto accident during the parties’ marriage and had consulted with an attorney but had not yet decided if he was going to be filing a personal injury case.⁴² The parties then filed for divorce and a Trial ensued.⁴³ The Wife argued that the Husband’s personal injury claim should constitute marital property, using the rational of the *mechanical approach* used in *Pace* and *Debow*, citing the timing of the injury as the basis therefore.⁴⁴ The Court disagreed and held

*“Based on the record provided, it is too speculative as to whether David will file a personal injury claim within the statute of limitations. While we do not want to encourage parties to delay the filing of a personal injury claim until after their dissolution of marriage proceeding is concluded, we cannot say in this case the trial court abused its discretion by not considering David’s potential personal injury claim.”*⁴⁵

A recent decision in **In Re the Marriage of Rivera**, 2016 IL App (1st) 160552, has provided an interesting timing debate as to the definition of “when” a personal injury has actually occurred. In *Rivera*, a man was incarcerated in 1993 for first degree murder and had been sentenced to life in prison without parole.⁴⁶ While in prison in 2000, the parties were married.⁴⁷ A series of challenges to this conviction ensued both prior to and during the marriage, which ultimately resulted in the conviction being overturned in 2011, and Mr. Rivera was released from prison in 2012.⁴⁸ In 2012, Mr. Rivera filed a complaint under section 1983 of the United States code alleging violations of his civil rights under color of law.⁴⁹ In 2014, Mr. Rivera filed a Petition for Dissolution of Marriage.⁵⁰ The issue of whether his settlement therefrom totaling \$20,000,000 constituted marital property was then certified for determination by the Appellate Court.⁵¹ In finding the settlement to be marital property, the Court applied the mechanical approach but defined the timing of the claim to have occurred only after the wrongful conviction was overturned in 2011, and thus occurring during the marriage.⁵²

⁴² In Re the Marriage of Berberet, 2012 IL App (4th) 110749

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ In Re the Marriage of Rivera, 2016 IL App (1st) 160552

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

PERSONAL INJURY AND WORKERS' COMP SETTLEMENTS ARE CONSIDERED INCOME FOR PURPOSES OF CHILD SUPPORT

The Court changed course slightly in **In Re the Marriage of Dodds**, 222 Ill.App.3d 99, 583 N.E.2d 608 (2nd Dist., 1991) which considered the proceeds of a worker's compensation settlement as a stream of income to be used for payment of child support. In *Dodds*, the parties were already divorced and their marital property had already been divided.⁵³ *After the divorce*, the Husband was injured and received a worker's compensation settlement.⁵⁴ The ex-Husband filed a Motion seeking to reduce his child support obligation based on his inability to work and the ex-Wife filed a Motion seeking to include the proceeds of the settlement as part of the ex-Husband's income seeking an increase in child support.⁵⁵ The ex-Husband tried to argue that such settlement funds were not "income" as defined by the child support statute and as defined by the IRS and also that since such payments were in a lump sum, instead of periodic payments, it did not meet the criteria of the statute anyway.⁵⁶

The Court in *Dodds*, found that said funds were part of the Husband's "income from all sources," reasoning

*"We note, first of all, that section 102 of the Marriage Act provides in relevant part that the Act shall be liberally construed and applied to promote its underlying purposes, one of which is to make reasonable provisions for minor children during and after litigation. Furthermore, the legislature used broad and inclusive language – "all income from all sources" – to define the scope of a supporting parent's income, thereby providing a basis for determining the amount of child support. This language leads us to believe the legislature intended the term "income" to be broadly applied. Accordingly, we conclude that the one-time receipt of money from a lump-sum payment of worker's compensation settlement comes within the parameters of net income as defined in Section 505(a)(3)."*⁵⁷

⁵³ In Re the Marriage of Dodds, 222 Ill.App.3d 99, 583 N.E.2d 608 (2nd Dist., 1991)

⁵⁷ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

The case of **Villanueva v. O’Gara**, 282 Ill.App.3d 147, 668 N.E.2d 589 (2nd Dist., 1996) moved the analysis in a slightly different direction and created a matter of first impression in Illinois. In *Villanueva*, the parties had never married but were the parents of a child.⁵⁸ The father was injured at work and received a lump sum payment of \$251,655.36 for his injuries.⁵⁹

The mother filed a motion seeking to have such payments declared as income and thus require that the then statutory amount for child support of 20% thereof (\$50,331.07) be paid to her as child support citing the Court’s holding in *Dodds* as the basis therefore.⁶⁰ The father was previously under a court-ordered obligation to pay the mother child support of \$50 per week.⁶¹

The Court disagreed and distinguished between workers’ compensation settlements (like *Dodds*) and personal injury settlements, citing numerous holdings from other State jurisdictions and finding that only a portion thereof represented lost wages or earnings which could be used for child support, and a portion thereof was awarded for pain and suffering and assorted ongoing medical expenses which would not be eligible as “income” for child support purposes, and the matter was remanded to the Trial Court to make that monetary allocation.⁶²

