THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 311(a)

No. 123602

IN THE SUPREME COURT OF ILLINOIS

***In re* MARRIAGE OF**	)	
	)	**On Appeal from Illinois Appellate**
TODD FATKIN,	)	**Court, Third District**
Petitioner,	)	**No. 3-17-0779**
	)	
and	)	**On Appeal from the**
	)	**Circuit Court of Knox County**
	)	**No. 2014 D 96**
	)	
DANIELLE FATKIN,	)	**Honorable Paul L. Mangieri**
***Respondent*.**	)	**Judge Presiding**

BRIEF *AMICI CURIAE* OF PAUL L. FEINSTEIN AND MICHAEL G. DiDOMENICO IN SUPPORT OF THE APPELLANT

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TABLE OF CONTENTS

Page

POINTS AND AUTHORITIES

POINTS AND AUTHORITIES
Continued

Page

POINTS AND AUTHORITIES
Continued

Page

INTEREST OF THE *AMICI*

Both Mr. DiDomenico and Mr. Feinstein have practiced matrimonial law at both the trial and appellate level for many years and are fellows of the American Academy of Matrimonial Lawyers (AAML). They have authored numerous *amicus* briefs in this Court and the Appellate Court on behalf of the AAML, and one previous in their individual capacities, and have collectively participated in hundreds of matrimonial law appeals. They are intimate with the jurisdictional issues implicated in this case and can provide helpful insight to this Court in reaching its decision.

INTRODUCTION

This case presents the Court with the opportunity to clarify the jurisdictional rules governing post-judgment dissolution of marriage appeals. For many years, post-judgment appellate jurisdiction has confounded the Appellate Court and led to a deep divide amongst the districts. This has led to much uncertainty and confusion for lawyers and litigants on how to answer a threshold and what should be straightforward question—when is a post-judgment order appealable?

This issue comes before this Court by way of the Third District majority below using Supreme Court Rule 304(b)(6) to afford merits review to the circuit court's order allowing Todd Fatkin to permanently remove the parties' minor child to Virginia. For the reasons below, this jurisdictional conclusion is wrong. However, given that this case, like any relocation case, implicates the best interests of a child, this Court can and should examine any other basis for appellate jurisdiction. While *amici* ultimately contend that this appeal should be dismissed for lack of jurisdiction because Supreme Court Rule 345(b) suggests *amici* must take a position, it is far from clear, and *amici* take no position on the

merits of the relocation order. What is known is that an examination of the jurisdictional issues in this case will be extraordinarily helpful to the matrimonial bench and bar, and those whom they represent.

ARGUMENT

I. A relocation order is not appealable pursuant to Supreme Court Rule 304(b)(6).

Supreme Court rules are not mere suggestions. In re Marriage of Dougherty, 2017 IL App (1st) 161893, ¶ 7. The rules have the force of law and are to be construed in the same manner as statutes. Id. The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Id. The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning. Id.

Supreme Court Rule 304(b)(6) provides for appellate jurisdiction, without the necessity of a finding pursuant to Supreme Court Rule 304(a), from "A custody or allocation of parental responsibilities judgment or modification of such judgment pursuant to the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/101 et seq.) or Illinois Parentage Act of 2015 (750 ILCS 46/101 et seq.)."

"Parental responsibilities" is defined to mean "both parenting time and significant decision-making responsibilities with respect to a child." 750 ILCS 5/600(d) Allocation of parenting responsibilities and parenting time is governed by 750 ILCS 5/602.5 and 750 ILCS 5/602. Modification of those provisions is governed by 750 ILCS 5/610.5.

