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*IN RE MARRIAGE OF COHN** BIFURCATION OF MARRIAGE DISSOLUTION JUDGMENTS IN ILLINOIS

Section 401(3) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) was amended in August of 1981 to allow for bifurcated[1] marriage dissolution judgments.[2] The amendment also attempted to retroactively validate any bifurcated judgment entered prior to the enactment of the amendment. The constitutionality of this amendment was recently tested in *In re Marriage of Cohn*,[3] a dissolution matter which arose under the IMDMA as originally instituted in 1977,[4] but which reached the Illinois Supreme Court after the enactment of the 1981 amendment. The court first ruled that, as originally enacted, the IMDMA permits a trial court to enter a judgment of dissolution while reserving other issues only in appropriate circumstances.[5] Secondly, the court held unconstitutional that part of the 1981

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* 93 Ill. 2d 90, 443 N.E.2d 541 (1982).

1. Bifurcate—to branch or separate into two parts. WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 213 (3d ed. 1981).

2. Section 401(3) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) amended August 14, 1981 provides:

> Such judgment [of dissolution] may 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 bifurcate the judgment for dissolution and reserve questions of child custody, the support of any child of the marriage entitled to support, the maintenance of either spouse and the disposition of property regardless of whether i) the court has in personam jurisdiction over the respondent, or ii) one of the parties would be unable to pay child support or maintenance if so ordered, or iii) the court has set aside an adequate fund for child support pursuant to subsection (d) of Section 503, or iv) the child or children of the parties do not reside with either parent. All judgments for dissolution of marriage reserving any such questions entered prior to the effective date of this amendatory Act of 1981 are declared to be valid as of the date of entry.

ILL. ANN. STAT. ch. 40, § 401(3) (Smith-Hurd Supp. 1983-84).

3. 93 Ill. 2d 190, 443 N.E.2d 541 (1982).

4. Before the amendment, § 401(3) of the 1977 IMDMA provided that: "Such judgment [of dissolution] 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 entered to support, the maintenance of either spouse and the disposition of property." ILL. REV. STAT. ch. 40, § 401(3) (1977).

5. *In re* Marriage of Cohn, 93 Ill. 2d 190, 200, 443 N.E.2d 541, 545-46 (1982).

amendment which attempted to retroactively validate bifurcated judgments.[6]

The petitioner, Ruth Cohn, filed for a dissolution of marriage from the respondent, Stuart Cohn, on May 1, 1979.[7] On May 14, 1979, after an uncontested hearing on the grounds for dissolution, the trial court judge determined that the dissolution could be properly granted,[8] but ordered the matter continued until a hearing on property disposition, child custody, support, and maintenance could be held or an agreement could be entered.[9] On December 12, 1979, the respondent filed a motion requesting the trial court to enter a judgment for dissolution of marriage in accordance with the proceedings held on May 14, 1979.[10] After a hearing on the motion, the trial court entered the respondent's proposed judgment.[11]

Ruth Cohn appealed the judgment, alleging that the trial court lacked the authority to dissolve the marriage until it had adjudicated all issues in the lawsuit.[12] The appellate court held that the trial court did not have the authority to enter the dissolution judgment and therefore vacated the judgment of dissolution.[13] Stuart Cohn then appealed to the Illinois Supreme

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6. *Id.* at 207, 443 N.E.2d at 549.

7. *Id.* at 193, 443 N.E.2d at 542.

8. *Id.* The trial judge found that the petitioner established the grounds of extreme and repeated mental cruelty.

9. *Id.*

10. *Id.* at 194, 443 N.E.2d at 543. The petitioner filed a motion the same day requesting the court to vacate and expunge the proceedings of May 14, 1979. She alleged that following the May 14, 1979 proceeding she and respondent resumed cohabitation as husband and wife and she later became pregnant.

11. *Id.* at 194-95, 443 N.E.2d at 543. The trial court entered judgment after considering the transcript of the May 14, 1979 proceedings. The judgment was entered retroactive to May 14, 1979. Ruth Cohn was granted 30 days to file a motion to vacate. A hearing on the motion was held on January 25, 1980; on January 31, 1980, the trial court denied the motion. *Id.*

12. *Id.* at 195, 443 N.E.2d at 543. On appeal the petitioner also argued that: (1) the entry of the judgment retroactively was reversible error; (2) the respondent should be estopped from seeking a judgment of dissolution on the record of the case; and (3) the respondent had not provided any evidence that there were grounds for dissolution "without provocation" on his part. *In re* Marriage of Cohn, 94 Ill. App. 3d 732, 735, 419 N.E.2d 729, 732 (1981).

13. *Id.* at 740, 419 N.E.2d at 736. The appellate court in its unpublished opinion found that appropriate circumstances were necessary to allow a bifurcated judgment. The record of the trial court did not reveal any appropriate circumstances, therefore, "[t]he judgment of dissolution was entered without statutory authority and was, therefore, void." *In re* Marriage of Cohn, No. 40-148, slip. op. at 16 (Ill. App. Jan. 27, 1981), modified, 94 Ill. App. 3d 732, 419 N.E.2d 729 (1981)). The appellate court filed a modified opinion after concern arose about the declaration that bifurcated judgments of dissolution were void because this would make subsequent marriages bigamous. 9 FAM. L. REP. (BNA) 1005. In the modified opinion the court stated:

Court.

