

# Family Law

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

## Personal Injury & Workers' Compensation Claims in Illinois Divorces Part 2

BY STEPHANIE L. TANG

Following up on my column from last month, in this month's column, I will be focusing on whether personal injury and workers' compensation settlement awards are considered income for purposes of child support. The first thing family law practitioners often jump to when analyzing this question is the statutory definition of "income" under Section 505 of the IMDMA as "income from all sources." In

line with this broad definition, the Second District in *In re Marriage of Dodds*, 222 Ill. App. 3d 99 (2d Dist. 1991), found a workers' compensation award received by the husband for an injury that occurred after the parties were divorced constituted income for child support purposes. What has followed are several cases where Illinois appellate courts provide additional

*Continued on next page*

Personal Injury & Workers' Compensation Claims in Illinois Divorces Part 2

1

Adjudicating a Parentage Matter—Without the Parent?

1

A.I. and the Practice of Law

3

## Adjudicating a Parentage Matter—Without the Parent?

BY STACI BALBIRER

In the last few years, parentage matters have become prevalent in my practice and that of my partners—likely due to the fact that in 2020, 40.5 percent of all Illinois babies were born to unwed mothers. *Center of Disease Control, National Center for Health Statistics*.<sup>1</sup> That being said, just when I thought I had a handle on parentage matters, I was recently tasked with a first: adjudicating parentage for a

non-parent.

The facts in this specific case are fairly unusual and worth mentioning. A man and woman engaged in a consensual relationship. During the period in which this consensual relationship occurred, woman becomes pregnant. Man tragically passes away before child is born but man's mother (my client), who helped raise the

*Continued on next page*

## Personal Injury & Workers' Compensation Claims in Illinois Divorces Part 2

CONTINUED FROM PAGE 1

clarification on when these awards are considered “income.”

The 1996 Second District case of *Villanueva v. O’Gara*, 282 Ill. App. 3d 147 (2d Dist. 1996) took a slightly different approach, looking at the allocated portions of the \$251,655 awarded to the husband as and for a workers’ compensation settlement specifically. The *Villanueva* court found that only a portion of the workers’ settlement awarded represented lost wages or earnings which could be used for child support, and the portion awarded for pain and suffering and ongoing medical expenses would not be eligible as “income” for child support purposes. Conversely, the 2018 4th District case of *In re Marriage of Plowman*, 2018 IL App (4th) 170665, found that even net proceeds from a mother’s personal injury settlement attributable to damages for pain and suffering and disability was income to her for purposes of setting child support.

Practitioners should also recall the underlying premise from *In re Marriage of Rogers*, 213 Ill. 29 129 (2004) that income

is defined as income from all sources, but if the evidence shows a parent is unlikely to continue receiving certain lump-sum or fixed-time payments in the future, the court may consider deviating from the child support guidelines. *See also Mayfield v. Mayfield*, 2013 IL 114655 (2013). Therefore, even if the award is considered marital, it is still worthwhile to argue a deviation from statutory guidelines based on that parties’ income is proper, particularly if the award was applied to something in the children’s benefit. A similar argument was successful in the 2016 case of *In re Marriage of Fortner*, 2016 IL App (5th) 150246, in which a court analyzed whether Father’s wrongful death settlement received on behalf of his father constituted income to Father. The appellate court found the trial court properly modified child support to order a one-time lump-sum payment without finding a substantial change in circumstances based on characterizing the wrongful death settlement as income for the year in which it was received. ■

## Adjudicating a Parentage Matter—Without the Parent?

CONTINUED FROM PAGE 1

baby is now desirous of seeking grandparent visitation. It sounds like a law school exam prompt, but real life is stranger than fiction. And unlike a law school exam, I’m going to give you my step-by-step analysis in adjudicating parentage without the parent.

### Step 1: Determine the Applicable Section of the Parentage Act

In this situation, man passed away before the birth of the child. Therefore a voluntary acknowledgement of paternity (VAP) was not signed and section 46/305 is not applicable.

Additionally man does not fall within the definition of a presumed parent under 46/204(a). So what’s left—Article 6 of the Parentage Act.

### Step 2: Determine Who Has Standing to Maintain a Parentage Action

Who can seek to adjudicate parentage is clearly defined in Section 602. You may be wondering if this is where the case ends for my client—and if you stopped your analysis here, you would most likely fail your law school exam as grandparents or relatives are not included as those who may bring a claim to adjudicate parentage. So now what? It was time to get creative.

We filed a probate case having my client appointed as Independent Administrator of her deceased son’s estate. And now, under 602(j), she was a representative authorized by law to act for an individual who would otherwise be entitled to

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maintain a proceeding but who is deceased, incapacitated or a minor. “The administrator of an estate, as the deceased’s legal representative, stands in the deceased’s shoes. The administrator’s standing is contingent upon whether the presumed father, if not deceased (or incapacitated or a minor) could maintain a proceeding.” *In re Estate of Jagodowski*, 2017 IL App (2d) 160723 at ¶56. “In other words, section 602(j) puts a legal representative in the shoes of a person who could seek to adjudicate parentage but for being deceased.” *Id.* at ¶52. My client’s son, had he not tragically passed away, would have standing under 602(d) as the alleged father of the child to maintain a parentage action.

