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A REMEDY BEYOND REACH: THE STRINGENT STANDARD IN ILLINOIS FOR EXCLUSIVE POSSESSION OF THE MARITAL HOME DURING DIVORCE PROCEEDINGS

INTRODUCTION

Divorce in the United States has become relatively commonplace,¹ impacting over one million parents annually.² The divorce process typically lasts one year from initial filing to entry of final judgment for dissolution of the marriage.³ But the process may last much longer if the parties fall victim to the culturally ingrained expectation that a divorce is always a “bitter conflict,” especially if children are involved.⁴ For some couples, no passage of time is sufficient to ameliorate the emotions inherent in the divorce process—such as loss, grief, and anger—and these emotions can “embroil them in a long-term conflict.”⁵ Approximately one-third of divorcing parties have a difficult time adjusting to this emotional, life-changing event, and 5%–10% of that group never adjusts.⁶ Parties in this latter category are more likely to engage in what is known as “high-conflict” divorce: a dissolution proceeding characterized by never-ending litigation, continuously high levels of anger and distrust, the possibility of verbal or physical abuse, and the inability to communicate with each other.⁷ Even with the help of therapists and mediators, these conflicted parties may be unable to come to an agreement on any issue, thereby

1. Janet Weinstein & Ricardo Weinstein, “*I Know Better Than That*”: *The Role of Emotions and the Brain in Family Law Disputes*, 7 J.L. & FAM. STUD. 351, 362 n.34 (2005). The divorce rate peaked at 50% in the 1980s and has since dropped steadily to somewhere between 40% and 50% today. Anneli Rufus, *15 Ways to Predict Divorce*, DAILY BEAST (May 19, 2010), <http://www.thedailybeast.com/articles/2010/05/19/15-ways-to-predict-divorce.html>.

2. JESSICA G. LIPPMAN & PADDY GREENWALL LEWIS, *DIVORCING WITH CHILDREN: EXPERT ANSWERS TO TOUGH QUESTIONS FROM PARENTS AND CHILDREN* 79 (2008).

3. BENJAMIN D. GARBER, *KEEPING KIDS OUT OF THE MIDDLE: CHILD-CENTERED PARENTING IN THE MIDST OF CONFLICT, SEPARATION, AND DIVORCE* 131 (2008).

4. See Weinstein & Weinstein, *supra* note 1, at 388–89.

5. *Id.* at 366, 389.

6. Arnold T. Shienvold, *The High-Conflict Divorce & Your Children's Adjustment*, FAM. ADVOC., Summer 2011, at 32, 33.

7. *Id.*; see also GARBER, *supra* note 3, at 131 (describing high-conflict type divorces as involving parents who persist with “unending litigation . . . return[ing] to court dozens and even hundreds of times over a period that might go on forever, were it not for the eventual celebration of the child’s eighteenth birthday”); cf. Weinstein & Weinstein, *supra* note 1, at 378 (“Prolonged family law conflicts remain in the court system for years.”).

exacerbating the conflict in what is an inherently adversarial process.⁸ Courts typically act passively in a case under the assumption that litigating parties will behave rationally and do what is necessary to resolve their issues.⁹ But high-conflict divorce parties, who are characterized by irrational emotions and behavior, require “special handling.”¹⁰

Often, at least one spouse during a divorce would prefer to avoid as much contact with the other as possible.¹¹ In Illinois, however, divorcing parties may find themselves interacting significantly more often than they would prefer if neither will vacate the marital home and obtain alternative housing for the pendency of the divorce proceeding.¹² High-conflict divorce couples usually include one partner that refuses to leave the home because he or she still wants contact with or control over the other spouse. Alternatively, one spouse may be financially dependent upon the other, making it difficult for him or her to leave the home, despite a desire to do so. When high-conflict divorce parents continue to cohabit during divorce proceedings, “[t]ensions flare, arguments ensue, and violence often erupts.”¹³

And yet, the Illinois Marriage and Dissolution of Marriage Act (IMDMA)¹⁴ currently “makes little effort to definitively separate warring couples living under the same roof.”¹⁵ Section 701 of the IMDMA permits a spouse to petition for a court order granting exclusive possession of the marital home pending termination of divorce proceedings, but it imposes a strict standard to prevail.¹⁶ The petitioner must show that the other spouse’s continued presence in the home jeopardizes the physical or mental well-being of the petitioner

8. GARBER, *supra* note 3, at 132.

9. Weinstein & Weinstein, *supra* note 1, at 394.

10. *Id.*

11. One divorcee recalls the awkwardness of continuing to live with her husband for months after they separated and during their divorce: “It was really hard. . . . You’re living in the house and trying to stay out of each other’s way. Mealtimes were awkward—are you sitting together as a family?” Kathleen Lynn, *The Great Divide: Divorce and Home Sale*, CHI. TRIB. (Feb. 17, 2012), http://articles.chicagotribune.com/2012-02-17/classified/sc-cons-0216-divorce-homesale-20120217_1_divorcing-couples-divorcing-spouses-housing-market (quoting Jamie Bolnick).

12. See Meghan E. Nemeth, *Is the Burden for Exclusive Possession of the Home in Divorce Too High?*, CBA REC., Nov. 2009, at 44, 44 (“Name one lawsuit, other than a divorce, where the plaintiff and defendant live under the same roof[.]”).

13. *Id.*

14. Illinois Marriage and Dissolution of Marriage Act, Pub. Act. No. 80-923, 1977 Ill. Laws 2675 (codified as amended at 750 ILL. COMP. STAT. 5/101–802 (2012)).

15. Nemeth, *supra* note 12, at 44.

16. 750 ILL. COMP. STAT. 5/701; *see also* Nemeth, *supra* note 12, at 44. The section 701 process “can be arduous for a party with a legitimate need to live separate from their spouse.” *Id.*

or the children.¹⁷ Absent this finding of “jeopardy,” Illinois courts have been reluctant to order one party in a pending divorce case to vacate the marital home, regardless of the level of tension and hostility between the parties.¹⁸

This Comment addresses the section 701 standard in light of the psychological negative effects that high-conflict divorce has on the parties’ children and argues that the jeopardy standard effectively overlooks those subtler effects. Part II reviews research demonstrating the negative effects on children who are exposed to high-conflict divorce in the home¹⁹ and presents section 701 and its accompanying Illinois appellate caselaw.²⁰ Additionally, Part II introduces section 214 of the Illinois Domestic Violence Act (DVA): an analogous, yet independent route to exclusive possession of the home that requires a lesser showing than IMDMA section 701.²¹

Part III critiques the current section 701 statutory language and caselaw and argues that the long-term, psychological, harmful effects on the children of high-conflict divorce should be deemed to jeopardize their emotional and mental well-being.²² Part III argues alternatively that section 701 should be reformed to include the “balance of the hardships” test applied under DVA section 214²³ and lays out this proposed reform.²⁴ Part IV argues that unless the current standard under section 701 is relaxed or modified, continuing to permit the parties to cohabit the marital home during high-conflict divorce proceedings will undermine the goals and purposes of the IMDMA.²⁵ Part IV further argues that either relaxing the current section 701 standard or reforming it as proposed will have the incidental effect of deterring the parties from seeking exclusive possession under DVA section 214, thereby lightening up the domestic violence court dockets and allowing for more attention to genuine domestic violence victims.²⁶

II. BACKGROUND

Section 701 of the IMDMA allows a party involved in an acrimonious divorce to seek exclusive possession of the marital residence to

17. 750 ILL. COMP. STAT. 5/701.

18. Nemeth, *supra* note 12, at 44.

19. *See infra* notes 31–79 and accompanying text.

20. *See infra* notes 80–120 and accompanying text.

21. *See infra* notes 121–132 and accompanying text.

22. *See infra* notes 133–162 and accompanying text.

23. *See infra* notes 163–192 and accompanying text.

24. *See infra* notes 193–196 and accompanying text.

25. *See infra* notes 197–209 and accompanying text.

26. *See infra* notes 197–209 and accompanying text.

make her living situation more bearable during the proceeding.²⁷ Children who are exposed to high-conflict divorce in the home are negatively affected during the divorce with life-lasting impact.²⁸ Illinois appellate courts have construed section 701 to pose a high burden that has yet to encompass these negative effects under its jeopardy standard.²⁹ Meanwhile, section 214 of the DVA uses a more petitioner-friendly balance of the hardships test.³⁰

A. *The Effect of High-Conflict Divorce on the Child*

Children are the collateral damage in any divorce.³¹ The divorcing parents' behavior in the home can make this inherently traumatic experience even more difficult for the children.³² Parents in a high-conflict divorce allow their own feelings to take priority over those of their children.³³ Such parental behavior is unhelpful during a divorce and only harms the children, who feel helpless and fearful when caught in the middle of their arguing parents.³⁴ But because these parents are controlled by their emotions, switching the focus from their feelings and needs to those of their children is not an easy task.³⁵

1. *When High-Conflict Divorce Parents Cohabit the Marital Home*

During each stage of development, a child's learning experience is "profoundly affected" by how she lives in and sees her environment.³⁶ Parental behaviors and attitudes in the home serve as a developmental blueprint for a child's brain.³⁷ The developing child picks up on "subtle and overt feedback" from her parents, which teaches her which types of conduct are preferable and which types are undesir-

27. See 750 ILL. COMP. STAT. 5/701 (2012).

28. See *infra* notes 31–79 and accompanying text.

29. See *infra* notes 80–120 and accompanying text.

30. See *infra* notes 121–132 and accompanying text.

31. LIPPMAN & LEWIS, *supra* note 2, at 1–2. "Divorce is devastating for the children It is the death of a family." *Id.* at 79.