During the time between the appellate court decision and the review in the Illinois Supreme Court, the Illinois legislature amended section 401(3) to allow trial courts to bifurcate judgments. The amendment also attempted to retroactively validate bifurcated dissolution judgments.[14] After review of the case, the supreme court affirmed the appellate court.[15] The court first examined the argument that under the 1977 IMDMA authority to bifurcate judgments was not limited to cases exhibiting only "appropriate circumstances."[16] The court looked to section 401(3) which provided: "Such judgment [of dissolution] 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."[17]

The court found that section 401(3) was based on section 302(a)(4) of the Uniform Marriage and Divorce Act.[18] The Commissioner's Comment to section 302(a) indicates that its purpose is to give "the court the authority to refuse to make any award, if the evidence justifies an outright denial, as well as the authority to make such allotment as the facts require."[19] The

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"The circumstances of this case do not provide the 'appropriate circumstances' for dissolving the marriage before adjudicating the other issues involved. In the absence of such appropriate circumstances, the court is without authority to enter a judgment of dissolution." 94 Ill. App. 3d 732, 740, 419 N.E.2d 729, 735 (1981). To avoid the problem created by declaring bifurcated judgments void the court said "[a]lthough the provisions of § 401(3) are mandatory, they do not present a jurisdictional requirement." *Id.* This allowed the provisions to be waived. *Id.*

14. *See supra* note 2.

15. *In re* Marriage of Cohn, 93 Ill. 2d 190, 207, 443 N.E.2d 541, 549 (1982).

16. *Id.* at 196, 443 N.E.2d at 544. "Appropriate circumstances" include, but are not limited to situations in which: (1) the court does not have in personam jurisdiction over an individual so as to adjudge such matters as maintenance, support, custody and property disposition; (2) the individual could not afford to make payments; (3) the court has set aside an adequate fund for child support pursuant to § 503(d) of the IMDMA; or, (4) the child is not residing with either party. ILL. ANN. STAT. ch. 40, § 401, Historical and Practice Notes to Subsection (3) (Smith-Hurd 1980).

17. *See supra* note 4.

18. *In re* Marriage of Cohn, 93 Ill. 2d 190, 196, 443 N.E.2d 541, 544 (1982). UNIF. MARRIAGE AND DIVORCE ACT § 302(a)(4), 9A U.L.A. 121 (1979). The Uniform Act provides:

> The [_____] court shall enter a decree of dissolution of marriage if:
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> . . .
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> (4) to the extent it has jurisdiction to do so, the court has considered, approved, or provided for child custody, the support of any child entitled to support, the maintenance of either spouse, and the disposition of property; or has provided for a separate, later hearing to complete these matters.

Id.

19. UNIF. MARRIAGE AND DIVORCE ACT § 302, Commissioners' comment, 9A U.L.A. 123 (1979).

Historical and Practice Notes to section 401(3) refer to the same purpose, and state, "[t]he court may also "reserve" determination of these issues in appropriate circumstances."[20]

Pursuant to this authority, the Illinois Supreme Court held that the appellate court properly construed section 401(3) to require "appropriate circumstances" before bifurcating a judgment which reserves custody, support, maintenance or property disposition.[21] The supreme court found the trial record to be devoid of "appropriate circumstances."[22] Thus the court's interpretation of the IMDMA required reversal because the trial court lacked authority to grant the dissolution judgment.

Recognizing that complications could arise from its decision in *Cohn*,[23] the court stated that the mandatory finding of "appropriate circumstances" to justify bifurcation is not jurisdictionally required.[24] This holding, therefore, allows the "appropriate circumstances" requirement to be waived if a timely objection is not made at the trial court level.[25]

Next, the supreme court addressed the ancillary issue regarding the amendment of section 401(3). Because the section was amended after the appellate court decision in *Cohn*, but before review by the Illinois Supreme Court, the issue was whether the amendment retroactively validated the bifurcated dissolution judgment. The amendment explicitly allows a trial court to bifurcate a judgment for dissolution; the amendment provides that, "[a]ll judgments for dissolution of marriage reserving any such questions entered prior to the effective date of this amendatory Act of 1981 are declared to be valid as of the

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20. ILL. ANN. STAT. ch. 40, § 401, Historical and Practice Notes (Smith-Hurd 1981). The Notes also encourage "the court to decide all matters incident to the dissolution in a single judgment, to the fullest extent of its authority, in order to achieve finality, promote judicial economy and avoid multiple litigations and complications which can result from the entry of partial judgments." *Id.*

21. *In re* Marriage of Cohn, 93 Ill. 2d 190, 200, 443 N.E.2d 541, 545-46 (1982).

22. *Id.* According to the reviewing courts, there was nothing in the trial record which would allow the court to bifurcate the judgment of dissolution.

23. *Id.* at 206, 443 N.E.2d at 549. The effect of declaring dissolutions of marriage obtained by a bifurcated judgment invalid would mean that many people who thought they were no longer married would still be married, and their subsequent marriages would be bigamous or polygamous.

24. *Id.* at 206-07, 443 N.E.2d at 549. Not jurisdictionally required means that the court will still have jurisdiction to hear the case and bifurcate the judgment if both parties agree.

