

# MEMO

TO: LRB

CC: IFLSC  
STATE REPRESENTATIVE ELAINE NEKRITZ  
ADAM MARGOLIN  
ELANA T. VINER

FROM: P. ANDRÉ KATZ

DATE: MARCH 14, 2011

RE: SECTION 400

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## I. Illinois Marriage and Dissolution of Marriage Act (Continued)

### Part IV: Dissolution and Legal Separation

**Section 401 [750 ILCS 5/401] Dissolution of Marriage:** On February 27, 2010, there was a general consensus of the IFLSC members that all grounds should be removed with the exception of irreconcilable differences. There will be an irrebuttable presumption that irreconcilable differences have occurred six months after the action being filed. The parties can always waive the six-month separation by stipulation; however, after six months, the grounds would be conclusive.

Accordingly, Section 401(a) needs to be revised to implement the agreement that we reached. Attached to this memo is a memo we received from Karen Conte with proposed language that we support and believe should be implemented word for word.

Further, as set forth in the attached memo from Karen Conti, Pod 7 and the IFLSC recommend eliminating the inapplicable language in the first paragraph.

Finally, the IFLSC debated whether 401 should be titled "Dissolution of marriage and dissolution of civil union" (and, accordingly, whether all references throughout the statute to dissolution of marriage would be expanded to include dissolution of civil unions) in light of the passage of the Illinois Religious Freedom Protection and Civil Union Act (*see* <http://www.ilga.gov/legislation/96/SB/09600SB1716enr.htm>). At this time, the Committee voted against making this change; however, we agreed to include in any comments/annotations that we

are considering this change but for now have decided to leave the issue in the hands of the legislature.

**Section 402 [750 ILCS 4/102] Legal Separation:** There is a consensus amongst the IFLSC that we should continue to allow legal separations. Currently, actions for legal separation are really actions for maintenance and have draconian, and often unintentional, legal consequences to them including by way of illustration the termination of the accrual of marital property, most health insurance policies consider legal separations a triggering event for COBRA, etc. Accordingly, we agreed that the following concepts should be included in the provision relating to legal separation:

1. A party may qualify for a legal separation if they are living separate and apart:

- Physical separation is required; and
- If the court deems it appropriate to grant a legal separation, then the court should consider the enumerated factors set forth within Section 504 (as per our recommendations). In conformity with current law, the Court may approve property settlement agreements that the parties request be incorporated into the Judgment for legal separation. However they shall not have the power to value or allocate property absent such an agreement; the standard for approving the property agreement would be "unconscionability", and property agreements would be final and non-modifiable. The separation statute should specify that the application for temporary or permanent maintenance in a separation action be without prejudice and if a party to a legal separation institutes dissolution proceedings the issues of temporary and permanent maintenance shall be decided *de novo*.

[Note that there are no reported cases involving legal separations providing that the standard for living separate and apart for dissolution grounds (e.g., being able to live in one home). In this regard, under the current statute a party seeking a separation and maintenance must prove that he/she are living apart "WITHOUT FAULT" - and it may be awarded only for as long as they are living separate and apart. For good reason, this is a VERY different standard as fault may not be considered in deciding maintenance under section 504.]

2. The last sentence of Section 402(b) should be revised. As it stands, all temporary relief available under Section 501 is theoretically available in legal separations. However, this does not make sense as the court will be limited to awarding temporary and permanent maintenance under the current state of the law (which I do not believe we are advocating to change). Accordingly, we recommend that Section 501 (a)(i)(ii)(iii) and (iv) as well as Section 508 should be applicable to legal separation proceedings.

**Section 403 [750 ILCS 5/403] Pleadings-Commencement-Abolition of existing defenses-Procedure:** This provision is pretty straight-forward. Our suggestions are as follows:

1. Per Pod 7's recommendations, 403(a) will include "complaint or petition" - even though parties shall continue to be designated as "petitioner" or "respondent".
2. Paragraph 403(3) needs to be modified in light of the fact that the sole grounds that we are recommending will be irreconcilable differences.
3. If the Wife is pregnant, she should specify whom she believes the father is.
4. Paragraph 403(e) needs to be modified in order to take into consideration that the sole grounds are irreconcilable differences. Further, we believe that Section 403(e) should be clarified to indicate that testimony and evidence regarding grounds should first be heard when the court determines that sufficient evidence for grounds (irreconcilable differences) has been met and they should proceed to trial without a judgment of dissolution of marriage being entered at that time. We will need to leave in the default provisions.
5. Paragraph 403(f) should be deleted.