32. *Id.* at 79; see also Shienvold, *supra* note 6, at 34 (noting that children suffer when their parents cannot resolve their conflicts "expeditiously and with the least acrimony possible"); cf. Miguel A. Firpi & Andrew Wenger, *The High-Conflict Family: What Ongoing Fighting Means for Your Children*, FAM. ADVOC., Summer 2004, at 32, 32 (stating that if the divorce process is "managed well, the [children's] experience will be less traumatic").

33. LIPPMAN & LEWIS, *supra* note 2, at 79, 90. This is often the case even though the children's health and safety should always be the parents' first priority. GARBER, *supra* note 3, at 45.

34. See Weinstein & Weinstein, *supra* note 1, at 373.

35. *Id.*

36. Firpi & Wenger, *supra* note 32, at 35.

37. Weinstein & Weinstein, *supra* note 1, at 359.

able.³⁸ This process shapes the neuropathways in her brain that determine future behavior and attitudes.³⁹ Because a child of any age learns from her models, her childhood experiences will likely affect her needs, feelings, and decisions in adulthood.⁴⁰ As previously noted, high-conflict divorce parents are characterized by high levels of anger and distrust and they often cannot communicate with each other.⁴¹ Experiencing this parental conflict causes a child stress that could become patterned in her brain, thereby determining her conduct in future relationships.⁴²

Regardless of the child's age, parents cannot disguise marital conflict in the home from their child.⁴³ Even if she does not actually see or hear her parents argue, she can sense the conflict and tension in their relationship.⁴⁴ The parents can also draw the children into their conflict, by arguing in front of them or by one parent creating alliances with a child against the other parent.⁴⁵ Even worse, a parent who takes his or her anger out on a child prioritizes the adult's feelings and needs over those of the child and forces the child to confront problems that the child is too young to comprehend.⁴⁶

Overall, high-conflict divorce parents who cohabit and constantly argue terrify their young children, create a fearful home environment, and, in the long term, can cause their children to lose the ability to

38. *Id.* at 360.

39. *Id.*

40. Firpi & Wenger, *supra* note 32, at 35.

41. Shienvold, *supra* note 6, at 33.

42. Weinstein & Weinstein, *supra* note 1, at 387.

43. See GARBER, *supra* note 3, at 48.

44. *Id.* If the children do actually see their parents furious with one another, “[i]t can be devastating.” Julie Taylor, *Be a Calm(er) Mom*, GOOD HOUSEKEEPING, <http://www.good-housekeeping.com/family/parenting-tips/anger-management-parents> (last visited Feb. 17, 2014). Moreover, privately resolving a conflict that occurred in front of children may cause them to worry that their parents' conflict persists. GARBER, *supra* note 3, at 60.

45. GARBER, *supra* note 3, at 48. An example of alliance-creation includes one parent undoing the other's disciplining of the child, thereby undermining the disciplining parent's authority. *Id.* at 51. Another example is when one parent asks the child to keep a secret from the other. *Id.* at 52. Over time, an alliance with one parent can undermine the child's relationship with the non-allied parent. *Id.* at 53.

46. *Id.* at 96. Judith Wallerstein and Sandra Blakeslee note the risk of a parent's anger spilling onto innocent people. JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *WHAT ABOUT THE KIDS? RAISING YOUR CHILDREN BEFORE, DURING, AND AFTER DIVORCE* 15 (2003). One mother, whose husband had recently left her, unintentionally lashed out at her six-year-old son: “After being screamed at for ten minutes, the small child turned with a hurt look and said, ‘Mommy, what did I do?’” *Id.* See also Taylor, *supra* note 44 (“Like it or not, most of us parents flip out in front of our dear children from time to time. Sometimes the anger is aimed at them, other times [it's] not, but it's always a deeply unsettling experience.”). A recent New Hampshire study found that 90% of parents admitted to hollering at their children aged 2–12 in the course of one year. *Id.*

trust others.⁴⁷ These children demonstrate a higher degree of internalizing problems like anxiety, obsessive worrying, and depression, and they have difficulty concentrating, paying attention, regulating emotions, and sleeping.⁴⁸ These children often externalize problems like “aggressiveness, anger, academic difficulties, poorer peer relationships, resentment of authority, inability to adapt to new situations, sexual acting-out, [and] drug and alcohol use,” as well as long-term problems in adulthood with intimacy in their own marriages.⁴⁹ The more developmental stages a child consecutively proceeds through while consistently exposed to the parental conflict, the greater the potential for damage to her brain development.⁵⁰

2. *Age-Specific Effects of High-Conflict Divorce on Children in the Home*

Infants and young children are especially reliant on their parents for emotional development.⁵¹ They can sense a change in a parent’s mood and tone of voice and are aware of any stress and tension.⁵² If an infant senses her parents are “tense or emotionally distraught,” she may experience immediate symptoms like “irritability, changes in eating habits, an increase in crying and fussiness, and sleep-related problems.”⁵³ Moreover, because an infant’s brain development depends on the function of her caretaker’s brain,⁵⁴ her long-term physical and emotional development may also be negatively impacted.⁵⁵

47. WALLERSTEIN & BLAKESLEE, *supra* note 46, at 128. “Prolonged rallies of rage” cause younger children to feel “insecurity and fear” and older children to feel “resentment and anger.” Weinstein & Weinstein, *supra* note 1, at 387.

48. Shienvold, *supra* note 6, at 33; *see also* Jen Weigel, *Can Your Divorce Be Collaborative?*, CHI. TRIB. (July 10, 2012), http://articles.chicagotribune.com/2012-07-10/lifestyle/ct-tribu-weigel-collaborative-divorce-20120710_1_divorcing-couples-certified-divorce-financial-analyst-average-divorce (noting that when spouses “bad-mouth” each other, this may cause the children “anxiety about returning home”).

49. Shienvold, *supra* note 6, at 33.

50. Weinstein & Weinstein, *supra* note 1, at 359–60.

51. *Id.* at 371.

52. Firpi & Wenger, *supra* note 32, at 32; *see also* GARBER, *supra* note 3, at 47 (explaining how newborns respond to the emotional tone of voices and have a different experience of being held by a calm parent versus an angry parent).

53. Shienvold, *supra* note 6, at 33; *see also* GARBER, *supra* note 3, at 47 (“[V]isual, audible, and tactile experiences of emotional pressure can cause [the infant] to become tense herself, cry and refuse food or become unable to hold [food] down.”).

54. *See* Weinstein & Weinstein, *supra* note 1, at 381.

55. GARBER, *supra* note 3, at 47.

Long-term exposure to continuous emotional pressure can have lasting negative influences on her brain functioning.⁵⁶

Toddlers between the ages of two and five react strongly and emotionally to stimuli like “raised voices, arguments, [and] insults.”⁵⁷ Arguments in the home cause stress that disrupts the consistency and stability of a toddler’s routine.⁵⁸ This environment is stressful because her once nurturing parents, who formerly provided structure and protection, are now too angry or emotionally unavailable to meet her needs.⁵⁹ When a toddler who lacks this sense of safety reaches adulthood, she may be apprehensive of “new situations and relationships with others” and require partners to satisfy “excessive needs of security and reassurance.”⁶⁰ Toddlers may also suffer from regression—the process by which emotional pressure causes a child’s behavior to become less mature.⁶¹ Additionally, they may become withdrawn and developmentally delayed.⁶² Toddlers may even imitate and display their parents’ angry behavior.⁶³ Overall, a high-conflict divorce makes a toddler feel helpless to control her environment, and if this feeling is not addressed, the toddler’s anxiety and insecurity can persist for the remainder of her life.⁶⁴

Children in elementary school are particularly vulnerable to their parents’ conflict and arguing.⁶⁵ When children are routinely exposed to negative comments about either parent, they instinctively adopt manipulative behaviors to manage the conflict.⁶⁶ For example, a child

56. Weinstein & Weinstein, *supra* note 1, at 372; *see also* Firpi & Wegner, *supra* note 32, at 32 (arguing that parental conflict may damage an infant’s ability to “develop positive and secure attachments far into the future”).

57. Firpi & Wenger, *supra* note 32, at 32.

58. Shienvold, *supra* note 6, at 33; *see also* Firpi & Wenger, *supra* note 32, at 32–33 (stating that toddlers experience “confusion and fear” during parental conflict, though they do not understand much else aside from the fact that “something is terribly wrong”).

59. Firpi & Wenger, *supra* note 32, at 33; *see also* Shienvold, *supra* note 6, at 33.

60. Firpi & Wenger, *supra* note 32, at 33.

61. GARBER, *supra* note 3, at 47. Regression includes behaviors like thumb sucking or losing accomplished developmental skills, such as potty training. Firpi & Wenger, *supra* note 32, at 33. Over time, regression can damage the child’s sense of self and impair her ability to develop healthy relationships in the future. GARBER, *supra* note 3, at 47.