25. *Id.* at 207, 443 N.E.2d at 549. This distinction, that appropriate circumstances are not jurisdictionally required, prevented all prior bifurcated dissolutions from being invalid and will allow for future bifurcated dissolutions if an objection is not made.

date of entry."[26]

The court has allowed statutory amendments to be applied retroactively if the purpose of the amendment was to clarify an existing law.[27] Conversely, if the amendment was intended to change the law, it could not be applied retroactively.[28] The supreme court found, by looking to the amendment's legislative history,[29] that the purpose of the amendment was to reverse the appellate court decision.[30] The court further reasoned that a material change in a statute by amendment is presumed to change, rather than clarify, the statute.[31] While the legislature

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26. ILL. ANN. STAT. ch. 40, § 401(3) (Smith-Hurd 1981). *See supra* note 2.

27. *See* Commonwealth Edison Co. v. Dep't of Local Gov't Affairs, 85 Ill. 2d 495, 426 N.E.2d 817 (1981) (allowed retroactive application of an amendment which determined the meaning of the terms "economic productivity" and "productive earning value"); O'Connor v. A & P Enter., 81 Ill. 2d 260, 408 N.E.2d 204 (1980) (allowed retroactive application of amendment to determine if assessment procedures applied automatically to farm real estate).

28. Roth v. Yackley, 77 Ill. 2d 423, 428-29, 396 N.E.2d 520, 522 (1979) (prevented application of amendment which would have retroactively allowed fines and costs to be reasonable terms and conditions of probation).

29. In the Illinois Senate during the second reading of Senate Bill 377, Senator Marovitz stated:

> Amendment No. 1 deals with a situation that came up in committee. This is regarding the *Cohn* case where a lot of bifurcated divorces were ruled invalid. This puts back a paragraph which says that all judgments for dissolution prior to the determination handed down in the *Cohn* Case are valid.

Ill. Senate Floor Debates, April 30, 1981, at 32.

On the third reading of the bill Senator Marovitz stated:

> Senate Bill 377 is in response to a . . . recent court decision in the *Cohn* Case, which caused a tremendous amount of consternation, regarding . . . bifurcated divorces. This bill clarifies the . . . validity of bifurcated divorces to that . . . a judge . . . could validly . . . dissolve a marriage, issue a judgment for divorce, and reserve the question of child custody and maintenance, child support, disposition of property [sic].

Ill. Senate Floor Debates, May 20, 1981, at 189.

In the Illinois House of Representatives, Representative Greiman stated:

> There was a provision [in the Marriage and Dissolution of Marriage Act] for a bifurcation of the issues of property and the issues of grounds. And the question happened, 'What happens if they do not have the appropriate bifurcation?' There was apparently a case . . . that indicated that the divorce might well be in question. And so this Bill provides that judgments for dissolution, where they reserve the questions and enter the decree, are valid as of the date of the entry of that decree. . . . That's the significant part of this Bill.

Ill. House of Representatives Floor Debates, June 12, 1981, at 64-65.

30. *In re* Marriage of Cohn, 93 Ill. 2d 190, 203, 443 N.E.2d 541, 547 (1982) ("[I]t is clear that the amendment was an attempt to change the law as interpreted by the appellate court.").

31. *Id.* at 202, 443 N.E.2d at 547. O'Connor v. A & P Enter., 81 Ill. 2d 260, 271, 408 N.E.2d 204, 209 (1980) (material change in a statute presumptively changes the statute, but the presumption may be rebutted by circumstances surrounding the amendment); Hoover v. May Dep't Stores Co., 77 Ill. 2d 93, 107, 395 N.E.2d 541, 548 (1979) (amendment creating new rights is

is allowed the change the law prospectively, it cannot retroactively amend a statute in order to overrule prior judicial decisions.[32] The *Cohn* court reasoned that the separation of powers doctrine embodied in the Illinois Constitution grants to the General Assembly the power to enact and amend statutes,[33] but reserves the interpretation and application of statutes for the judiciary.[34] Based on its findings that the amendment's purpose was to change the statute and to reverse the appellate court decision,[35] the supreme court held that the retroactive application of the 1981 amendment was unconstitutional and therefore invalid.[36]

A court's authority to dissolve a marriage is derived from state legislation.[37] In this respect, a court must interpret statutes and apply them on a case by case basis.[38] In *Cohn*, the Illinois Supreme Court, in its interpretation of section 401(3), incorporated into the statute the phrase, "appropriate circumstances."[39] This phrase is mentioned once in the Historical and Practice Notes following section 401, but these notes are not part of the statute.[40] Instead the notes constitute an independent commentary and do not necessarily express the intention of the legislature.[41]

The Illinois Supreme Court has held that "[w]here the words employed in a legislative enactment are free from ambi-

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presumed to change the statute). *See generally* 1A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 22.30 (4th ed. 1972).

32. Roth v. Yackley, 77 Ill. 2d 423, 429, 396 N.E.2d 520, 522 (1979).

33. "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST. art. II, § 1.

34. *In re* Marriage of Cohn, 93 Ill. 2d 190, 204, 445 N.E.2d 541, 548 (1982); People v. Nicholls, 71 Ill. 2d 166, 179, 374 N.E.2d 194, 199 (1978) ("these provisions are part of the body of the law of this state and, as such, it is the judicial function to construe and apply them").

35. *In re* Marriage of Cohn, 93 Ill. 2d 190, 201, 443 N.E.2d 541, 546 (1982).

36. *Id.* at 207, 443 N.E.2d at 549.

37. McFarlin v. McFarlin, 384 Ill. 428, 430-32, 51 N.E.2d 520, 521 (1943) (jurisdiction of courts to act in divorce cases is conferred by state statute).

