No. 129155

IN THE SUPREME COURT OF ILLINOIS

IN RE MARRIAGE OF MASUD M. ARJMAND, Petitioner-Appellant, and MUNEEZA R. ARJMAND, Respondent (Morgan Stanley Smith Barney LLC, Morgan Stanley & Co., LLC, Morgan Stanley & Co., Inc., Morgan Stanley Investment Management, Inc., Bryan Estes, and Stogsdill Law Firm, PC, Defendants-Appellees).	)	On Appeal from the Appellate Court of Illinois, Second Judicial Circuit, No. 2-21-0285 There heard on Appeal from the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, No. 09-D-1168 The Honorable Timothy J. McJoynt, Judge Presiding.

BRIEF *AMICUS CURIAE* OF THE ILLINOIS CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

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INTEREST OF THE *AMICUS*

Amicus curiae The Illinois Chapter of the American Academy of Matrimonial Lawyers (the "Academy") is a national, not-for-profit organization comprised of lawyers who spend a substantial percentage of their time practicing matrimonial law, and who meet certain qualifications. There are more than 1,600 Fellows in 50 states. As representatives of a portion of the legal profession, the Academy takes an active interest in matters affecting the practice of family law in Illinois. The Academy's purpose is to preserve the best interest of the family and of society, and to improve the practice, elevate the standards and advance the cause of matrimonial law. Local and national electronic and print media often contact Academy Fellows for their opinions on breaking family law issues. In recent years, the Academy has appeared as *amicus curiae* in important cases in this Court and the Appellate Court, including: In re Marriage of Best, 228 Ill. 2d 107 (2008), where this Court clarified the procedures for declaratory judgment actions involving prenuptial agreements; In re Marriage of O'Brien, 2011 IL 109039, which clarified the standards for obtaining a substitution of judge; Johnston v. Weil, 241 Ill. 2d 169 (2011), where this Court confronted issues regarding mental health evaluations in child custody cases; In re Marriage of Eckersall, 2015 IL 117922, a case dealing with the appealability of interim child custody orders; In re Marriage of Altman, 2016 IL App (1st) 143076, where the First District Appellate Court held that earned fees cannot be disgorged in pre-judgment dissolution of marriage cases; In re Marriage of Goesel, 2017 IL 122046, where this Court affirmed the Altman holding; In re Marriage of Kane, 2018 IL App (2d) 180195, where the Second District Appellate Court held that attorneys are not made parties to a divorce case by filing for fees against their former clients; Yakich v.

Aulds, 2019 IL 123667, a case decided by this Court on *stare decisis* grounds regarding the constitutionality of the college contribution statute; and Sharpe v. Westmoreland, 2020 IL 124863, where this Court confronted step-parent rights vis-à-vis the Civil Union Act.

INTRODUCTION

At bottom, this case is about efficiency in our court system. The consequences of an erroneous denial of a motion for substitution of judge are well understood—every order later entered by the judge who made the erroneous denial must be vacated while the parties, and their attendant litigation costs, are returned to square one. Palos Community Hospital v. Humana Ins. Co., Inc., 2021 IL 126008, ¶ 37; In re Marriage of Crecos, 2015 IL App (1st) 132756, ¶ 29. The Academy urges any outcome where orders denying motions for substitution of judge receive merits review as soon as possible. This Court has previously construed its appellate jurisdictional rules with an eye toward efficiency of process and should do so again in this case. In re Marriage of Best, 228 Ill. 2d 107, 118 (2008) (holding that Supreme Court Rule 304(a) findings confer interlocutory appealability on pre-judgment orders determining the validity of prenuptial agreements in part because, not doing so, unnecessarily diminishes the efficiency of dissolution proceedings).

ARGUMENT

I. The district split should be resolved in favor of the interlocutory appealability of orders denying motions for substitution of judge.

The petition for leave to appeal in this case established the district split on the issue directly presented here: whether orders denying a motion for substitution of judge

are within the scope of review in an appeal from an otherwise appealable, interlocutory order.

The Second District interprets the scope of its interlocutory review narrowly. U.S. Bank Nat. Ass'n v. In Retail Fund Algonquin Commons, LLC, 2013 IL App (2d) 130213, ¶¶ 22, 24 (prior attendant orders entitled to merits review in an interlocutory appeal must be "intertwined with the merits of the interlocutory order"; appellants must "establish a link" between prior attendant orders and the interlocutory order on review); In re Marriage of Arjmand, 2-21-0285, ¶¶ 12-13. This view is borne, in part, from fear of the proverbial slippery slope—that any prior interlocutory orders an appellant may wish to challenge would be entitled to merits review, subverting circuit court discretion under Supreme Court Rules 304(a) and 308. In re Marriage of Nettleton, 348 Ill. App. 3d 961, 970-1 (2004). Applying these principles, the Second District in this case refused to review the merits of the substitution orders challenged by Mr. Arjmand. Arjmand, 2-21-0285, ¶¶ 12-14.