62. Shienvold, *supra* note 6, at 33. For example, the toddler’s ability to develop her sense of trust or “self-soothing” skills may suffer. *Id.*

63. Firpi & Wenger, *supra* note 32, at 33.

64. *Id.*

65. Shienvold, *supra* note 6, at 33. The child may become extremely depressed and withdrawn or extremely angry, depending on his personality. *Id.* at 34. Children with diagnosed attention problems, learning differences or autism can also perceive and respond to their parents’ emotions just like nondisabled children their age, even if the former have more trouble adequately verbalizing their experience. GARBER, *supra* note 3, at 48.

66. Shienvold, *supra* note 6, at 34.

may tell one parent what he wants to hear or actively lie to prevent being seen as an “ally of the ‘other side.’”⁶⁷ By learning to lie, the children may even stop identifying their own feelings, which can lead to “dysfunctional relationships” later in life.⁶⁸ Further, if a child is preoccupied with developing survival instincts to endure her parents’ fighting, she cannot spend appropriate time fostering her independence, peer development, and school adjustment, which will make her vulnerable in those areas in the future.⁶⁹ In future relationships, she may be passive or accommodating because she will have difficulty with honesty and straightforwardness, which in turn makes her more “vulnerable to exploitation or even abuse.”⁷⁰ Preadolescent children between the ages of nine and twelve may even exhibit their parents’ “dysfunctional relationship patterns,” which may negatively impact their adult relationships.⁷¹

While an adolescent or teenager may seem like she is in her own world, she too notices her divorcing parents’ emotional struggles in the home.⁷² In fact, a teenager who may seem absorbed in media, sports, drugs, alcohol, or even a gang may be engaging in those activities only to escape the tension at home.⁷³ She may also be distracted from developing her own identity, improving academically and vocationally, and strengthening her peer relationships.⁷⁴ Instead, she may become angry toward her parents, neglect school, and act out in other ways.⁷⁵ Adolescence is “the most vulnerable time . . . in terms of developing social and intimate peer relationships,”⁷⁶ and when she most needs a “‘road map’ for healthy, respectful, and reciprocal relationships.”⁷⁷ If she is forced to view a poor model of an adult relationship at home, she may “develop interpersonal behaviors that are dysfunctional, such as sexual acting-out.”⁷⁸ Additionally, the idea of locating an intimate partner can be “worrisome and anxiety provoking” for an

67. *Id.*; see also Firpi & Wenger, *supra* note 32, at 33.

68. Firpi & Wenger, *supra* note 32, at 33.

69. Shienvold, *supra* note 6, at 34.

70. Firpi & Wegner, *supra* note 32, at 33–34.

71. *Id.*

72. See *id.*; see also Shienvold, *supra* note 6, at 34.

73. See Shienvold, *supra* note 6, at 34; see also Firpi & Wenger, *supra* note 32, at 35.

74. Shienvold, *supra* note 6, at 34.

75. *Id.*; see also Firpi & Wenger, *supra* note 32, at 34.

76. Firpi & Wenger, *supra* note 32, at 34.

77. *Id.*

78. Shienvold, *supra* note 6, at 34.

adolescent who was “deprived of a healthy role model for relationships at a critically formative time of development.”⁷⁹

B. High-Conflict Divorces and Section 701 of the IMDMA

A spouse in the middle of a contentious, high-conflict divorce may realize she cannot go through the entire proceeding while cohabiting the marital residence with her spouse. If the other spouse takes no initiative to obtain alternative housing, what judicial relief is available in Illinois? In 1977, the General Assembly passed section 701 of the IMDMA:

Marital Residence—Order Granting Possession to Spouse. Where there is on file a verified complaint or verified petition seeking temporary eviction from the marital residence, the court may, during the pendency of the proceeding, only in cases where the physical or mental well being of either spouse or their children is jeopardized by occupancy of the marital residence by both spouses, and only upon due notice and full hearing, unless waived by the court on good cause shown, enter orders of injunction, mandatory or restraining, granting the exclusive possession of the marital residence to either spouse, by eviction from, or restoration of, the marital residence, until the final determination of the cause. No such order shall in any manner affect any estate in homestead property of either party.⁸⁰

Courts have “broad authority to intervene when necessary” to fulfill their duty of protecting “spouses and children when their well being is jeopardized” by co-occupancy of the divorcing parties.⁸¹ Appellate review of a lower court’s ruling on a section 701 petition is greatly deferential, and findings of fact will not be disturbed unless manifestly against the weight of the evidence.⁸² A trial court is not required by the “plain language of section 701 . . . to make specific findings of fact” when it rules on a petition.⁸³

1. Application of Section 701

The Illinois appellate courts interpreting section 701 have imposed a high bar for success.⁸⁴ None of the decisions thus far have provided

79. See Firpi & Wenger, *supra* note 32, at 34–35. A marriage characterized by conflict can “exacerbate[] the already intense and difficult task of developing intimacy, empathy, and reciprocity in relationships” for adolescents. *Id.* at 34. They may even worry about having a “better marriage than their parents.” *Id.*

80. Illinois Marriage and Dissolution of Marriage Act, Pub. Act. No. 80-923, § 701, 1977 Ill. Laws 2675, 2698 (codified at 750 ILL. COMP. STAT. 5/701 (2012)).

81. *In re Marriage of Heinrich*, 2011 IL App (2d) 110683-U, ¶ 16.

82. *Id.* ¶ 23 (quoting *In re Marriage of Lima*, 638 N.E.2d 1186, 1188 (Ill. App. Ct. 1994)).

83. *Id.* ¶ 24.

84. *In re Marriage of Levinson*, 975 N.E.2d 270, 281 (Ill. App. Ct. 2012).

a specific definition of the terms “well-being” or “jeopardized” as they appear in section 701.⁸⁵ The first case to rule on a section 701 petition, *In re Marriage of Hofstetter*,⁸⁶ may be responsible for the stringent jeopardy standard currently in effect.

In *Hofstetter*, the wife simultaneously filed petitions for dissolution of marriage and exclusive possession of the marital home under section 701.⁸⁷ She alleged that her husband of almost nine years “beat and struck her; that she had no place to live; and that it was dangerous to her physical, emotional and mental well-being to reside [with him].”⁸⁸ She testified about an incident when he became upset that she had not cooked him breakfast, began yelling at her, kicked her, and hit her with his fist, a gun, and an iron.⁸⁹ She further alleged that he pointed the gun at her, shot it twice, and threatened to kill her.⁹⁰ On appeal the Illinois Appellate Court, First District upheld the trial court’s grant of exclusive possession of the marital home to the wife, finding sufficient evidence to determine that the “husband’s presence in the marital home would jeopardize the wife’s physical and emotional well-being.”⁹¹

Almost ten years later, in *In re Marriage of Lombaer*, the first district reversed a trial court’s grant of exclusive possession to the petitioning husband.⁹² After considering the wife’s multiple forced hospitalizations for failure to take prescribed medications to treat her mental illness and her erratic behavior around the parties’ children,⁹³ the court held that the evidence was “insufficient . . . to establish that the mental or physical well being of the parties or the children would be jeopardized” by her continued co-occupancy of the home.⁹⁴ The court found nothing in the record below regarding the “nature, frequency, severity, pattern and consequences of past abuse and the likelihood of future abuse.”⁹⁵ Four years later, in *In re Marriage of Lima*,

85. *Id.*

86. *In re Marriage of Hofstetter*, 430 N.E.2d 79 (Ill. App. Ct. 1981).

87. *Id.* at 81.

88. *Id.* at 80–81.

89. *Id.* at 81.

90. *Id.* at 81–82. He admitted to striking and beating her. *Id.* He recalled: “[S]he became furious and so did I. I should have calmed down and walked out of the house.” *Id.* at 82.

91. *Id.*

92. *In re Marriage of Lombaer*, 558 N.E.2d 388 (Ill. App. Ct. 1990).

93. *See id.* at 391–92. Such erratic behavior included restlessness, weight loss, irritability, nervousness, short temper with the children, not properly supervising the children and letting them have the “run of the apartment,” looking through binoculars at other buildings, eating baby food, and believing someone had “drugged her water” after an antismoking class. *Id.* at 392.

94. *Id.* at 395.