38. People v. Nicholls, 71 Ill. 2d 166, 374 N.E.2d 194 (1978).

39. *In re* Marriage of Cohn, 93 Ill. 2d 190, 200, 443 N.E.2d 541, 545-46 (1982).

40. ILL. ANN. STAT. ch. 40, § 401, Historical and Practice Notes (Smith-Hurd 1981). *Cf.* Lousin, *Constitutional Intent: The Illinois Supreme Courts' Use of the Record in Interpreting the 1970 Constitution*, 8 J. MAR. J. PRAC. & PROC. 189, 200 (1975). Notes at the end of the sections of the Illinois Constitution are opinions of the writers of the notes and not the General Assembly's interpretation. This is also true of the Historical and Practice Notes at the end of the sections in chapter 40.

41. Lousin, *supra* note 40, at 200.

guity or doubt, they must be given effect by the courts."[42] Consequently, the only means of avoiding the "plain meaning" of a statute is through legislative enactment, not by judicial construction.[43] "Since courts lack legislative powers [they] are not permitted to add words to a statute to change its meaning."[44] For these reasons, the Illinois Supreme Court in *Cohn* should not have held that appropriate circumstances should exist before a bifurcated judgment will be allowed[45] unless it found the statute to be ambiguous.

The court, however, did not indicate that section 401(3) was ambiguous. Instead the court stated that sound policy considerations required the interpretation it gave to section 401(3).[46] From a policy standpoint, the interpretation given is most likely proper.[47] But policy considerations should not be used as a basis for interpretation unless the statute is ambiguous.[48]

Section 401(3) was enacted "in order to achieve finality,[49]

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42. People *ex rel.* Pauling v. Misevic, 32 Ill. 2d 11, 15, 203 N.E.2d 393, 395 (1964) (citing City of Nameoki v. City of Granite City, 408 Ill. 33, 95 N.E.2d 920 (1950) and Louisville and Nashville R.R. Co. v. Industrial Bd., 282 Ill. 136, 118 N.E. 483 (1917)).

In *Pauling* the legislature provided for release from mental institutions when the patient has complete and permanent recovery. The court held that if the patient cannot have complete recovery the court cannot intervene and make exceptions even though the patient has become blind and harmless. People *ex rel.* Pauling v. Misevic, 32 Ill. 2d 11, 203 N.E.2d 393 (1964).

43. City of Decatur v. German, 310 Ill. 591, 595, 142 N.E. 252, 253-54 (1923) (only method to prevent a 1923 amendment from superseding a 1917 amendment was by legislative amendment).

44. People v. Community High School Dist. No. 128, 50 Ill. App. 2d 445, 452, 200 N.E.2d 609, 613 (1964). *See also* Anderson v. Bd. of Educ., 390 Ill. 412, 425, 61 N.E.2d 562, 568 (1945).

In *People v. Community High School Dist. No. 128*, the statute allowed for establishing a community high school in a "territory having a population of not less than 2,000 persons and an equalized assessed valuation of not less than $6,000,000." The court held it would not construe the statute to prevent the establishment of a community high school even though the territory includes part of an already existing high school district. People v. Community High School Dist. No. 128, 50 Ill. App. 2d 445, 200 N.E.2d 609 (1964).

45. *In re* Marriage of Cohn, 93 Ill. 2d 190, 200, 443 N.E.2d 541, 546. The Illinois Supreme Court stated: "[W]e believe the appellate court properly construed section 401(3) as originally contemplating that appropriate circumstances should exist before a trial judge enters a judgment of dissolution and reserves questions of child custody, support, maintenance, or property disposition." *Id.*

46. *Id.* at 200, 443 N.E.2d at 545-46.

47. *See* Polow, *Bifurcation and Matrimonial Litigation*, 3 FAM. ADV. 25 (1980) (bifurcation should not be used routinely, but will alleviate some problems faced by judges and parties).

48. *See supra* notes 42-44 and accompanying text.

49. A judgment of dissolution with other issues reserved is not final and appealable, unless the trial judge makes an express finding that there is no

promote judicial economy,[50] avoid multiple litigations and complications[51] which can result from the entry of partial judgments."[52] Other adverse effects are also created by allowing bifurcation. In a state which divides the property of a dissolved marriage under an equitable distribution system,[53] a woman

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just reason for delaying enforcement or appeal. *See In re* Marriage of Lentz, 79 Ill. 2d 400, 403 N.E.2d 1036 (1980); *In re* Marriage of Nilsson, 81 Ill. App. 3d 580, 402 N.E.2d 284 (1980) (petitioner filed for dissolution which was granted, respondent appealed and appellate court dismissed case due to lack of jurisdiction).

50. Section 401(3) was designed to promote judicial economy, but this objective is not served when the section is allowed to be waived. Section 403(e) of the IMDMA, on the other hand, had an adverse effect on judicial economy by requiring bifurcated trials for contested divorces. Strukoff v. Strukoff, 76 Ill. 2d 53, 389 N.E.2d 1170 (1979) (bifurcation of trial required by statute and requirement is constitutional).

51. If bifurcated judgments are allowed, complications could arise. Adjudication of marital property rights which have become entangled with the rights of the ex-spouse's new spouse would present complicated problems. *E.g.*, *In re* Marriage of Belluomini, 104 Ill. App. 3d 301, 432 N.E.2d 958 (1982). In this case the respondent entered into a bigamous marriage with the petitioner, the petitioner sued for divorce and the respondent's wife intervened to protect her interest in the respondent's assets.