**Section 404 [750 ILCS 5/404] Conciliation::**

No recommended changes except as it relates to visitation, we recommend including a provision allowing the court to assess the cost of mediation without prejudice and subject to reallocation in Section 404. (See Section 404.1(c) which has a similar provision.) We suggest that we simply use the same language in Section 404.1(c) with an additional provision that states that any such fee requests are without prejudice and subject to reallocation at the conclusion of the case.

**Section 4.04.1 [750 ILCS 5/404.1] Educational Program:**

1. No recommended changes.
2. Section 404.1(c) needs to be modified to state that the costs will be assessed without prejudice and will be subject to reallocation at the conclusion of the case.

**Section 405 [750 ILCS 5/405] Hearing on Default-Notice:** We recommend that we include a provision stating that all of the provisions related to default hearings set forth in the Illinois Code of Civil Procedure are applicable to these hearings on default.

**Section 406 [750 ILCS 5/406] Fault or Conduct of Petitioner:** In light of our recommended changes to grounds, we recommend the removal of this Section

**Section 407 [750 ILCS 5/407] Admission of Respondent:** In light of the fact that we are proposing the abolition of all grounds, we propose the section be removed.

**Section 408 [750 ILCS 5/408] Collusion – Assent or consent of Petitioner** We propose this Section be removed.

**Section 409 [750 ILCS 5/409] Proof of Foreign Marriage:**

1. We recommend that the word “circumstantial” be removed and that it simply read “evidence.”

2. We recommend that the court be able to consider or take judicial notice of certified or official documents tendered directly from an embassy or consultant. To this end, Rule 803(9) of the new Illinois Rules of Evidence creates a hearsay exception for records of vital statistics, including marriage records:

**(9) Records of Vital Statistics.** Facts contained in records or data compilations, in any form, of births, fetal deaths, deaths, or *marriages*, if the report thereof was made to a public office pursuant to requirements of law (emphasis added).

**Section 410 [750 ILCS 4/510] Process – Practice – Proceedings – Publication:**  
No recommended changes.

**Section 411 [750 ILCS 5/411] Commencement of Action:**

1. We believe Section 411(a) and (d) should be modified to give the court discretion to allow the case to proceed even if a petition for dissolution of marriage is not timely filed. Section 411(c) provides the court with the authority to grant the respondent extensions of time to file his/her response for good cause shown and we should allow for a similar provision in Section 411(d). Specifically, the word “shall” should be replaced with the word “may.” The Commentary will make very clear that the trial court will have discretion relative to the current 180-day requirement.

2. We should clarify the statute to reflect that a praecipe constitutes the commencement of an action that would serve as a basis to move and dismiss a subsequently filed petition for dissolution of marriage in another county under Section 2-619(a)(3).

**Section 412 [750 ILCS 5/412] Filing of Petition – Cases requiring service by publication:** We recommend removing this Section, as the Civil Practice Act should apply. Specifically, Section 206 of the Illinois Code of Civil Procedure provides as follows:

§2-206. Service by publication; affidavit; mailing; certificate.

- (a) Whenever, in any action affecting property or status within the jurisdiction of the court, including an action to obtain the specific performance, reformation, or rescission of a contract for the conveyance of land, plaintiff or his or her attorney shall file, at the office of the clerk of the court in which the action is pending, an affidavit showing that the defendant resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him or her, and stating the place of residence of the defendant, if known, or that upon diligent inquiry his or her place of residence cannot be ascertained, the clerk shall cause publication to be made in some newspaper published in the county in which the action is pending. If there is no newspaper published in that county, then the publication shall be in a newspaper published in an adjoining county in this State, having a circulation in the county in which action is pending. The publication shall contain notice of the pendency of the action, the title of the court, the title of the case, showing the names of the first named plaintiff and the first named defendant, the number of the case, the names of the parties to be served by publication, and the date on or after which default may be entered against such party. The clerk shall also, within 10 days of the first publication of the notice, send a copy thereof by mail, addressed to each defendant whose place of residence is stated in such affidavit. The certificate of the clerk that he or she has sent the copy in pursuance of this Section is evidence that he or she has done so.

**Section 413 [750 ILCS 5/413] Judgment:** Pod 7 submitted the attached proposal which is directed at clarifying the fact that any motion to reconsider or similar type of motion filed under 735 ILCS 5/2-1203(b) would not serve to stay any temporary order entered by the court during the pendency of the case. The IFLSC agreed to adopt this language (specifically, please refer to the language in the second proposal on the bottom). This section should also reference petitions for declaration of invalidity, as virtually every provision addresses judgments for dissolution of marriage, legal separations and judgment for declaration of invalidity.

We also are recommending that all Judgments be entered within 60 days of the closing of proofs; provided, however, that if the court enters an order specifying good cause as to why it needs an additional 30 days, it may take up to a total of 90 days to issue the Judgment.