95. *Id.*

the Illinois Second District Appellate Court reversed a trial court's grant of exclusive possession of the marital home to the petitioning wife.⁹⁶ The court held that neither an isolated incident of nonconsensual sexual intercourse initiated by the husband⁹⁷ nor the wife's onset of diabetes and related complications since commencement of dissolution proceedings supported a finding that her physical or mental well-being was jeopardized by the husband's co-occupancy of the home.⁹⁸

The Illinois Appellate courts did not analyze another section 701 case until 2011. In *In re Marriage of Heinrich*, the second district affirmed the trial court's grant of exclusive possession of the marital home to the petitioning wife.⁹⁹ After considering evidence that the husband consumed excessive amounts of alcohol, used profane language toward her in front of their two children, and was verbally abusive,¹⁰⁰ the second district determined that the trial court "could have reasonably concluded that occupancy of the marital residence by both [parties] jeopardized the well being of either [the wife] or the children, or both."¹⁰¹ The *Heinrich* court noted that actual physical violence is not a prerequisite to satisfy the jeopardy standard under section 701.¹⁰²

In 2012, the first district reversed the trial court's grant of exclusive possession of the marital home to the petitioning wife in *In re Marriage of Levinson*.¹⁰³ The court noted that the children's guardian ad litem did not characterize the home environment to be dangerous, despite his opinion that co-occupancy of the home caused everyone "undue stress" and was not in the best interest of the children.¹⁰⁴ The trial court had found the "birdnesting" parenting arrangement—under which each parent occupied the home during their scheduled

96. *In re Marriage of Lima*, 638 N.E.2d 1186 (Ill. App. Ct. 1994).

97. *See id.* at 1187.

98. *Id.* at 1189.

99. *In re Marriage of Heinrich*, 2011 IL App (2d) 110683-U.

100. *See id.* ¶¶ 3–5. The husband had been ordered (and failed) to undergo an alcohol evaluation. *Id.* ¶ 8. The wife called the police on one occasion to dispel a dispute between them in front of their children, one of whom was upset and crying. *Id.* ¶ 7. She called the police because she felt "shaken" and "agitated." *Id.*

101. *Id.* ¶ 24. The court acknowledged that there was conflicting evidence regarding the dispute and that the situation in the home following it had "improved dramatically," but reasoned that the trial court, which "was in the best position to assess the credibility of the witnesses," could have rejected that evidence. *Id.* ¶ 26. Further supporting the lower court's holding was the fact that the husband had an alternate residence in Wisconsin that he frequently used, and the children's court-appointed guardian ad litem recommended that the wife have exclusive possession of the home. *Id.* ¶¶ 6, 9.

102. *Id.* ¶ 26.

103. *In re Marriage of Levinson*, 975 N.E.2d 270 (Ill. App. Ct. 2012).

104. *Id.* at 282.

parenting time—caused the wife “high personal stress,”¹⁰⁵ which she believed also indirectly affected the children.¹⁰⁶ However, the appellate court held that this stress was insufficient to constitute “jeopardy” under section 701.¹⁰⁷ The court also acknowledged that possession of the home was “being used as a tool in the arsenals of . . . two individuals involved in a contentious divorce,” but the court was “not free to set [its] own standard.”¹⁰⁸ Accordingly, the court refused to define jeopardy under section 701 “in a more expansive manner” than the term had previously been defined in the *Lima*, *Lombaer*, and *Hofstetter* cases.¹⁰⁹

The most recent section 701 case to reach the Illinois appellate level was *In re Marriage of Akers*, in which the second district affirmed the trial court’s grant of exclusive possession of the marital home to the petitioning wife.¹¹⁰ The parties had agreed that the husband would reside in a previously purchased second residence if they ultimately divorced. Despite moving there several months after she filed her petition for dissolution,¹¹¹ he returned to the marital home after she filed her section 701 petition and relentlessly insisted on discussing the divorce, causing her to feel “fearful, bullied, and upset.”¹¹² First, the second district agreed with the trial court’s reasoning that the parties’

105. *Id.* She felt anxious about sharing the home with her husband because she had no privacy and had to pack and unpack her personal belongings in padlocked storage boxes each time he arrived for his parenting time. *Id.* at 279. Meanwhile, he owned several properties and had family located nearby to stay with when he vacated the home during her parenting time. *Id.* at 273.

106. She alleged that the “changing of the guard” inherent in the parenting schedule (itself a result of the “tension and hostility between the parties” that prevented them from being simultaneously in the same place) confused the children and made them feel abandoned, because they did not understand why she was leaving, where she was going, if she had another home, or which parent would be watching them. *Id.* at 273. She further testified that their sons became more aggressive with each other after his parenting time. *Id.* at 278. The older son’s anxiety increased, he was more emotional and easily frustrated, he began wetting his pants, and he would protest or block the door when his father arrived for his parenting time. *Id.* at 278–79.

107. *Id.* at 282. The court analogized to *Lima*, in which the wife unsuccessfully alleged that her well-being was jeopardized due to stress resulting from the incident of nonconsensual sexual intercourse: “Just as in *Lima*, this combination of factors is clearly not sufficient under section 701 to constitute jeopardy.” *Id.* at 283–84.

108. *Id.* at 284. Instead, the court felt “bound” by the jeopardy standard set forth in section 701 as it had been previously interpreted. *See id.*

109. *In re Levinson*, 975 N.E.2d at 282.

110. *In re Marriage of Akers*, 2012 IL App (2d) 120526-U.

111. *Id.* ¶ 8.

112. *Id.* ¶¶ 8–9, 26. He approached her in the home to speak about the divorce “once or twice every two weeks,” often accused her of lying, and would continue to pursue the subject even after she asked him to stop. *Id.* ¶ 9. She further alleged that he drank alcohol almost daily, that he could become aggressive, animated, and threatening when intoxicated, and that she had sleeping difficulties as a result of his overall conduct. *Id.* ¶¶ 9–10.

second residence and the time that the husband spent there were “relevant to the consideration of [the wife’s] and the children’s physical and mental well-being.”¹¹³ The court then held that, while the evidence of the children’s well-being was “not abundantly specific,”¹¹⁴ the wife’s testimony concerning her own well-being was sufficient to constitute jeopardy under section 701.¹¹⁵

Overall, Illinois appellate courts have affirmed section 701 petitions if: (1) there is evidence of past physical abuse that indicates a possibility of future physical abuse;¹¹⁶ or (2) the situation between the parties has escalated to such a level that, while physical abuse has not yet occurred, the parties’ past interactions suggest that future physical abuse is imminent if they continue residing together in the marital home.¹¹⁷ The absence of evidence showing the “nature, frequency, severity, pattern and consequences of past abuse and the likelihood of future abuse”¹¹⁸ has proven to be fatal to a section 701 petition.¹¹⁹ Feelings of stress and discomfort absent a threat of violence resulting from co-occupancy of the marital home have proven insufficient to constitute jeopardy under section 701.¹²⁰

C. *An Alternative Route to Exclusive Possession of the Marital Home*

Under section 214 of the Domestic Violence Act (DVA), a party may obtain an emergency order of protection granting exclusive possession of the residence if a court finds that she has been abused by a family or household member.¹²¹ “Abuse” includes harassment, which is defined as knowing conduct that is unnecessary to achieve a reason-

113. *Id.* ¶ 22.

114. *Id.* ¶ 26. When the children heard the parties arguing with one another, they would “cringe and fold up . . . and withdraw.” *Id.* ¶ 10.

115. *See id.* ¶ 32. The court distinguished the *Levinson* wife and children by explaining that they only experienced “stress and confusion by the shared-residence and visitation arrangements,” whereas the *Akers* wife “felt fearful and bullied and alleged that [the husband] utilized the second residence to harass her.” *Id.* The court further distinguished *Levinson* by noting that there was no birdnesting arrangement issue because the parties already had joint custody of the children, the wife was the primary residential parent, and the parties agreed he “would reside (and presumably parent) in the second residence.” *Id.*

116. *See In re Marriage of Hofstetter*, 430 N.E.2d 79 (Ill. App. Ct. 1981).

117. *See In re Marriage of Heinrich*, 2011 IL App (2d) 110683-U; *In re Akers*, 2012 IL App (2d) 120526-U.

118. *In re Marriage of Lombaer*, 558 N.E.2d 388, 395 (Ill. App. Ct. 1990).

119. *See id.*; *In re Marriage of Lima*, 638 N.E.2d 1186 (Ill. App. Ct. 1994); *In re Marriage of Levinson*, 975 N.E.2d 270 (Ill. App. Ct. 2012).

120. *See In re Levinson*, 975 N.E.2d 270; *In re Lima*, 638 N.E.2d 1186.

121. Illinois Domestic Violence Act of 1986, Pub. Act. No. 84-1305, § 214, 1986 Ill. Laws 1602, 1611 (codified as amended at 750 ILL. COMP. STAT. 60/214 (2012)).

able purpose and which “would cause a reasonable person emotional distress.”¹²² Harassment “implies ‘intentional acts which cause someone to be worried, anxious, or uncomfortable.’”¹²³

When deciding whether to grant an order of exclusive possession under section 214, a court is not “limited by the [jeopardy] standard set forth in Section 701 of the [IMDMA].”¹²⁴ Instead, the court balances the hardships to the responding party (and any minor child in his care) with the hardships to the petitioning party (and any minor child in her care) that would result “from continued exposure to the risk of abuse . . . or from loss of possession of the residence or household.”¹²⁵ During this analysis, there is a presumption that the “balance of hardships” favors possession of the home by the petitioner, unless the respondent can rebut the presumption by a preponderance of the evidence by showing that his hardships “substantially outweigh” the hardships to petitioner (and any minor child in her care).¹²⁶ Alternatively, the petitioner can request that the court—rather than exclude respondent from a mutual residence or household—order the respondent to provide “suitable, accessible, alternate housing” for petitioner.¹²⁷

Exclusive possession may be granted under section 214 in an *ex parte* proceeding, “regardless of prior service of process or of notice upon the respondent,” if the petitioner shows that the hardships to respondent that would result from an emergency order granting petitioner exclusive possession of the residence are outweighed by the “immediate danger of further abuse.”¹²⁸ Further, *ex parte* relief under section 214 will not be denied if petitioner “has or could obtain temporary shelter elsewhere while prior notice is given to respondent.”¹²⁹ The first district held that granting section 214 relief *ex parte* is not a due process violation if the petition is “supported by affidavits

122. 750 ILL. COMP. STAT. 60/103(1), (7).