Adjudication of the ex-spouse's property rights in the event one party dies prior to property disposition creates a problem between probate distribution and marital property distribution. *E.g.*, *In re* Marriage of Davies, 95 Ill. 2d 474, 448 N.E.2d 883 (1983). In *Davies*, the petitioner filed for a dissolution. A written judgment of dissolution was entered by the court and then the respondent died. The petitioner then sought to have the dissolution judgment vacated 17 months after the judgment was entered. *Id.* In *In re* Marriage of Garlinski, 99 Ill. App. 3d 107, 425 N.E.2d 22 (1981), the petitioner filed for dissolution. A written judgment of dissolution was entered and then the respondent died. The property rights of the petitioner were to be decided with the executor substituted for the deceased respondent. A recent amendment to § 401(3) may help resolve some of these problems by requiring that the proceedings continue in the event a party dies subsequent to the dissolution judgment. *See infra* note 100. Loss of ability to file joint income tax return, results in the parties losing the favorable tax treatment of a joint return. The wife could lose her medical insurance coverage, particularly if the coverage is provided by the husband's employer. This problem has been alleviated to an extent by the Insurance Act, which provides for insurance conversion for former spouses. ILL. REV. STAT. ch. 73, § 968(d) (1981).

Any property acquired by an ex-spouse during the interim between the dissolution and the property disposition, which would have been treated as marital property, will not be included in the property disposition. *See In re* Marriage of Smith, 86 Ill. 2d 518, 427 N.E.2d 1239 (1981) (property acquired after marriage by "lucrative" means may be held as nonmarital property). *See also*, Heyman, *The Illinois Marriage and Dissolution of Marriage Act: New Solutions to Old Problems*, 12 J. MAR. J. PRAC. & PROC. 1, 10 (1978). *See generally* ILL. ANN. STAT. ch. 40, § 401, Historical and Practice Notes (Smith-Hurd 1981).

52. ILL. ANN. STAT. ch. 40, § 401, Historical and Practice Notes (Smith-Hurd 1981).

53. Equitable distribution is the division of marital property in just proportions upon the dissolution of marriage. Marital misconduct is not considered in the distribution, rather the needs of the parties are considered in

who has remarried by the time of the property division hearing is likely to receive less than if she had not remarried.[54] Additionally, if the custodial parent has remarried, the amount of child support to be paid might be less.[55] Also a court, by granting a dissolution judgment, will promote judicial inefficiency; if a determination of the remaining issues will take an extended period of time to settle, temporary maintenance may be needed which could require further hearings. Moreover, bifurcation may fail to resolve the issue of which parent is to have custody of the children,[56] requiring additional proceedings. The granting of bifurcated judgments also places the spouses in an unsettled state; the parties are no longer married, yet their marriage is not totally dissolved.[57]

While the *Cohn* court's interpretation of section 401(3) will serve to avoid these adverse effects and accomplish what the court determined to be the objectives of the section, there are certain instances, other than those enumerated in *Cohn*, when bifurcation may be appropriate.[58] One such circumstance is when one spouse uses the existence of the marriage unfairly and attempts to extort an inequitable marriage settlement. One spouse may attempt to delay resolution of remaining issues in hopes that the other spouse will die prior to the dissolution judg-

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conjunction with the property to be distributed. Auerbach, *Property Considerations Upon Dissolution and Declaration of Invalidity*, in ILLINOIS FAMILY LAW at 11-15 (IICLE 1981).

54. Miller, *Bifurcation of Dissolution of Marriage Actions*, Part Two, 55 FLA. B.J. 831, 832 (1981). In states which have equitable distribution of property, the woman is likely to receive less if she remarries before the property disposition because the judge will perceive her as needing less. This should not happen, but the judge will not be able to totally bar from his memory that the woman is remarried and not as dependent on the property for survival. *Id.*

55. Miller, *supra* note 54, at 832. Assuming the wife receives custody of the children, the amount of child support granted by the judge is likely to be less if the woman is remarried. Although the woman's new husband has no duty to support the children, the judge will realize these children are living in the same house with the woman and her new husband, and, therefore, their needs are less than if they were dependent solely on the woman for support. *Id.*

56. The court may have to make a determination of temporary custody if both parents want custody of the children.

57. Without the property disposition the spouses are restricted as to what they may do. They know that eventually certain property will belong to each, but they do not know which property. Upon the property disposition the spouses must be careful not to compromise their positions or adversely affect the property. *See In re* Marriage of Hellwig, 100 Ill. App. 3d 452, 426 N.E.2d 1087 (1981) (courts should seek finality so parties can plan future with certainty).

58. *See supra* note 16.

ment.[59] Another appropriate circumstance would be where one spouse has attempted to kill the other spouse.[60] The situations in which bifurcation is warranted are relatively rare and certainly distinguish themselves as "appropriate circumstances." To deny bifurcated judgments when there are appropriate circumstances would be an inequitable administration of justice. For this reason, the interpretation given the statute by the court in *Cohn* is proper.