"Relocation" is separately defined to mean "(1) a change of residence from the child's current primary residence located in the county of Cook, DuPage, Kane, Lake, McHenry, or Will to a new residence within this State that is more than 25 miles from the child's current residence; (2) a change of residence from the child's current primary

residence located in a county not listed in paragraph (1) to a new residence within this State that is more than 50 miles from the child's current primary residence; or (3) a change of residence from the child's current primary residence to a residence outside the borders of this State that is more than 25 miles from the current primary residence." 750 ILCS 5/600(g) Relocation is separately governed by 750 ILCS 5/609.2, which, in substantial part, codified the factors established by this Court in In re Marriage of Eckert, 119 Ill. 2d 316, 326-327 (1988).

Given the plain language of Rule 304(b)(6) and its reference to only "parental responsibilities judgments," it is clear that the rule does not allow for the appeal of relocation orders. In re Parentage of Rogan M., 2014 IL App (1st) 132765, ¶¶ 22-23 (Rule 304(b)(6) does not confer appellate jurisdiction to review merits of order denying removal) [1] The Appellate Court has long recognized a legal difference between custody and visitation orders (n/k/a parental responsibilities and parenting time) and removal (n/k/a relocation). See, e.g., In re Marriage of Yndestad, 232 Ill. App. 3d 1, 5 (1992) ("A petition to remove a child to another State is not a modification of a custody judgment even if granting the petition would have an impact upon the non-movant's joint custody rights."); Winebright v. Winebright, 155 Ill. App. 3d 722, 724 (1987) ("Even where the parties have

[1] This Court should also note that the committee comments to Rule 304(b)(6) dated March 8, 2016, make reference to the new terms used in the Illinois Marriage and Dissolution of Marriage Act. That is, "custody" is now referred to as "allocation of parental responsibilities"; "visitation is now referred to as "parenting time"; and "removal" is now referred to as "relocation." Notwithstanding this recognition, Rule 304(b)(6) makes no reference to relocation orders. This is in contrast to Supreme Court Rule 306(a)(5) which does expressly reference relocation orders, as discussed *infra.* Simply put, if Rule 304(b)(6) was supposed to confer appellate jurisdiction over final relocation orders, it would have said so. Altenheim German Home v. Bank of America, N.A., 376 Ill. App. 3d 26, 36 (2007) (doctrine of *inclusion unius exclusion alterius* means the inclusion of one is the exclusion of all others)

been awarded joint custody, a petition to remove the child from Illinois does not constitute a petition to modify custody; hence the removal petition is governed by section 609 of the IMDMA, and section 610 does not apply."); In re Marriage of Bednar, 146 Ill. App. 3d 704, 706 (1986) (holding same) [2]

The Appellate Court in this case purported to distinguish this case from the above cases when it said "those cases dealt with the parties' filings related to a request for a potential relocation, whereas a relocation order entered by the trial court in this case that, in effect, modified the prior judgment allocating parental responsibilities." In re Marriage of Fatkin, 2018 IL App (3d) 170779, ¶ 31. While on one hand conceding that "not all relocation orders may constitute a modification of a joint custody order," the Court went on to hold that "the relocation order entered in this case modified the judgment awarding the parties' joint parenting responsibilities *to such an extent* that we view it as modification of the prior order allocating parenting responsibilities and, therefore, it falls within the scope of Rule 304(b)(6)." Id. (emphasis added) In other words, the Appellate Court below held that an order denying relocation is not appealable under Rule 304(b)(6), but that an order granting relocation is, so long as the particular panel assigned the case determines the order "modified" a prior parenting responsibilities order to a sufficient "extent." It is submitted that this kind of subjective assessment has no place in determining appellate jurisdiction and serves only to confuse the matrimonial bench and bar. Orders granting or

[2] The recent amendments to Illinois' divorce laws provide that "a parent's relocation constitutes a substantial change in circumstances for purposes of Section 610.5." 750 ILCS 5/609.2(a). However, that does not fully relieve a petitioning party's evidentiary burden to also establish a modification if necessary to serve the child's best interests in 750 ILCS 5/610.5(c), and only emphasizes how a relocation order and an order modifying a parental responsibilities judgment are not the same thing, as a matter of law.