123. *People v. Cardamone*, 883 N.E.2d 628, 634 (Ill. App. Ct. 2008) (quoting *People v. Taylor*, 812 N.E.2d 759, 763 (Ill. App. Ct. 2004)). *But see* *Wilson v. Jackson*, 728 N.E.2d 832, 840 (Ill. App. Ct. 2000) (arguing that the DVA was not intended to “exaggerate every petty argument into a basis for an order of protection”).

124. 750 ILL. COMP. STAT. 60/214(b)(2).

125. *Id.* § 214(b)(2)(B); *see also In re Marriage of Akers*, 2012 IL App (2d) 120526-U, ¶ 2 (noting that, unlike under section 701 of the IMDMA, balancing the hardships to the parties is permissible under section 214(b)(2) of the DVA).

126. 750 ILL. COMP. STAT. 60/214(b)(2)(B).

127. *Id.* The court may also issue this order *sua sponte*. *Id.*

128. *Id.* § 217(a)(3)(ii).

129. *Id.* However, *ex parte* relief will be denied if the hardships to respondent that would result from exclusion from the home substantially outweigh those to the petitioner seeking *ex parte* relief. *Id.*

that demonstrate exigent circumstances” that would justify entry of an emergency, *ex parte* order.¹³⁰

Overall, it is easier to obtain exclusive possession of the residence via an emergency order of protection under section 214 of the DVA than to obtain the same relief in a divorce proceeding under section 701 of the IMDMA.¹³¹ This is due to the presumption that the “balance of hardships” favors possession of the home by the petitioner, and the possibility of an *ex parte* hearing on the petition without prior notice to the respondent.¹³²

III. ANALYSIS

While not as immediate or visible as the effects of physical abuse, arguing parents in the heat of a high-conflict divorce nonetheless have devastating and long-term negative effects on their children’s mental and emotional development, and this situation should constitute jeopardy under section 701. If a court denies a section 701 petition in a high-conflict divorce case, those negative effects on the children are only further perpetuated, subjecting the children to further exposure and ultimately more lifelong harm.¹³³ The current application of section 701’s jeopardy standard does not encompass these subtler, negative effects on the children of a high-conflict divorce.¹³⁴ If the current jeopardy standard under section 701 cannot be interpreted to encompass these negative effects, it should be reformed with a “balance of the hardships” test similar to that applied under section 214 of the DVA.¹³⁵

130. *Sanders v. Shephard*, 541 N.E.2d 1150, 1155 (Ill. App. Ct. 1989). The court reasoned that notice was not required because “the harm which [this remedy] is intended to prevent would be likely to occur if the respondent were given any prior notice.” *Id.* (quoting 750 ILL. COMP. STAT. 60/217(a)(3)(i)).

131. See Scott A. Lerner, *Sword or Shield? Combating Orders-of-Protection Abuse in Divorce*, 95 ILL. B.J. 590 (2007) (“OPs [Orders of Protection] are easy to get, [easy to] use under the DVA.”).

132. See 750 ILL. COMP. STAT. 60/214(b)(2)(B). See generally Lerner, *supra* note 131. The “expedited” nature of a proceeding under the DVA essentially means the court makes its decision “without hearing all of the relevant evidence.” *Id.* at 592.

133. Continuous arguing can also increase the risk of physical abuse: “Anger builds on anger; the emotional brain heats up. By then, rage, unhampered by reason, easily erupts in violence.” Weinstein & Weinstein, *supra* note 1, at 384 (citing DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* 61–62 (1995)).

134. See *infra* notes 136–162 and accompanying text.

135. See *infra* notes 163–192 and accompanying text. It should be noted that during composition of this Comment, the Illinois House of Representatives introduced a bill, H.B. 1452, 98th Gen. Assemb., Reg. Sess. (Ill. 2013), that, if passed, would be a “major overhaul” of the IMDMA. See Andrew Maloney, *House Looks to Make Divorce Law Changes*, CHI. L. BULL., Mar. 27, 2014, at 22. If enacted, the bill (among other changes) would repeal section 701 and relocate it to section 501, the section that permits parties to move for various forms of temporary

A. *Critique of the Application of the Current Section 701 Jeopardy Standard*

A petitioner can satisfy the section 701 jeopardy standard with a “showing of past harm which would lead to future physical or mental jeopardy.”¹³⁶ Past occurrences of physical abuse clearly satisfy this standard and are more readily apparent than the more subtle, negative repercussions resulting from a child’s exposure to his high-conflict divorce parents’ constant bickering in the home.¹³⁷ As the first district held in *Hofstetter*, the first section 701 case, physical abuse is undoubtedly sufficient to constitute jeopardy.¹³⁸ But the particularly alarming facts of *Hofstetter* may have inadvertently set the “high bar”¹³⁹ currently in effect.

1. *Critique of the First District’s Approach to Section 701*

Since *Hofstetter*, the first district has repeatedly denied section 701 petitions when there is no evidence of physical abuse, effectively ignoring the subtler, negative effects on a child’s future emotional and mental well-being from exposure to the high-conflict divorce.¹⁴⁰ The first district has required a finding of the “nature, frequency, severity, pattern and consequences of past *abuse* and the likelihood of future *abuse*” before holding the evidence sufficient to establish that continued co-occupancy of the home by both parties would jeopardize either one spouse’s or the children’s physical or mental well-being.¹⁴¹ By

relief during proceedings and prior to entry of final judgment. H.B. 1452 sec. 5-20, § 701. Proposed section 501(c-2), entitled “Allocation of the Marital Residence,” requires the same procedure of filing a petition for exclusive possession of the home and retains the jeopardy standard. *Id.* sec. 5-15, § 501(c-2). However, section 501(c-2) concludes: “In entering orders under this subsection (c-2), the court shall balance the hardships to the parties.” *Id.* sec. 5-15, §501 (c-2). Thus, the new section 701 would finally align with the section 214 balance of the hardships test advocated for in this Comment. The bill passed the House on April 10, 2014 and is currently pending in the Senate. *Bill Status of HB1452*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1452&GAID=12&DocTypeID=HB&LegId=72208&SessionID=85&GA=98> (last visited June 15, 2014).

136. Nemeth, *supra* note 12, at 44.

137. For example, the risk of future physical jeopardy was readily apparent in *Hofstetter*, because the incident that provoked the wife to file and ultimately succeed on her section 701 petition involved her husband yelling at her, violently striking and threatening to kill her, and even shooting a gun at her twice. See *In re Marriage of Hofstetter*, 430 N.E.2d 79, 81–82 (Ill. App. Ct. 1981).

138. *Id.* at 82.

139. *In re Marriage of Levinson*, 975 N.E.2d 270, 281 (Ill. App. Ct. 2012).

140. See, e.g., *In re Marriage of Lombaer*, 558 N.E.2d 388, 390–92 (Ill. App. Ct. 1990) (reversing grant of exclusive possession in absence of physical abuse, despite evidence of wife’s mental illness, her refusal to take prescribed medication, her irresponsible behavior around the children, and the husband’s multiple calls to police that resulted in forced hospitalizations).

141. *Id.* at 395 (emphasis added).

focusing on visible abuse in the home, the first district ignores the subtler, negative effects that the parties' arguing and hostility may be having on their children.¹⁴²

For purposes of jeopardy, the first district incorrectly finds insufficient the stress and anxiety the parties experience by sharing the home during divorce and the indirect effects this can have on their children. For example, in *Levinson* the guardian ad litem openly admitted that the parties' sharing of the home was not in the children's best interest,¹⁴³ and the trial court found the children experienced stress both directly from the arrangement and indirectly through their mother's "high personal stress."¹⁴⁴ If a guardian ad litem, an attorney who is appointed by a court to give recommendations regarding the children's best interests,¹⁴⁵ testifies that the parties' sharing of the home is not in the children's best interests, this should be sufficient to order one of the parties to vacate. This is especially true when continued exposure to the tense, hostile parents can cause the children further stress and anxiety with long-lasting, negative impact on future mental and emotional development.¹⁴⁶ Otherwise, what is the point of a guardian ad litem advising the court that a particular condition is not in the children's best interests, if no responsive action is taken to remedy that condition?

The first district in *Levinson* even admitted "possession of the marital residence [was] being used as a tool in the arsenals of [the parties], two individuals involved in a contentious divorce."¹⁴⁷ If a court recognizes that the parties are battling over possession of the marital home purely to win one battle in a contentious divorce war, the court should resolve this issue instead of prolonging an antagonistic dispute until the final judgment. By not stepping in at this junction, the court foregoes an opportunity to temporarily resolve one of many unresolved issues and in so doing gives the parties another source of ammunition with which to fight each other.