The legislature reacted to the appellate court's decision in *Cohn* by enacting an amendment which attempted to retroactively validate bifurcated dissolution judgments.[61] If the amendment was made to clarify the statute it could be applied retroactively.[62] Arguably, section 401(3) was in need of clarification because there was disparity among the appellate courts as to the interpretation of the section.[63] In *In re marriage of Panozzo*,[64] the First District Appellate Court upheld the bifurcated judgment of dissolution under an attack by a husband arguing that the judgment was void.[65] Yet the Third District Appellate Court, in *In re Sharp*,[66] stated that "[a] court cannot enter a judgment of dissolution until [a] provision is made for child cus-

59. If the spouse desiring the dissolution is very old or very ill the other spouse may attempt to delay the determination of the final issues in hopes the spouse will die before all issues are settled. A recent Florida case identifies this possibility. A 62-year-old woman had been married for 18 months to a 77-year-old man. The judge issued an oral judgment of dissolution and directed the husband's attorney to prepare a written final judgment. Before the written final judgment could be entered, the husband died and the wife was able to inherit as the surviving spouse. Jarvis v. Tucker, 8 FAM. L. REP. (BNA) 2504 (Fla. Ct. App. 1982). *See* Behar v. Southeast Banks Trust Co., 374 So.2d 572 (Fla. Ct. App. 1979) (wife continually changed counsel which delayed final hearing, court granted dissolution judgment without determining all issues).

60. If a spouse murders her partner, and is acquitted, she will inherit as the surviving spouse. In *Cohn*, Ruth Cohn conspired to have her husband murdered. *In re* Marriage of Cohn, 94 Ill. App. 3d 732, 735, 419 N.E.2d 729, 731 n.1 (1981). The appellate court specifically stated that it did not consider the effect the conspiracy had on the trial court's determination. *Id.* If this was a factor in the trial court's granting of the dissolution judgment, the appellate court could have found that appropriate circumstances existed and granted the dissolution judgment.

61. *See supra* note 2.

62. *See supra* note 27.

63. *See supra* note 4.

64. 93 Ill. App. 3d 1085, 418 N.E.2d 16 (1981).

65. *In re* Marriage of Panozzo, 93 Ill. App. 3d 1085, 418 N.E.2d 16 (1981). *Id.* This case was decided after the appellate court decision of *Cohn* which had declared bifurcated dissolution judgments void, but before the modified opinion. Although the issue of § 401(3) was not addressed directly, if this district was interpreting § 401(3) in the same manner the court should have found the judgment void.

66. 65 Ill. App. 3d 945, 382 N.E.2d 1279 (1978).

tody."[67] Under *Sharp*, a judgment of dissolution cannot be made even under "appropriate circumstances," which the appellate court in *Cohn* held would be proper.[68] These differences among the appellate courts indicate that section 401(3) was in need of clarification.

The *Cohn* court characterized the legislative discussion surrounding the passage of the 1981 amendment as an attempt by the general assembly to overrule the appellate court.[69] The appellate court decision in *Cohn* did prompt the amendment, but the legislative discussions do not indicate the amendment was enacted to overrule the appellate court decision. In fact, Senator Marovitz argued that the purpose of the amendment was to clarify the validity of bifurcated divorces so that courts could validly dissolve a marriage, but reserve the question of child custody, maintenance, child support, and disposition of property.[70] There is a presumption that the legislature, in enacting an amendment which materially changes a statute, intended to change, rather than clarify, the statute.[71] This presumption, however, is rebuttable.[72] Extrinsic evidence which shows that the legislature did not intend to change the existing statute will serve to rebut the presumption.[73] In *Cohn*, the Illinois Supreme Court evidently found that the statute did not need clarification even though: 1) three appellate courts interpreted the section differently;[74] 2) it treated the section as ambiguous,[75] and; 3) it

67. *In re* Sharp, 65 Ill. App. 3d 945, 951, 382 N.E.2d 1279, 1284 (1978) (hearing to modify child support provision).

68. *In re* Marriage of Cohn, 94 Ill. App. 3d 732, 740, 419 N.E.2d 729, 735 (1981).

69. *See supra* notes 29-30 and accompanying text.

70. *See supra* note 29 at third reading of bill to the Illinois Senate.

71. *See supra* note 31.

72. Bruni v. Department of Registration and Educ., 59 Ill. 2d 6, 12, 319 N.E.2d 37, 40 (1974). The court cited Scribner v. Sachs, 18 Ill. 2d 400, 411, 164 N.E.2d 481, 488 (1960) in which the law prior to 1929 required an "X" to mark a ballot. After amendment in 1929 this portion was omitted. The court found that the presumption that the amendment was to change the law was rebutted and still required an "X".

73. *See* Bruni v. Department of Registration and Educ., 59 Ill. 2d 6, 12, 319 N.E.2d 37, 40 (1974) (Illinois Supreme Court regarded fact that the amendment followed a requested opinion of Attorney General, as to the meaning of "conviction of a felony," proved intent was to clarify law).

74. *In re* Marriage of Cohn, 94 Ill. App. 3d 732, 419 N.E.2d 729 (1981); *In re* Marriage of Panozzo, 93 Ill. App. 3d 1085, 418 N.E.2d 16 (1981); *In re* Sharp, 65 Ill. App. 3d 945, 382 N.E.2d 1279 (1978). *See supra* notes 63-68 and accompanying text.