## **II. Illinois Marriage and Dissolution of Marriage Act (Continued)**

### **Part IV/A: Joint Simplified Dissolution Procedure**

**Section 451 [750 ILCS 5/451] Applicability:** No recommended changes.

**Section 452 [750 ILCS 5/452] Petition:** Subject to the comments relating to Section 452 below, we are recommending Howard Feldman's proposal, as to how we should expand the availability of the joint simplified dissolution procedure to more litigants.

Specifically, we agreed to adapt Howard Feldman's proposal subject to:

1. We should add a \$50,000 asset limit
2. In 452(i), all liabilities should be identified
3. In 452(f), we should add "or retirement benefits"

**Section 453 [750 ILCS 5/453] Procedure; Judgment:** No comment with the exception that the affidavits should be form in nature and made available to the parties.

**Section 454 [750 ILCS 5/454] Affidavit:** No comment, with the exception that the affidavits should be form in nature and made available to the parties.

**Section 455 [750 ILCS 5/455] Copies of Judgment:** No recommended changes.

**Section 456 [750 ILCS 5/456] Forms:** No recommended changes.

**Section 457 [750 ILCS 5/457] Brochure to Describe Proceedings:** No recommended changes.

M E M O R A N D U M

November 19, 2009

TO: Family Law Study Committee  
FROM: Karen Conti  
Re: Grounds for Dissolution  
5/401 et seq.

I am attaching my proposed changes. Please note:

1. I changed 401 to eliminate grounds other than irreconcilable differences and changed the 2 year waiting period to 6 months (per recommendations of Judge Karen Shields).

2. As to 403, I deleted specific references to grounds and basically substituted the requirements of Section 401, which are the requirements of residency, irreconcilable differences and 6 months waiting period. Do we eliminate 403(c) regarding recrimination and condonation?

3. Eliminate 406
4. Eliminate 407?
5. Eliminate 408?

I will welcome your input!

Sec. 401. Dissolution of marriage.

(a) the Court shall enter a judgment of dissolution of marriage when if at the time the action was commenced, one of the spouses was a resident of this State or was stationed in this State while a member of the armed services, and the residence or military presence had been maintained for 90 days next preceding the commencement of the action or the making of the finding and the following have been proven; provided, however, ~~that a finding of residence of a party in any judgment entered under this Act from January 1, 1982 through June 30, 1982 shall satisfy the former domicile requirements of this Act, and if one of the following grounds for dissolution has been proved;~~

(1) ~~That, without cause or provocation by the petitioner; the respondent was at the time of such marriage, and continues to be naturally impotent; the respondent had a wife or husband living at the time of the marriage; the respondent had committed adultery subsequent to the marriage; the respondent has wilfully deserted or absented himself or herself from the petitioner for the space of one year, including any period during which litigation may have been pended between the spouses for dissolution of marriage or legal separation; the respondent has been guilty of habitual drunkenness for the space of 2 years; the respondent has been guilty of gross and confirmed habits caused by the excessive use of addictive drugs for the space of 2 years, or has attempted the life of the other by poison or other means showing malice, or has been guilty of extreme and repeated physical or mental cruelty, or has been convicted of a felony or other infamous crime; or the respondent has infected the other with a sexually transmitted disease. "Excessive use of addictive drugs", as used in this Section, refers to use of an addictive drug by a person when using the drug by a person when using the drug becomes a controlling or a dominant purpose of his life; or~~

irreconcilable differences have caused the irretrievable breakdown of the marriage and the court determines that efforts at reconciliation have failed or that future attempts at reconciliation would be impracticable and not in the best interests of the family; and

(2) That the spouses have lived separate or apart for a continuous period in excess of 6 months. ~~2 years and irreconcilable differences have caused the irretrievable breakdown of the marriage and the court determines that efforts at reconciliation have failed or that future attempts at~~



~~reconciliation would be impracticable and not in the best interests of the family. If the spouses have lived separate and apart for a continuous period of not less than 6 months, next preceding the entry of the judgment dissolving the marriage, as evidenced by testimony or affidavits of the spouses, the requirement of living separate and apart for a continuous period in excess of 6 months ~~2 years~~ may be waived upon written stipulation of both spouses filed with the court. At any time after the parties cease to cohabit, the following periods shall be included in the period of separation:~~

(A) any period of cohabitation during which the parties attempted in good faith to reconcile and participated in marriage counseling under the guidance of any of the following: a psychiatrist, a clinical psychologist, a clinical social worker, a marriage and family therapist, a person authorized to provide counseling in accordance with the prescriptions of any religious denomination, or a person regularly engaged in providing family or marriage counseling; and

(B) any period of cohabitation under written agreement of the parties to attempt to reconcile.