This approach was followed by the 4th District in **In Re Marriage of Plowman**, 2018 IL App (4th) 170665. Following the entry of an order of dissolution, one spouse received a personal injury settlement which, after deductions for attorney’s fees and costs, left a net distributable amount of just over \$158,000.00.⁶³ The non-injured ex-spouse asked the trial court to consider the entire proceeds as income for purposes of modifying the child support order.⁶⁴

The trial court agreed and entered an order modifying the child support arrangement.⁶⁵ On appeal, the reviewing court agreed, rejecting the injured spouse’s argument based on *Villanueva* that no portion of the settlement was attributable to lost earnings and therefore should not be considered income for child support purposes.⁶⁶

⁵⁸ Villanueva v. O’Gara, 282 Ill.App.3d 147, 668 N.E.2d 589 (2nd Dist., 1996)

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ In re Marriage of Plowman, 2018 IL App (4th) 170665

⁶⁴ Id.

⁶⁵ Id. ⁶⁶ Id.

It would seem that Illinois courts have largely rejected the *Villanueva* approach for calculating income for child support purposes in favor of a broader approach that includes non-economic damages attributable to pain, suffering, and disability in calculating income from all sources in determining child support.

PROCEEDS FROM WRONGFUL DEATH SETTLEMENT ARE CONSIDERED INCOME

This approach was similarly followed in **In Re Marriage of Fortner**, 2016 IL App (5th) 150246, where the 5th District addressed the question of whether the proceeds of a wrongful death lawsuit constitute income for purposes of determining child support. Following the divorce, Mr. Fortner was the beneficiary of a wrongful death settlement reached on behalf of his father.⁶⁷ This change in circumstances prompted Mr. Fortner's ex-wife to file a petition to modify child support alleging an increase in income based on the proceeds from the wrongful death action.⁶⁸

The trial court did not view the funds as income but did recognize a drastic improvement in Mr. Fortner's standard of living and ordered him to make a onetime lump sum payment to his former spouse for child support.⁶⁹ Mr. Fortner appealed, arguing that under *Villanueva*, the benefits he received were purely for non-economic losses suffered by virtue of his father's wrongful death and should not be considered income.⁷⁰

The appellate court noted that while no published Illinois decision previously labeled wrongful death proceeds as income, that the statutory definition was broad enough for such a payment to fall within its parameters.⁷¹ The court further recognized that a non-recurring benefit falls within definition of income for calculation of child support and agreed with the trial court's imposition of the onetime payment to account for the windfall from the wrongful death settlement.⁷²

⁶⁷ In re Marriage of Fortner, 2016 IL App (5th) 150246

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.



PRACTICE, CONSIDERATIONS AND CONCLUSION

The mechanical approach ratified by the Supreme Court in *DeRossett*, which focuses upon the timing of the injury *and* the timing of the filing of the claim in question, is the prevailing standard to be applied in the State of Illinois when determining whether a personal injury and/or worker's compensation settlement shall constitute marital or non-marital property. If found to be marital property, the Court is not required to divide the settlement amount *equally* but must instead divide the amount *equitably* by applying the factors set forth in 750 ILCS 5/503(d).⁷³

It is important when representing a client in a personal injury or workers' compensation claim who is involved in a divorce or child support proceeding that the client be made aware that the proceeds of the action will be considered marital property and as income for purposes of calculating child support payments.

If you are the attorney representing the injured party, you should not disburse settlement funds without first checking with the law firm handling the family law action to ensure the personal injury cause of action has been identified as an asset. Disbursing the settlement funds to a client without checking to see if the claim was listed or determining how the funds are to be allocated the personal injury client is under a court order to make child support payments, he should be made aware that his proceeds will be considered income for purposes of his support payments.

In the event you represent the spouse of the injured party, it is essential that you make personal injury counsel aware of the divorce action and place him on notice that the funds may be subject to allocation in the divorce decree. Other considerations that should not be ignored by the personal injury practitioner would be any unpaid child support liens which could attach to the settlement funds.

⁷³ In re Marriage of DeRossett, 173 Ill. 2d 416 (1996)



As a general rule, personal injury settlements, unlike jury verdicts, are not itemized, and a precise allocation between economic and non-economic damages can be challenging. In addition, settlements by their very nature are compromises and can be affected by the strength of the liability and frequently by the amount of the Defendant's available insurance coverage. These factors must be considered during allocation discussions in the divorce proceedings

Guidance in the allocation can be found in the event that an economist has provided a wage loss report or if a future health care plan was created. If so, efforts should be made under the analytical approach to differentiate between the portions of the settlement which are economic in nature (lost wages and medical expenses) and those for non-economic loss (pain, suffering disability, disfigurement).

The effects of a personal injury or a workers' compensation claim on a divorce proceeding are significant and should not be ignored by counsel in either case. It is essential to make contact with the attorneys in the parallel proceeding to make sure that both the spouses' interests are protected.

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