### Step 3: Establish a Parent-Child Relationship

Now that my client has standing to maintain a claim to adjudicate parentage, she still must establish a parent-child relationship. Under section 46/408(a) “if a genetic testing specimen is not available from the man who may be the father of the child, for good cause and under circumstances the court considers to be just, the court may order the following individuals to submit specimens for genetic testing:

- (1) the parents of the man;
- (2) brothers and sisters of the man;
- (3) other children of the man and their mothers; and
- (4) other relatives of the man necessary to complete genetic testing.”

(750 ILCS 46/408).

The parent-child relationship will either be established (or disproved) by my client and the minor child submitting to a DNA test. The DNA test results, if conclusive, will determine if my client can seek grandparent visitation pursuant to 5/602.9 of the Illinois Marriage and Dissolution of Marriage Act.

### Step 4: We Wait

You spent the time reading this article, or maybe skimmed to the end to find out what happens—but results are not in. I know, I hate that to. But when I know, you’ll know—Part Two to come... ■

1. <https://www.cdc.gov/nchs/pressroom/states/illinois/il.htm>.

# A.I. and the Practice of Law

BY RALEIGH D. KALBFLEISCH

Artificial intelligence (AI) is the ability of a system or a program to think and learn from experience. AI applications have significantly evolved over the past few years and have found their applications in almost every business sector. Artificial intelligence is machine-displayed intelligence that simulates human behavior or thinking and can be trained to solve specific problems. AI is a combination of machine learning techniques and deep learning. Types of artificial intelligence models are trained using vast volumes of data and have the ability to make intelligent decisions.

Machine learning is a subfield of artificial intelligence, which is broadly defined as the capability of a machine to imitate intelligent human behavior. Artificial intelligence systems are used to perform complex tasks in a way that is similar to how humans solve problems.<sup>2</sup> Deep learning is a type of machine learning and artificial intelligence that imitates the way humans gain certain types of knowledge. Deep learning is an important element of data science, which includes statistics and predictive modeling.<sup>3</sup>

According to Statista, revenue from the artificial intelligence software market worldwide is expected to reach 126 billion

dollars by 2025. As per Gartner, 37 percent of organizations have implemented AI in some form. The percentage of enterprises employing AI grew 270 percent over the past four years. According to Servion Global Solutions, by 2025, 95 percent of customer interactions will be powered by AI. A recent 2020 report from Statista reveals that the global AI software market is expected to grow approximately 54 percent year-on-year and is expected to reach a forecast size of USD \$22.6 billion.<sup>4</sup>

Applications that we may all be familiar with are: Siri, Cortana, Google Assistant, and Alexa, Instagram and the like. Examples used in our everyday lives are: Instagram - On Instagram, AI considers your likes and the accounts you follow to determine what posts you are shown on your explore tab; on Facebook, AI is used along with a tool called DeepText. With this tool, Facebook can understand conversations better. It can be used to translate posts from different languages automatically; on Twitter AI is used (theoretically) for fraud detection, for removing propaganda, and hateful content. Twitter also uses AI to recommend tweets that users might enjoy, based on what type of tweets they engage with.<sup>5</sup>

How can AI change or assist in the practice of law? What is worse than underproduction of discovery? It is often full production of hundreds if not thousands of documents produced electronically. AI can speed up the mining of relevant information from discovery taking days rather than weeks to compile the information needed for the case.<sup>6</sup> Another example is motion practice. AI can be used to very quickly produce initial drafts, citing the relevant case law, advancing arguments, and rebutting (as well as anticipating) arguments advanced by opposing counsel. Examples include contracts, the many different types of documents that get filed with a court in litigation, responses to interrogatories, summaries for clients of recent developments in an ongoing legal matter, visual aids for use in trial, and pitches aimed at landing new clients. AI could also be used during a trial to analyze a trial transcript in real time and provide input to attorneys that can help them choose which questions to ask witnesses.<sup>7</sup>

AI is already used extensively in the practice of law when attorneys and their staff conduct legal research. Practicing attorneys may not even be aware they are using AI in this area, since it has been seamlessly



woven into many research services. One such service is Westlaw Edge, launched by Thomson Reuters more than three years ago. The keyword or Boolean search approach that was the hallmark of the service for decades has been augmented by semantic search<sup>8</sup>. This means the machine learning algorithms are trying to understand the meaning of the words, not just match them to keywords. Another example of an AI-powered feature from Westlaw Edge is Quick Check, which uses AI to analyze a draft argument to gain further insights or identify relevant authority that may have been missed. Quick Check can even detect when a case cited has been indirectly overturned.<sup>9</sup>

An interesting example is Casetext. The company recently announced an AI legal assistant called CoCounsel. CoCounsel, which is powered by technology from OpenAI, the company that created ChatGPT, allows an attorney to ask the same sort of questions that he or she might ask of a junior associate, such as, "Can you research what

courts in this jurisdiction have done in cases presenting similar fact patterns to the case we are working on?"<sup>10</sup>