142. See *id.* at 390.

143. *In re Levinson*, 975 N.E.2d at 282.

144. *Id.*

145. See 750 ILL. COMP. STAT. 5/506(a)(2) (2012) ("The guardian ad litem shall testify or submit a written report to the court regarding his or her recommendations in accordance with the best interest of the child.").

146. See *supra* notes 31–79 and accompanying text.

147. *Id.* at 284 (emphasis added). One example of the contentiousness of this case is the wife's previous filing (and withdrawal, without prejudice) of a petition for an emergency order of protection. She alleged that the husband, while holding their son, grabbed her wrist, "pulled it back and forth and twisted it several times," then slammed it in a door. *Id.* at 272 & n.1. She alleged injury to her wrist and scratches on the son's stomach. *Id.* at 272 n.1.

Further, by justifying denial of a section 701 petition with concerns of disrupting the stability in the children's routine and environment,¹⁴⁸ the first district is only shielding them from the reality of divorce. While denying a section 701 petition may initially and briefly deter a child's sadness and emotional upheaval caused by one of her parents moving out, it only delays the inevitable reality: her parents are getting divorced and they will no longer reside together as a family unit.¹⁴⁹ Any immediate benefits to the children's stability that may be achieved by not ordering one spouse to vacate the home earlier in the case are outweighed by the risk that the parents will further expose their children to stress and pain in a "never-ending battle" until final judgment.¹⁵⁰ Ironically, the first district is effectively maintaining stability of a home environment characterized by the parents' arguing, hostility, and tension. By rationalizing denial of a section 701 petition on the basis that it will maintain the home environment for the children, the first district in actuality only maintains the status quo of an unhealthy environment for the children.

If the first district refuses to grant one spouse exclusive possession of the home under section 701 due to an absence of past physical abuse or for the alleged purpose of maintaining the current home environment for the children, the high-conflict divorce parents may both continue to stubbornly refuse to leave the home, or one may be financially unable to do so. The high-conflict divorce parties' continued cohabitation guarantees their children's increased exposure to their poor relationship model and arguing. This in turn will only further jeopardize the children's mental and emotional development, thereby contributing to lifelong, unhealthy behaviors and attitudes.¹⁵¹

2. *The Second District's Evolving Application of Section 701*

None of the cases summarized in this Comment have expressly acknowledged that, absent physical abuse, high-conflict (though non-violent) divorce parents who expose their children to their poor relationship model can jeopardize their children's future well-being. However, some second district holdings imply what *Heinrich* explicitly states: physical violence is not required to support a finding of "jeop-

148. See *In re Levinson*, 975 N.E.2d at 277.

149. See LIPPMAN & LEWIS, *supra* note 2, at 44.

150. See GARBER, *supra* note 3, at 77. It also increases the risk of physical abuse if the tension and hostility escalates beyond the parties' control. See Weinstein & Weinstein, *supra* note 1, at 384 n.127 (citing GOLEMAN, *supra* note 133, at 61-62).

151. See *supra* notes 31-79 and accompanying text.

ardy” under section 701.¹⁵² The holdings in *Heinrich* and *Akers* suggest that the second district may be relaxing the stringent jeopardy standard under section 701.

However, it is unclear if these holdings turned on the negative effects that high-conflict—though non-violent—divorce parents have on their children. For example, even though the *Akers* parents’ hostile, tense interactions made their two children “cringe and fold up . . . and withdraw,” the court noted that this evidence alone was “not abundantly specific” regarding a determination of jeopardy under section 701.¹⁵³ If the court had not held that the wife’s well-being was jeopardized by the husband’s harassing behavior towards her personally, the evidence regarding the children alone may not have been sufficient to grant the wife’s section 701 petition. The children’s reactions to their parents’ arguing clearly show they were negatively affected by the heated interactions. These children were forced to view a poor relationship model at a critical developmental stage when they needed a “‘road map’ for healthy, respectful, and reciprocal relationships.”¹⁵⁴

Similarly, the second district in *Heinrich* referenced in its finding of jeopardy the one particular incident of the parents’ fighting in front of their children, resulting in the police being summoned to the home.¹⁵⁵ But the *Heinrich* court never specifically mentioned that the parents’ arguing may have negatively affected their children mentally or emotionally. Had the children not been in the same room during that argument or had the police not been involved, it is uncertain if the parents’ general arguing would have carried as much weight.¹⁵⁶ Moreover, the husband’s disregard of a prior court order requiring him to undergo an alcohol evaluation¹⁵⁷ influenced the court, which may undermine its affirmation of the trial court’s finding of jeopardy. The second district may have been more perturbed by the husband’s disregard of a court order than the negative effects of a contentious domestic environment.

Also adding to the ambiguity of the courts’ evaluations of jeopardy is the weight the second district accords to a secondary, alternative residence in its decision to order one spouse to vacate the primary

152. *In re Marriage of Heinrich*, 2011 IL App (2d) 110683-U, ¶ 26; *see also In re Marriage of Akers*, 2012 IL App (2d) 120526-U.

153. *In re Akers*, 2012 IL App (2d) 120526-U, ¶¶ 10, 26.

154. Firpi & Wenger, *supra* note 32, at 34.

155. *In re Heinrich*, 2011 IL App (2d) 110683-U, ¶ 7.

156. But even if a child does not see or hear his parents argue, he can still sense and be negatively affected by the conflict and tension in their deteriorating relationship. GARBNER, *supra* note 3, at 48.

157. *In re Heinrich*, 2011 IL App (2d) 110683, ¶ 25.

marital residence. If the husbands in *Heinrich* and *Akers* did not already have alternative housing available, would the second district still have ordered them to vacate the marital home?¹⁵⁸ In the first district, the availability of alternative housing to the nonpetitioning spouse seems to be irrelevant in determining a section 701 petition. For example, the nonpetitioning *Levinson* husband owned several properties and had family in the area, providing him with multiple options for residency outside the marital home.¹⁵⁹ Similarly, in *Lombaer* the husband offered to provide his nonpetitioning wife alternative housing if the court granted him exclusive possession of the marital home, but the first district nonetheless denied his section 701 petition.¹⁶⁰

Cases like *Heinrich* and *Akers* provide optimism for spouses in a high-conflict divorce who are considering filing a section 701 petition for exclusive possession of the marital home. However, the recently decided *Levinson* case is a harsh reminder that stress and any resulting negative effects on the exposed children's development will likely not suffice under section 701, at least in the first district. The *Akers* court specifically distinguished *Levinson* by noting that there, the wife's and children's mere experience of stress, confusion, and instability resulting from the parents' cohabitation did not constitute jeopardy under section 701.¹⁶¹ But again, while feelings of stress, anxiety, or confusion may not constitute immediately visible jeopardy to one's physical or mental well-being, the ramifications of a child's exposure to conflict will ultimately surface.¹⁶²

*B. The Benefit of Applying a "Balance of the Hardships"
Analysis to Section 701*

Section 214 of the Domestic Violence Act provides a substantially lower standard for exclusive possession of the residence compared to the "arduous" process under section 701 of the IMDMA.¹⁶³ First, exclusive possession can be granted at an ex parte hearing, even if the

158. See *id.* ¶ 6; *In re Akers*, 2012 IL App (2d) 120526-U, ¶ 8. Compare *In re Marriage of Lima*, 638 N.E.2d 1186, 1188 (Ill. App. Ct. 1994), where the husband had already moved out of the marital home by the time the second district heard the wife's section 701 petition, which may have contributed to its denial.

159. *In re Marriage of Levinson*, 975 N.E.2d 270, 276 (Ill. App. Ct. 2012). Meanwhile, the wife was living out of padlocked storage boxes and had no alternative residence while he occupied the marital home. *Id.* at 279.

160. See *In re Marriage of Lombaer*, 558 N.E.2d 388, 392 (Ill. App. Ct. 1990).

161. *In re Akers*, 2012 IL App (2d) 120526-U, ¶ 32.

162. See *supra* notes 31–79 and accompanying text.

163. See Nemeth, *supra* note 12, at 44.

petitioner “could obtain temporary shelter elsewhere while prior notice is given to [the] respondent.”¹⁶⁴ It may be imprudent to permit a party in an ongoing divorce proceeding to be granted this type of ex parte relief under section 701. The parties in a divorce case interact with one another throughout the entire proceeding, which typically lasts at least one year, but often even longer for a high-conflict divorce.¹⁶⁵ Thus, any opportunity to decrease the level of tension and hostility between the parties should be encouraged, especially if minor children are involved.¹⁶⁶

However, the component of section 214 that would most improve section 701 is its “balance of the hardships” test, used to determine whether to grant a petitioner exclusive possession of the home.¹⁶⁷ Under that test, courts must balance the hardships to the respondent and any minor child in his care with the hardships to the petitioner and any minor child in her care that will result from continued exposure to either the risk of abuse or from losing possession of the residence.¹⁶⁸ The section 214 balance of the hardships test is preferable because it is more flexible than the rigid section 701 jeopardy test.