denying relocation are either appealable under Rule 304(b)(6) or they are not. But it cannot and should not be left to the whims of a particular panel, based on how two Justices perceive the "extent" a relocation order may change a family's dynamic. As Justice Schmidt correctly pointed out in his dissent, Danielle Fatkin's difficulty in exercising her rights is merely a factor in the relocation calculus; it has nothing to do with appellate jurisdiction. Fatkin, 2018 IL App (3d) 170779, ¶ 43; 750 ILCS 5/609.2(g)(7). Ironically, as set forth below, the majority's decision below represents a step backward from the Appellate Court's recent cases on Supreme Court Rule 304(a) which began to chip away at the subjectivity it had made part of determining post-judgment appellate jurisdiction.

For the above reasons, an order granting relocation is not appealable pursuant to Supreme Court Rule 304(b)(6).

II. Other possible bases for appellate jurisdiction in this case.

Given that this case involves the best interests of a minor child, there is no doubt that merits review is preferred. In re Custody of Purdy, 112 Ill. 2d 1, 4 (1986). There are two other possibilities that require this Court's analysis and consideration.

A. Supreme Court Rule 306(a)(5).

Supreme Court Rule 306(a)(5) provides for permissive interlocutory appeals "from interlocutory orders affecting the care and custody of or the allocation of parental responsibilities for un-emancipated minors or the relocation (formerly known as removal) of un-emancipated minors, if the appeal of such orders is not specifically provided for elsewhere in these rules."

It is not disputed here that Ms. Fatkin did not file a petition for leave to appeal pursuant to Rule 306(a)(5); rather, she filed a notice of appeal on November 16, 2017, just

3 days after the circuit court's order granting removal. Fatkin, 2018 IL App (3d) 170779, ¶ 23. This is within the 14-day requirement to file a petition for leave to appeal set forth in Rule 306(b) for cases brought pursuant to Rule 306(a)(5). In the Appellate Court's most recent case considering Rule 306(a)(5) jurisdiction, the Court recounted cases where a timely filed notice of appeal was re-construed as a petition for leave to appeal pursuant to Rule 306(a)(5) when either the proper Rule 306(b) procedure was not followed or where it was reasonable for the appellant to believe that case law provided for jurisdiction under another rule. In re Marriage of Kostusik, 361 Ill. App. 3d 103, 112-114 (2005) (collecting cases) Thus, there is at least some authority for the notion that the Appellate Court's consideration of the merits of Ms. Fatkin's appeal could be considered the allowance of a Rule 306(a)(5) petition, given Ms. Fatkin's filing of a timely notice of appeal.

However, even so reconstrued, it is suggested that Rule 306(a)(5) jurisdiction would only be proper in this case if the rule covers permanent relocation orders. The issue here is that Rule 306, by definition, governs permissive "*Interlocutory* Appeals." (emphasis added) Subsection (a)(5) expressly states (unlike the other subsections in Rule 306(a)) that permissive appeals may be taken from "*interlocutory* orders affecting the care and custody…." (emphasis added) Case law suggests that "interlocutory" can have multiple meanings depending on the context in which it is raised. In re Marriage of Teymour, 2017 IL App (1st) 161091, ¶ 18, fn2. (discussing case law describing interlocutory orders as those that are temporary and modifiable at any time prior to final judgment, and describing interlocutory orders that are final, but not appealable) Applied here, the issue is whether Rule 306(a)(5) confers appellate jurisdiction over the circuit court's *permanent* relocation order or only orders regarding temporary relocation, such as those contemplated by 750

ILCS 46/502(a), the type of temporary child-related orders the matrimonial bar has long understood Rule 306(a)(5) to cover. In re Marriage of Dougherty, 2017 IL App (1st) 161893, ¶¶ 5-8 (holding "care and custody" in Rule 306(a)(5) relates only to temporary orders involving the custodial placement of minor children)