75. *In re* Marriage of Cohn, 93 Ill. 2d 190, 200, 443 N.E.2d 541, 545-46 (1982). The primary rule of statutory construction is to give effect to the legislature's intent. When the statute is unambiguous, the best indication of intent is the statute itself. *See* People v. Robinson, 89 Ill. 2d 469, 475-76, 433 N.E.2d 674, 677 (1982). *See also* People *ex rel.* Gibson v.Cannon, 65 Ill. 2d 366, 369, 357 N.E.2d 1180, 1182 (1976). By resorting to extrinsic material as an

was stated during the legislative debates that the amendment clarified the section.[76]

In the past, the Illinois Supreme Court has allowed retroactive application of an amendment which changed an existing law.[77] Originally section 403(e) of the IMDMA required bifurcated trials when dissolution actions were contested.[78] After the trial court determined that grounds for a dissolution existed, a minimum of forty-eight hours was required before proceeding to the remaining issues.[79] The Illinois Supreme Court determined that the forty-eight hour waiting period was mandatory.[80] The Illinois legislature then amended section 403(e) to retroactively allow the forty-eight hour period to be waived.[81] Subsequently, in *In re Marriage of Aschwanden*,[82] the court allowed the amendment, which was procedural in character, to be applied retroactively and, in effect, overrule a previous Illinois Supreme

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aid in determining the proper construction, the courts evidently felt the statute was ambiguous.

76. *See supra* note 29 at third reading of bill to the Illinois Senate.

77. *In re* Marriage of Aschwanden, 82 Ill. 2d 31, 411 N.E.2d 238 (1980) (because amendment was procedural in character, modification applied retroactively). *See also* Landesman v. GMC, 72 Ill. 2d 44, 48, 377 N.E.2d 813, 814 (1978); Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 377, 371 N.E.2d 634, 642 (1977). After these suits were filed, the Illinois Legislature enacted a statute to provide the prerequisites of a class action. Since the statute dealt with a procedural matter, it could be applied retroactively.

78. The Illinois statute which dealt with contested dissolutions stated: "Contested trials shall be on a bifurcated basis with the grounds being tried first. Upon the court determining that the grounds exist, the court shall allow not less than 48 hours for the parties to settle amicably the remaining issues before resuming trial." ILL. REV. STAT. ch. 40, § 403(e) (1977).

79. *Id.*

80. Strukoff v. Strukoff, 76 Ill. 2d 53, 61-62, 389 N.E.2d 1170, 1173 (1979). The Illinois Supreme Court noted that the purpose of § 403(e) was to encourage amicable settlement of remaining issues. This court stated: "We consider that the parties could not waive the provision for an interval between the hearings called for by § 403(e)." The court also determined, "[t]he provision is mandatory and not discretionary, and the noncompliance in the trial court will require reversal." *Id.*

81. ILL. REV. STAT. ch. 40, § 403(e) (1978). After the legislature passed Public Act 81-398, § 403(e) was amended to provide:

> Contested trials shall be on a bifurcated basis with the grounds being tried first. Upon the court determining that the grounds exist, the court shall allow 48 hours for the parties to settle amicably the remaining issues before resuming the trial. The parties may waive the 48 hour waiting period and proceed immediately to trial on the remaining issues or immediately enter into an amicable settlement of the remaining issues. In cases where the grounds are uncontested and proved as in cases of default, the trial on all other remaining issues shall proceed immediately, if so ordered by the court or if the parties so stipulate, issue on the pleadings notwithstanding.

Id.

82. 82 Ill. 2d 31, 411 N.E.2d 238 (1980).

Court decision.[83] That situation is analogous to the situation in *Cohn*. The change in the amendment construed in *Cohn* affected a procedural matter like the amendment in *Aschwanden*. The retroactive application of the amendment in *Aschwanden* had the effect of overruling the Illinois Supreme Court's decision in *Strukoff v. Strukoff*.[84] In *Cohn*, the amendment would have had the effect of overruling the appellate court decision.[85] The amendment construed in *Aschwanden* did not overrule a case pending appeal, but it did effectively overrule an Illinois Supreme Court decision which was the state of the law at the time the dissolution in *Aschwanden* was granted. The separation of powers doctrine[86] will not allow the legislature to overrule a court decision.[87] However, the legislature may amend statutes to change the law prospectively.[88] As support, the supreme court discussed *Roth v. Yackley*.[89] In May of 1978, the plaintiff in *Roth* filed suit for the return of fines and costs he had paid as an incident of probation.[90] Earlier, in March of 1978, the Illinois Supreme Court had held that fines and costs were not reasonable terms and conditions of probation as required by the

83. In *Strukoff* the Illinois Supreme Court decided that § 403(e) required a bifurcated trial in the case of a contested dissolution. When *Aschwanden* was decided in the trial court, § 403(e) and the interpretation it was given in *Strukoff* were still controlling law. While *Aschwanden* was pending appeal § 403(e) was amended so as to not require a bifurcated trial. The Illinois Supreme court applied the amended version which then allowed the court to fully adjudicate the dissolution without bifurcating the trial. This amendment, therefore, in effect overruled *Strukoff* and was applied retroactively. This situation is analogous to the situation in *Cohn*.

84. The amendment had the effect of overruling Strukoff v. Strukoff, 76 Ill. 2d 53, 61-62, 389 N.E.2d 1170, 1173 (1979).

85. The amendment would have had the effect of overruling *In re* Marriage of Cohn, 94 Ill. App. 3d 732, 419 N.E.2d 729 (1981), *aff'd*, 93 Ill. 2d 190, 443 N.E.2d 541 (1982).

86. *See* separation of powers doctrine *supra* note 33.

87. "Each of the three departments [executive, legislative, and judicial] is to perform the duties assigned to it and no department may exercise the powers properly belonging to either of the other two." Agran v. Checker Taxi Co., 412 Ill. 145, 148, 105 N.E.2d 713, 715 (1972). "Since legislative enactments may have the effect of rendering court judgments ineffective, it is the direct legislative reversal of a court decision that is per se objectionable." 2 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 41.08 (4th ed. 1972).