First, section 214 grants a presumption to the petitioner for exclusive possession. The respondent may rebut this presumption if he can show by a preponderance of the evidence that the hardships to him substantially outweigh those to the petitioner and any minor child in her care.¹⁶⁹ In determining whether the respondent’s hardships resulting from loss of possession of the home truly outweigh those to the petitioner, the court would undoubtedly consider any alternative housing options or his financial resources to obtain such housing.¹⁷⁰ Conversely, if the petitioning spouse has alternative housing available to her or the financial means to obtain it, a court may determine that the nonpetitioning spouse’s hardships substantially outweigh those of

164. 750 ILL. COMP. STAT. 60/217(a)(3)(ii) (2012). However, lack of notice is not permitted under section 214 if “the hardships to respondent from exclusion from the home substantially outweigh those to petitioner.” *Id.*

165. GARBER, *supra* note 3, at 131; *see also* Shienvold, *supra* note 6, at 33.

166. Nemeth agrees that “[t]he ramifications of an order of protection [under the DVA] at the onset of a divorce case are large: the parties and oftentimes the attorneys are alienated, and it tends to set a negative tone for future negotiations.” Nemeth, *supra* note 12, at 45.

167. *See* 750 ILL. COMP. STAT. 60/214(b)(2)(B); *see also* *In re Marriage of Akers*, 2012 IL App (2d) 120526-U, ¶ 21 (noting that balancing the hardships to the parties, “*unlike section 701 of the [IMDMA]*, is permissible under section 214(b)(2) [of the DVA]” (emphasis added)).

168. 750 ILL. COMP. STAT. 60/214(b)(2)(B).

169. *Id.*

170. The nonpetitioning husband in several of the section 701 cases above did in fact have alternative housing available in which he could have resided pending conclusion of divorce proceedings.

the petitioner. The balance of the hardships test also emphasizes the hardships of the petitioner if she is the caretaker of the parties' children.¹⁷¹ This consideration would have been helpful to the petitioning wife in *Levinson* because the guardian ad litem specifically noted that the children were primarily attached to and dependent upon their mother.¹⁷²

Second, section 214 permits a court to order the nonpetitioning spouse to "provide suitable, accessible, alternate housing" for the petitioner instead of granting the petitioner exclusive possession of the home.¹⁷³ Such a court order would have been helpful to the petitioning mother in *Levinson*, where the guardian ad litem felt the birdnesting arrangement in the marital home was beneficial to maintain stability for the children during the divorce.¹⁷⁴ However, the wife had no alternative residence in which to reside when she vacated the marital home for the husband's parenting time; conversely, he owned multiple properties and had family living nearby to stay with when the wife had the home for her parenting time.¹⁷⁵ If the court could have ordered the husband to make one of his properties available to the wife during the divorce proceedings or provide her financial resources to obtain alternative housing, this could have reduced the tension and hostility between the parties that resulted from having to share the marital home.

Third, section 214 encompasses harassing behavior that causes immediate emotional distress. Such harassing behavior includes "intentional acts which cause someone to be worried, anxious, or uncomfortable."¹⁷⁶ Conversely, section 701 requires "a showing of past harm [such as physical abuse] which would lead to future physical or mental jeopardy."¹⁷⁷ If the section 701 standard were more closely aligned with section 214, it would conceivably cover the petitioning husband in *Lombaer*. He was clearly anxious and uncomfortable because his mentally ill wife engaged in erratic and irresponsible behavior, did not adequately supervise their children, and refused to take prescribed medications.¹⁷⁸ Similarly, the petitioning wife in *Levinson* felt stressed and anxious about sharing the marital home with her hus-

171. See 750 ILL. COMP. STAT. 60/214(b)(2)(B).

172. *In re Marriage of Levinson*, 975 N.E.2d 270, 274 (Ill. App. Ct. 2012).

173. 750 ILL. COMP. STAT. 60/214(b)(2)(B).

174. *In re Levinson*, 975 N.E.2d at 277-78.

175. *Id.* at 273.

176. *People v. Cardamone*, 883 N.E.2d 628, 634 (Ill. App. Ct. 2008) (quoting *People v. Taylor*, 812 N.E.2d 759, 763 (Ill. App. Ct. 2004)).

177. Nemeth, *supra* note 12, at 44.

178. *In re Marriage of Lombaer*, 558 N.E.2d 388, 390-92 (Ill. App. Ct. 1990).

band during their divorce proceedings for multiple reasons: she had no privacy in an alternative residence; the husband left the house in disarray after his parenting time; the “tension and hostility between the parties” prohibited them from even being in the same place simultaneously; and the children were exhibiting behaviors such as aggressiveness, bedwetting, and reluctance to see their father, suggesting they were also anxious and uncomfortable with the birdnesting arrangement.¹⁷⁹

Applying the section 214 balance of the hardships test to a section 701 petition would better address scenarios like the *Lombaer* and *Levinson* cases: while physical abuse was lacking, the high-conflict divorce parents could not continue to amicably cohabit the marital home, and one (or both) refused to leave. When a spouse is stressed, anxious, or uncomfortable due to the other spouse’s co-occupancy of the marital home during their divorce, the arguing and conflict in the home will increase. This in turn increases the child’s exposure to her high-conflict divorce parents’ arguments, perpetuating the negative long-term effects on her emotional and mental development.¹⁸⁰

Fourth, and lastly, domestic violence victims under section 214 and divorcing parties under section 701 should not be placed on unequal footing when it comes to granting exclusive possession of the home. While there is no denying that domestic violence is a serious issue, the negative effects on children exposed to their divorcing parents’ arguments in the home should be considered just as dangerous and serious.¹⁸¹ Section 214 encompasses harassing behavior that causes immediate emotional distress, which includes deliberate acts that cause one to become worried, anxious or uncomfortable.¹⁸² This stress and anxiety can have psychological effects on children that are equally devastating as domestic violence and that may last for a lifetime.¹⁸³ But this stress and anxiety does not satisfy the jeopardy standard of section 701.

179. *In re Levinson*, 975 N.E.2d at 273, 278–79.

180. *See supra* notes 31–79 and accompanying text.

181. Studies show that when parents express a significant amount of anger in front of or toward their children, the children become less empathetic, more aggressive, and more depressed than their peers who live in more stable families. Taylor, *supra* note 44. Additionally, these children tend to underperform in school. *Id.* Overall, exposure to parental anger and conflict in the home undermines a child’s “ability to adapt to the world,” and communicates that she is unsafe and that there is something wrong with her. *Id.*

182. *People v. Cardamone*, 883 N.E.2d 628, 634 (Ill. App. Ct. 2008) (quoting *People v. Taylor*, 812 N.E.2d 759, 763 (Ill. App. Ct. 2004)).

183. *See infra* notes 31–79 and accompanying text.

Moreover, unlike an isolated incident of domestic violence that prompts an emergency filing under section 214, a child's experience of his divorcing parents' conflict in a section 701 petition begins long before the divorce papers are filed and the parents establish separate residences.¹⁸⁴ And the earlier and longer a child is exposed to this parental conflict, the greater the likelihood she will suffer "serious emotional harm."¹⁸⁵

Further, providing a more lenient standard under section 214 may also result in overcrowding the Domestic Violence Court docket with section 214 petitions by divorcing parties who more appropriately belong under section 701.¹⁸⁶ When a divorcing party assumes she cannot prevail under section 701 and resorts to the more accessible section 214, this may result in "harm or disadvantage to true victims of domestic violence."¹⁸⁷ First, if there was no preexisting domestic violence in the home, the petitioner may "create violence or fabricate the threat" thereof in order to obtain an order of protection granting her exclusive possession under section 214.¹⁸⁸ Second, one commentator warns that "the vast quantity of petitions and orders" under the DVA may "dilute the effect of meritorious petitions and orders by legitimate abuse victims."¹⁸⁹

In conclusion, children of divorced parents are already four times more likely than children of intact families to get divorced as adults.¹⁹⁰ Combine this discouraging statistic with the negative effects of a high-

184. GARBER, *supra* note 3, at 66. While a child's first experience of his parents' conflict may have been the first time she heard "loud voices . . . slammed doors and angry words," her experience of her parents' conflict likely began even before their first argument. *Id.* The parental conflict "dates back to those early, tense silences, no matter how much you may have pretended that everything was okay." *Id.*; see also Shienvold, *supra* note 6, at 33 (claiming that children of high-conflict parents "show signs of emotional and behavior disturbances even before their parents separate").

185. GARBER, *supra* note 3, at 66.

186. See Nemeth, *supra* note 12, at 45 (stating that the effect of the current section 701 jeopards standard is to "promote filing for exclusive possession under the [DVA]").

187. *Id.* at 44.