Another novel use of AI is predicting legal outcomes. Accurately assessing the likelihood of a successful outcome for a lawsuit can be very valuable. It allows an attorney to decide whether they should take a case on contingency, or how much to invest in experts, or whether to advise their clients to settle. Companies such as Lex Machina use machine learning and predictive analytics to draw insights on individual judges and lawyers, as well as the legal case itself, to predict behaviors and outcomes.<sup>11</sup>

All is not perfect in the legal AI world however. While the potential benefits of AI in the law are real; it can increase attorney productivity and avoid costly mistakes. In some cases, it can increase the speed of research and decision-making. However, I submit that AI is not yet ready to replace human judgment in the legal profession. The risk of embedded bias in data that powers AI

and the inability to adequately understand the rationale behind AI-derived decisions in a way understandable to humans (i.e., explainability) must be overcome before using the technology in some legal contexts.<sup>12</sup> A more concerning use of AI is in advising judges on bail and sentencing decisions. One such application is Correctional Offender Management Profiling for Alternative Sanctions (COMPAS). COMPAS and similar AI tools are used by criminal judges in many states to assess the recidivism risk of defendants or convicted persons in decisions on pre-trial detention, sentencing or early release. There is much debate about the fairness or accuracy of these systems. According to a ProPublica study, such assessment tools seemed biased against black prisoners, disproportionately flagging them as being significantly more likely to reoffend than white prisoners.<sup>13</sup> Equivant, the company that developed COMPAS, sought to refute the ProPublica analysis and rejected its conclusions about racial bias<sup>14, 15</sup> using AI

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in this context may reflect, or even amplify, the inherent bias in the data of the criminal justice system. The data used to train the ML (machine learning) models is based on actual arrests and conviction rates that may be slanted against some populations.<sup>16</sup>

AI raises a host of questions in the context of the legal profession: Will the failure to use AI in some aspects of the law (like discovery) ever amount to malpractice? For example, if not using AI is shown to slow the discovery process, or results in incomplete disclosures, there may arise a professional obligation to use AI in discovery. Should criminal defendants have a right to access AI tools if helpful to their case? Do attorneys need to disclose their use of AI in a case? If so, do they need to disclose the training data or other inputs used to configure the ML models? Does the lack of effective transparency make them inappropriate for some applications in the law? Is there a way to ensure there is no embedded bias that reflects sexist, homophobic, ageist or racist views?

What happens when AI is used to replace human judgment, especially in the criminal law context? AI is not ready for this for a number of reasons. For one, there may

exist bias in the training data which will be amplified and further institutionalized by the resulting ML models. There is the due process problem of lack of transparency and explainability with using AI. One cannot cross-examine a deep learning artificial neural network so how would this play out at trial; especially when an individual's freedom is one the line? "The idea of allowing algorithms to make liberty-depriving decisions may simply be unconscionable. It is not inconceivable that machine learning algorithms will begin to predict when a person is likely to commit a future crime with high confidence, like the science fiction movie *Minority Report*. Another compelling reason to limit the use of AI in the criminal context may be that judges, lawyers and society as a whole could grow to have too much trust in these algorithms. Even if humans retain ultimate decision authority, it is not uncommon for them to become overly reliant on technology-based recommendations, a phenomenon called automation bias. With AI, this trust may be especially misplaced since the actual capabilities of the technology may not be as "intelligent" as they seem."<sup>17</sup> ■

1. [https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained?utm\\_source=mitsloangooglep&utm\\_medium=social&utm\\_campaign=machinelearnexp&gclid=Cj0KCQjww4](https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained?utm_source=mitsloangooglep&utm_medium=social&utm_campaign=machinelearnexp&gclid=Cj0KCQjww4).
2. <https://www.techtarget.com/searchenterpriseai/definition/deep-learning-deep-neural-network>.
3. <https://www.simplilearn.com/tutorials/artificial-intelligence-tutorial/artificial-intelligence-applications>.
4. *Id.*
5. <https://www.brookings.edu/blog/techtank/2023/03/20/how-ai-will-revolutionize-the-practice-of-law/>.
6. *Id.*
7. Semantic search describes a search engine's attempt to generate the most accurate SERP results possible by understanding based on searcher intent, query context, and the relationship between words.
8. <https://businesslawtoday.org/2022/02/how-ai-is-reshaping-legal-profession/>.
9. *Id.*
10. <https://businesslawtoday.org/2022/02/how-ai-is-reshaping-legal-profession/>.
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12. <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.
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14. <https://businesslawtoday.org/2022/02/how-ai-is-reshaping-legal-profession/>.
15. <https://businesslawtoday.org/2022/02/how-ai-is-reshaping-legal-profession/>.
16. [https://businesslawtoday.org/2022/02/how-ai-is-reshaping-legal-profession/#\\_ftn1](https://businesslawtoday.org/2022/02/how-ai-is-reshaping-legal-profession/#_ftn1).

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