B. Supreme Court Rule 304(a).

It is not disputed in this case that the circuit court did not make an express finding pursuant to Supreme Court Rule 304(a) as to its permanent relocation order. It also does not appear disputed, at least by this panel of the Appellate Court, that had a Rule 304(a) finding been made, jurisdiction would otherwise have been proper under that rule, notwithstanding the pendency of claims related to transportation costs and modification of child support. Fatkin, 2018 IL App (3d) 170779, ¶¶ 26-27. In the event this Court determines that jurisdiction is improper under Rule 304(b)(6) and Rule 306(a)(5), the Court has the opportunity to clarify the case law on Rule 304(a) jurisdiction in the post-dissolution judgment context.

Since (and even before) this Court's decision in In re Marriage of Gutman, 232 Ill. 2d 145, 151 (2008), the Appellate Court has been divided on when post-dissolution judgment orders are appealable. For many years, the Second and Fourth Districts held that, absent a Rule 304(a) finding, a post-judgment order is not appealable without a Rule 304(a) finding when other claims remain pending, unless some other rule specifically confers jurisdiction. In re Marriage of Alyassir, 335 Ill. App. 3d 998, 999-1000 (2003) (position of Second District); In re Marriage of Gaudio, 368 Ill. App. 3d 153, 157-158 (2006) (position of the Fourth District) This position was consistent with this Court's decision in Gutman

that held a Rule 304(a) finding is required to make post-judgment orders appealable when other claims remain pending. Gutman, 232 Ill. 2d at 151.

Notwithstanding Gutman, the First and Third Districts invented ways to distinguish Gutman, holding that post-judgment orders are appealable as final orders pursuant to Supreme Court Rules 301 and 303, without the necessity of a Rule 304(a) finding, if the order appealed is not "related" to the claims still pending. In re Marriage of A'Hearn, 408 Ill. App. 3d 1091, 1093-1094 (2011) (position of the Third District); In re Marriage of Demaret, 2012 IL App (1st) 111916, ¶ 35 (position of the Sixth Division of the First District) The problem with a theory of post-judgment appellate jurisdiction based on the "relatedness" of the claims is and was its inherent subjectivity. None of the cases attempted to define what a "related" claim is, and the reader was left with the guidance only by comparing the specific claims at issue in the case to give "relatedness" any meaning. Not surprisingly, the Appellate Court inconsistently applied these rules, making *de facto* determinations about "relatedness" on a case-by-case basis, very similar to the Rule 304(b)(6) "extent of modification" theory applied by the Fatkin majority here. The resulting dispositions have been all over the map, especially in the First District.[3]

To be sure, all claims in a divorce case are "related"—all arise out of the same family, the same parties, the same children, and from the same set of financial and child-related circumstances. In effect, the "relatedness" theory of post-judgment jurisdiction was

[3] See, e.g., In re Marriage of Knoll, 2016 IL App (1st) 152494, ¶ 46 (Fifth Division, merits reached); In re Marriage of Baumgartner, 2014 IL App (1st) 120552, ¶¶ 34-36 (Sixth Division, merits reached); In re Marriage of Ehgartner-Schacter, 366 Ill. App. 3d 278, 284-285 (2006) (First Division, dismissed in part); In re Marriage of Carr, 323 Ill. App. 3d 481, 483-485 (2001) (Third Division, appeal dismissed); In re Marriage of Dianovsky, 2013 IL App (1st) 121223, ¶ 40 (Second Division, appeal dismissed).

really no jurisdictional standard at all, only a means to provide merits review when the rules did not permit it but when the Appellate Court wanted to provide it, however well-intentioned.