188. *Id.*

189. *Id.* at 45. Nemeth herself recommends adding a paragraph to the Temporary Relief section of the IMDMA that would provide "an unequivocal and unambiguous option to seek and obtain exclusive possession of the marital residence and reduce tension and conflict that so often erupts in front of minor children" at the outset of divorce proceedings. *Id.* Texas has such a statutory provision that takes into account the parties' and children's relative "financial, emotional, and physical hardships" to determine who should have exclusive possession of the home at the outset of the case. *Id.*

190. See *Divorce Statistics and Divorce Rate in the USA*, DIVORCE STAT., <http://www.divorcestatistics.info/divorce-statistics-and-divorce-rate-in-the-usa.html> (last visited Feb. 22, 2014). This is because the child's exposure to his parents' divorce causes him "ambivalence about commitment in a 'disposable society.'" Rufus, *supra* note 1.

conflict divorce, and the long-term effects on a child's ability to maintain lasting relationships suffers even further. A child's exposure to her parents' discordant relationship in the home alters the "foundation upon which [s]he begins to build a sense of intimacy and reciprocity."¹⁹¹ The conflict shapes her perception of appropriate relationship behaviors, such as communication, respect, compromise, negotiation, self-expression of feelings, and how to support others.¹⁹² The longer high-conflict divorce parents expose their children to their negative interactions, the more ingrained the parents' flawed demonstrations of social skills become. These effects should be considered equally dangerous to domestic violence and merit application of the section 214 "balance of the hardships" test to section 701 petitions.

C. Proposed Reform to Section 701

If the current section 701 jeopardy standard is not interpreted to encompass a child's impaired mental and emotional development that results from exposure to her high-conflict parents living in the home, the statutory language should be replaced with a "balance of the hardships" test. In applying the balance of the hardships test to a section 701 petition, courts would engage in the following analysis:

First, the court would make an initial finding that the parties are engaged in a high-conflict divorce by considering testimony from the parties and by examining the overall nature of their case progression since the filing of the divorce. The following factors would be indicative of a high-conflict divorce case: little progress has been made in the case due to the parties' refusal to settle even the most trivial of issues; one or both parties stubbornly refuse to vacate the marital home; and the frequency and intensity of the parties' arguments in the home. The court would also consider evidence of the parties' arguing and hostility in the home preceding the filing of the divorce petition to determine the length and extent of their arguing and hostility in the home before the case commenced.

Second, if the parties have minor children and there has not yet been a temporary custody order entered establishing the parenting arrangement for divorce proceedings, the court would next hold such a hearing to determine who will be the primary residential parent of the children. If necessary, the court would appoint a guardian ad litem to make recommendations for the temporary custody order, because it is

191. GARBER, *supra* note 3, at 18. This foundation will affect the child's "first friendships in grade school to first crushes in junior high and onward [and] shape [her] intimate adult partnerships." *Id.*

192. *See id.* at 19.

unlikely that the high-conflict divorce parties will be able to agree on the temporary parenting arrangement.

Finally, the court would apply the balance of the hardships test to determine whether the hardships to the nonpetitioning spouse and any minor child in his care substantially outweigh those to the petitioner and any minor child in her care that would result from continued exposure to either the risk of harm or from loss of possession of the residence.¹⁹³ The court would presume this balance favors the petitioner.¹⁹⁴ For example, if the nonpetitioning spouse was previously designated as the primary residential parent, this would be sufficient to shift the balance of hardships in his favor and order the petitioner to vacate the marital home, because it is preferable for the children to maintain stability by remaining in the home during the divorce.

Using this balance of the hardships analysis to determine a section 701 petition is preferable in a sensitive legal proceeding like divorce because it accounts for the relative hardships and financial resources of each party. Further, it considers who will be the primary caretaker of the children and all other surrounding circumstances before deciding who should have exclusive possession of the marital home. Moreover, the required showing under section 214 is less stringent than the jeopardy standard under section 701.¹⁹⁵ This would help account for the subtler, yet serious, negative effects that high-conflict divorce has on the long-term emotional and mental development of children.¹⁹⁶

IV. IMPACT

Like all other sections of the IMDMA, section 701 is to be “*liberally* construed and applied to promote [the IMDMA’s] underlying purposes.”¹⁹⁷ Replacing the “high bar”¹⁹⁸ of the current jeopardy standard with either a more liberal construction of the current statute or with the balance of the hardships reformation will promote multiple overarching policy goals of the IMDMA.

In addition to the IMDMA’s purpose of protecting children involved in a divorce, the IMDMA also seeks to promote the “amicable settlement of disputes.”¹⁹⁹ The current section 701 standard makes it difficult for a court to order one of two high-conflict divorce parties to

193. Cf. 750 ILL. COMP. STAT. 60/214(b)(2)(B) (2012).

194. Cf. *id.*

195. Compare *id.*, with 750 ILL. COMP. STAT. 5/701.

196. See *supra* notes 31–79 and accompanying text.

197. 750 ILL. COMP. STAT. 5/102 (emphasis added).

198. *In re Marriage of Levinson*, 975 N.E.2d 270, 281 (Ill. App. Ct. 2012).

199. 750 ILL. COMP. STAT. 5/102(3).

vacate the marital home, even if it is evident they can no longer cohabit peacefully and one of them (the petitioner) clearly does not wish to continue cohabiting with the other. The continued co-occupancy of the marital home by such parties will only perpetuate their arguments, foster their “never-ending battle,”²⁰⁰ and increase the risk of physical abuse.²⁰¹ Increased arguing, tension, and hostility will affect future legal proceedings in which the parties are expected to amicably settle their disputes, as they will likely be unable to agree on any issue. This will only augment their differences and conflict in an already “adversarial court system”²⁰² and will not further the policy of “amicable settlement of disputes.”²⁰³

Relaxing the current section 701 standard will promote the IMDMA’s goal of securing the “maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of the children during and after the litigation.”²⁰⁴ Parents in a high-conflict divorce are unlikely to cooperate with each other for their children’s well-being, and cooperation will presumably be even more unattainable if they are forced to live together in the marital home during the case. High-conflict divorce parties are “embroiled in emotion-laden conflict” and allow their own feelings to take priority over those of their children.²⁰⁵ Given the divorcing parties’ “highly charged emotional state,” changing the focus from their mutual feelings of hostility to the needs of their innocent children can be quite difficult.²⁰⁶ Their children feel helpless and fearful when caught in the middle of their arguing parents in the home.²⁰⁷ After litigation, the parents may still be unable to cooperate regarding their children’s well-being if they were forced to spend the entire divorce proceeding living with each other, which likely only fostered their hostility toward one another.

The underlying purpose of section 701 is to enable a court to “intervene when necessary” in order to “protect spouses and children when their well being is jeopardized,” and courts are purportedly given “broad authority” to do so.²⁰⁸ Regardless of this “broad authority,”

200. See GARBER, *supra* note 3, at 77.

201. See Weinstein & Weinstein, *supra* note 1, at 384 n.127 (citing GOLEMAN, *supra* note 133, at 61–62).

202. GARBER, *supra* note 3, at 132.

203. 750 ILL. COMP. STAT. 5/102(3).

204. *Id.* § 102(7).

205. LIPPMAN & LEWIS, *supra* note 2, at 79.

206. Weinstein & Weinstein, *supra* note 1, at 373.

207. See *id.*

208. *In re Marriage of Heinrich*, 2011 IL App (2d) 110683-U, ¶ 16.

Illinois domestic relations courts have yet to recognize the negative long-term effects on a child's mental and emotional development and future relationships that result when she is exposed to her high-conflict divorce parents in the home. The risk of these future negative effects on the children may not convince a court that intervention is necessary because they are not as immediate or palpable as physical abuse. However subtle these effects may be, they impose a lifelong burden on the children of high-conflict divorce when those negative effects manifest themselves in their adult relationships.²⁰⁹

Finally, relaxing the section 701 standard could have the subsidiary effect of clearing up the domestic violence court docket of petitions inappropriately filed by divorcing parties that may untruthfully allege physical abuse to take advantage of the more lenient section 214 standard.

V. CONCLUSION

Although courts typically prefer to play a passive role in dispute resolution²¹⁰ and are generally "reluctant to tell parents how to raise their children,"²¹¹ ordering two high-conflict parents to establish separate residences for the remainder of divorce proceedings properly addresses the inevitable reality of the family's future.²¹² Granting a section 701 petition gives the children and all parties involved healthy closure and relieves hostility in the home and the children's exposure to their parents' conflicts.²¹³

A child does not ask for her parents to engage in a high-conflict divorce, nor does she have the ability to remove herself from the marital home if her arguing parents continue to live together during proceedings. A child of high-conflict divorce should not be subjected to her divorcing parents' unhealthy relationship model, especially when that experience unconsciously and negatively affects her for the rest of her life, thereby perpetuating a cycle of future unhealthy relationships and divorce. Section 701 should be applied in a more expansive manner to encompass these negative effects and aid in ending that divorce cycle. If it cannot be applied more expansively, section 701 should be reformed to include the balance of the hardships test applied under section 214 of the DVA. Such a reformation would allow a court to

209. See *supra* notes 31–79 and accompanying text.

210. Weinstein & Weinstein, *supra* note 1, at 394.

211. GARBER, *supra* note 3, at 26.

212. Cf. LIPPMAN & LEWIS, *supra* note 2, at 44.

213. *Id.* at 38–39. "Some children actually experience a sense of relief that the long stressful ordeal is over." Shienvold, *supra* note 6, at 32.

consider all the circumstances of the case, such as available alternative housing, and it will not be limited by the strict jeopardy standard. In turn, this would better address the subtle, negative effects of high-conflict divorce on the children.

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