~~In computing the period during which the spouses have lived separate and apart for the purposes of this Section, periods during which the spouses were living separate and apart prior to July 1, 1984 are included.~~

(b) Judgment shall not be entered unless, to the extent it has jurisdiction to do so, the court has considered, approved, reserved or made provision for child custody, the support of any child of the marriage entitled to support, the maintenance of either spouse and the disposition of property. The court may enter a judgment for dissolution that reserves any of these issues either upon (i) agreement of the parties, or (ii) motion of either party and a finding by the court that appropriate circumstances exist.

The death of a party subsequent to entry of a judgment for dissolution but before judgment on reserved issues shall not abate the proceedings.

750 ILCS 5/401(a)

**Recommendation by Pod 7:**

750 ILCS 5/401(a) should be redacted as follows:

The court shall enter a judgment of dissolution of marriage if at the time the action was commenced one of the spouses was a resident of this State or was stationed in this State while a member of the armed services, and the residence or military presence had been maintained for 90 days next preceding the commencement of the action or the making of the finding; ~~provided, however, that a finding of residence of a party in any judgment entered under this Act from January 1, 1982 through June 30, 1982 shall satisfy the former domicile requirements of this Act;~~ and if one of the following grounds for dissolution has been proved:

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750 ILCS 5/403(a)

**Recommendation by Pod 7:**

We will recommend a revision to 750 ILCS 5/403(a) so that it reads:

The complaint or petition for dissolution of marriage or legal separation shall be verified and shall minimally set forth:

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750 ILCS 5/413(a)

**Recommendation by Pod 7:**

750 ILCS 5/413(a) should be revised as follows:

A judgment of dissolution of marriage or of legal separation or of declaration of invalidity of marriage is final when entered, subject to the right of appeal. An appeal from the judgment of dissolution of marriage that does not challenge the finding as to grounds does not delay the finality of that provision of the judgment which dissolves the marriage, beyond the time for appealing from that provision, and either of the parties may remarry pending appeal. An order directing payment of money for support or maintenance of the spouse or the minor child or children shall not be suspended or the enforcement thereof stayed pending the appeal, or stayed pending a timely filed motion directed at the order or judgment.

750 ILCS 5/501.1(a)

**Recommendation by Pod 7:**

750 ILCS 5/501.1(a) should be revised as follows:

(a) Upon service of a summons and petition or praecipe filed under the Illinois Marriage and Dissolution of Marriage Act or upon the filing of the respondent's appearance in the proceeding, whichever first occurs, a dissolution action stay shall be in effect against both parties and their agents and employees, without bond or further notice, until a final judgment is entered, the proceeding is dismissed, or until further order of the court:

~~(1) restraining both parties from transferring, encumbering, concealing, destroying, spending, damaging, or in any way disposing of any property, without the consent of the other party or an order of the court, except in the usual course of business, for the necessities of life, or for reasonable costs, expenses, and attorney's fees arising from the proceeding, as well as requiring each party to provide written notice to the other party and his or her attorney of any proposed extraordinary expenditure or transaction;~~

(1) ~~(2)~~ restraining both parties from physically abusing, harassing, intimidating, striking, or interfering with the personal liberty of the other party or the minor children of either party; and

(2) ~~(3)~~ restraining both parties from removing any minor child of either party from the State of Illinois or from concealing any such child from the other party, without the consent of the other party or an order of the court.

The restraint provided in this subsection (a) does not operate to make unavailable any of the remedies provided in the Illinois Domestic Violence Act of 1986.

~~A restraint of the parties' actions under this Section does not affect the rights of a bona-fide purchaser or mortgagee whose interest in real property or whose beneficial interest in real property under an Illinois land trust was acquired before the filing of a lis pendens notice under Section 2-1901 of the Code of Civil Procedure.~~

Post-Judgment Venue (750 ILCS 5/512(c))

**Recommendation by Pod 7:**

750 ILCS 5/512(c) should be revised as follows:

(c) If neither party then resides in the judicial circuit wherein the judgment was entered or last modified, further proceedings shall be had in that circuit or in the judicial circuit wherein either party resides ~~or where the respondent is actively employed~~; provided, however, that the court may, in its discretion, transfer matters involving a change in child custody to the judicial circuit where the minor or dependent child resides.

### **Mandatory Timetables for Written Judgment**

**Recommendation by Pod 7:** Illinois Supreme Court Rules Committee should consider creating a rule stating that Written Judgments must be issued within 60 days, with the ability to extend upon good cause shown.