88. Roth v. Yackley, 77 Ill. 2d 423, 429, 396 N.E.2d 520, 522 (1979) (amendment could not be applied retroactively, but prospective application is acceptable).

89. 77 Ill. 2d 423, 396 N.E.2d 520 (1978).

90. People v. DuMontelle, 71 Ill. 2d 157, 374 N.E.2d 205 (1978). Section 10 of the Cannabis Control Act of 1973, allowed placing first time offenders on probation with reasonable terms and conditions. ILL. REV. STAT. ch. 56-½, § 710 (1973). The defendant appealed the imposition of a $65 fine and $25 in court costs against him. The Illinois Supreme Court held the imposition of fines and costs to be unreasonable terms and conditions of probation. People v. DuMontelle, 71 Ill. 2d 157, 374 N.E.2d 205 (1978).

statute dealing with the possession of marijuana.[91] In *Roth*, the defendants claimed that amendments to the statute, which became effective in June of 1978, retroactively authorized the imposition of fines and costs as conditions of probation.[92] The supreme court held that the General Assembly could not overrule a decision of the court by providing for retroactive application of the amendment.[93] The supreme court decided that the *Cohn* case was very similar to *Roth* and that *Roth* required denial of the retroactive application of section 401(3).[94]

The court distinguished *Cohn* from another Illinois Supreme Court decision, *Schlenz v. Castle*,[95] in which the court upheld a legislative act which applied new statutory language retroactively.[96] The distinction between *Schlenz* and *Roth* is that in *Schlenz* the General Assembly did not amend a statute, but enacted a new section.[97] The legislature "may ratify and confirm any act which it might lawfully have authorized in the first instance."[98] This distinction is tenuous. To allow a new section, but not an amendment, to effectively overrule a prior court decision, but not an amendment is merely placing form over substance. To allow the legislature to achieve that which it might have lawfully done in the first place, would have allowed the legislature to overrule the appellate court's decision in *Cohn*.[99]

The Illinois Supreme Court, in deciding *Cohn*, was in a dilemma. In order to use the extrinsic material as an aid in interpreting the statute, the court was required to determine that the statute was ambiguous. However, if the court acknowledged that the statute was ambiguous and in need of clarification, the amendment to the statute could have been applied retroactively.

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91. Roth v. Yackley, 77 Ill. 2d 423, 425, 396 N.E.2d 520 (1978).

92. *Id.* at 426, 396 N.E.2d at 521. The amendment declared that the changes were applicable to events which occurred prior to the effective date of the amendment. *Id.*

93. *Id.* at 429, 396 N.E.2d at 522.

94. *In re* Marriage of Cohn, 93 Ill. 2d 190, 204, 443 N.E.2d 541, 548 (1982).

95. 84 Ill. 2d 196, 417 N.E.2d 1336 (1981).

96. Schlenz v. Castle, 84 Ill. 2d 196, 211, 417 N.E.2d 1336, 1343 (1981). The Illinois Supreme Court had previously held that, in regard to tax assessments which were to be published by a certain date, if the publication did not occur the assessment was invalid. The General Assembly then enacted a new section which validated assessments not made within the time provided by statute. The Illinois Supreme Court upheld the new section which retroactively validated tax assessments. *Id.*

97. *Id.* at 207, 417 N.E.2d at 1341.

98. Steger v. Traveling Men's Bldg. Ass'n, 208 Ill. 236, 242, 70 N.E. 236, 239 (1904) (the Illinois Supreme Court allowed enactment to retroactively validate liens taken before an officer of the corporation mortgagee). *See* Schlenz v. Castle, 84 Ill. 2d 196, 207-08, 417 N.E.2d 1336, 1342 (1981).

99. *See supra* note 37 and accompanying text.

To avoid this result, the court held that sound policy considerations required the interpretation given to section 401(3). This rationale allowed the court to hold that the amendment was intended to change, rather than clarify, the statute.

The Illinois Supreme Court decision interpreted section 401(3) in the manner the Illinois legislature intended.[100] The trial judge is not to have full discretion, but is to be restricted as to when a dissolution judgment may be granted without deciding all issues. Interpreting section 401(3) in this manner will prevent complications and encourage judicial economy, but this cannot be accomplished if the parties are allowed to waive the requirement of section 401(3).

As a result of its decision in *Cohn*, the supreme court has added confusion to the already obscure area of law dealing with the retroactive application of legislative acts. At first glance, it appears that the court was correct in not allowing the retroactive application of amendments. However, the Illinois Supreme Court has allowed retroactive application of amendments previously when the purpose was to clarify. The facts in *Cohn* amply support the conclusion that the amendment to section 401(3) was intended to clarify rather than overrule the appellate court. Assuming, arguendo, that the amendment was not to clarify, the amendment could be applied retroactively following the reasoning in *Aschwanden*. For these reasons, the 1982 amendment could have been applied retroactively allowing the dissolution in this case.

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100. This is supported by a recent amendment to § 401(3) which closely follows the Illinois Supreme Court's holding in *Cohn*. The amendment allows bifurcation if the parties agree or appropriate circumstances are found. The amended statute now states:

> Such 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 which reserves any issues either upon (a) agreement of the parties, or (b) 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.

ILL. ANN. STAT. ch. 40, § 401(3) (Smith-Hurd Supp. 1983-84).