Just last year, the First District righted its wrong. In In re Marriage of Teymour, 2017 IL App (1st) 161091, ¶¶ 12-43, the Third Division parted ways with its earlier case law and adopted the position of the Second and Fourth Districts that post-judgment orders are not appealable when other claims remain pending absent a Rule 304(a) finding. Teymour provides a most thoughtful analysis of the history of this issue in the Appellate Court. The Fifth Division of the First District recently followed Teymour, again parting ways from its own previous case law. In re Marriage of Sanchez, 2018 IL App (1st) 171075, ¶¶ 20-29 (dismissing appeal from post-judgment orders when other claims remained pending absent a Rule 304(a) finding) Interestingly, in the case at bar, the Third District cited Teymour approvingly, seemingly for the proposition that Rule 304(a) jurisdiction did not exist given the absence of a Rule 304(a) finding. Fatkin, 2018 IL App (3d) 170779, ¶¶ 26-27. The Court did not even acknowledge its decision in A'Hearn that would have provided for Rule 301 and 303 jurisdiction, without the necessity of turning Rule 304(b)(6) on its head.

In any event, for the reasons stated by Justice Lavin in Teymour, and for the reasons set forth by this Court in Gutman, post-judgment dissolution orders are not appealable as final orders under Rules 301 and 303 when other claims remain pending absent a Rule 304(a) finding. Notwithstanding its recent trend towards uniformity on this issue, the Appellate Court remains divided, and this Court should clarify the law. O'Casek v. Children's Home and Aid Soc. of Illinois, 229 Ill. 2d 421, 440 (2008) (decisions of one

panel of the appellate court are not binding on others). *Amici* believe that the Teymour analysis should control and be codified by this Court's disposition. This application of Rule 304(a) to post-judgment orders provides the most clear and cogent approach to appellate jurisdiction.

Amici make one other observation. The granting or denying of a Rule 304(a) finding is itself an unreviewable decision. Case law provides that the circuit court has discretion either way, but there is no guidance on what the proper exercise of that discretion entails. In the context of otherwise final post-judgment dissolution orders, circuit courts should be favorably disposed to enter Rule 304(a) findings when asked (and divorce lawyers need to know they need to ask), absent some compelling reason not to permit merits review and achieve true finality. In this case, the pendency of claims for child support and transportation costs would not have been compelling reasons, and the absence of a Rule 304(a) finding here has the unfortunate potential of not permitting merits review of an order concerning a child's best interests.

Amici's position on Rule 304(a) can be best summed up by a dissenting opinion filed by Justice Schmidt (who also dissented in this case) in In re Custody of C.C., 2013 IL App (3d) 120342. In that case, the majority held that the amount of permanent child support was "unrelated to" whether there was an ability to pay attorney fees in justifying merits review. Id. at ¶¶ 51-60. Venting his frustration over the uncertainly that has befallen post-judgment appellate jurisdiction in matrimonial cases, Justice Schmidt wrote:

> Out in the real world, far, far away from the rarified air of the appellate court, real lawyers are struggling to figure out how to best protect the rights of their respective clients. With all due respect, appellate decisions such as this make that job difficult, if not impossible. Additionally, it will make the extremely expensive proposition of litigation even more expensive. Now, when there is a ruling on any portion of a multiple claim case in the trial

> court, the lawyers will have to figure out whether an appellate court will decide if the issue ruled upon was sufficiently similar to the remaining issues so as not to require an interlocutory appeal, or whether two of three judges might find the issue sufficiently dissimilar from the other issues, requiring a notice of appeal to be filed within 30 days. One can expect reasonable lawyers to avoid malpractice exposure by filing notices of appeal on every order in the trial court for fear that failure to do so could find the issue unreviewable at a later time due to lack of jurisdiction.

Id. at ¶ 81.

PRAYER

WHEREFORE, your *Amici*, attorneys Michael G. DiDomenico and Paul L. Feinstein, respectfully pray that this Court establish clear and concise rules for appellate jurisdiction in post-judgment matrimonial appeals, and for such other, further and different relief as the Court, in its equity deems just and proper.

Respectfully submitted,

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CERTIFICATION OF BRIEF

I certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the cover page, table of contents, points and authorities, and this certification, is 11 pages.

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