The Fourth and First Districts take a somewhat broader view of the scope of its interlocutory review—that it includes the ability to "review any prior error that bears directly upon the question of whether the order on appeal was proper." Sarah Bush Lincoln Health Center v. Berlin, 268 Ill. App. 3d 184, 187 (1994); Partipilo v. Partipilo, 331 Ill. App. 3d 394, 398 (2002). Under this construct, the question of whether "the order on appeal was proper" includes answering the question of whether the judge who entered the order on interlocutory appeal should have entered it in the first place.[1] Berlin, 268 Ill.

[1] Although the Fifth District did not undertake any discussion of its jurisdiction, it also has reviewed the merits of an order denying a substitution motion on interlocutory appeal

App. 3d at 187. Thus, merits review of substitution orders on interlocutory appeal is appropriate because the potential consequences of *not* affording merits review outweigh any other considerations. Id. The Academy agrees with this approach.

If a case is otherwise before the Appellate Court on interlocutory appeal, any challenge to a prior order questioning whether the judge should have heard the case and entered the order at issue should also be decided. While Berlin and Partipilo suggest that merits review is only warranted when the judge who denied the substitution motion is the same judge who entered the interlocutory order under review (Berlin, 268 Ill. App. 3d at 187; Partipilo, 331 Ill. App. 3d at 398), in most cases that judge will continue to hear the case on remand, especially in divorce cases. Thus, including these orders within the scope of interlocutory review not only decides the issue of whether the judge should have entered the order on appeal in the first place, but it also clears the air for that judge to stay on the case, without fear that all later entered orders will be wiped out.

In that vein, consider what will happen here if this Court affirms. The case will return to Judge McJoynt in DuPage County for further proceedings on Mr. Arjmand's complaint. Judge McJoynt will dispose of it on summary judgment or with a trial. An appeal will then be taken where issue #1 in Mr. Arjmand's opening brief will (again) be that Judge McJoynt erred in denying his motions for substitution of judge. If Mr. Arjmand turns out to be right, then all proceedings after this interlocutory appeal will be vacated. The parties have then not only wasted their time and money litigating before a judge who should not have been hearing the case, but Judge McJoynt will have wasted his time and judicial resources better spent on the cases he was entitled to hear. All while

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from a plenary order of protection pursuant to Supreme Court Rule 307. In re Marriage of Paclik, 371 Ill. App. 3d 890, 895-8 (2007).

the Appellate Court could so easily have reached the substitution issue when deciding this interlocutory appeal. This procedure is wasteful and makes no sense.

The issue of whether Judge McJoynt should be hearing this case is now squarely before the Appellate Court. The fact that the issue presents in a Supreme Court Rule 304(a) interlocutory appeal should not matter given the potential drastic consequences of deferring merits review until finality is reached.

II. Direct, mandatory, and expeditious appeals from orders denying motions for substitution of judge should be the law in Illinois.

As set forth above, the issue as framed in the case law has evolved in terms of whether substitution orders fall within the scope of interlocutory review. The underlying premise on both sides of this debate is that, under this Court's rules, there does not appear to be a mechanism for *direct* review of an order denying a motion for substitution of judge. U.S. Bank Nat. Ass'n, 2013 IL App (2d) 130213, ¶ 25. ("Our Supreme Court has seen fit not to provide specifically for interlocutory appeals of any order disposing of a motion for substitution."); Murges v. Bowman, 254 Ill. App. 3d 1071, 1084 (1993); City of Chicago v. Airline Canteen Service, Inc., 64 Ill. App. 3d 417, 428 (1978).

The closest path to direct review is construing such orders as "injunctions" and therefore appealable under Supreme Court Rule 307(a)(1). This Court has instructed the term "injunction" in Supreme Court Rule 307(a)(1) should be interpreted "broadly" and that substance should prevail over form. Skolnick v. Altheimer & Gray, 191 Ill. 2d 214, 221 (2000); In re A Minor, 127 Ill. 2d 247, 260 (1989). An "injunction' is defined as a "'judicial process operating in personam and requiring [a] person to whom it is directed to do or refrain from doing a particular thing.'" Skolnick, 191 Ill. 2d at 221 (*quoting* A Minor, 127 Ill. 2d at 261). Although no case has expressly so held, when interpreting

"injunction" broadly, one could conclude that an order refusing to restrain a judge from exercising further jurisdiction over a case falls within the scope of Supreme Court Rule 307(a)(1).[2] The Academy urges this Court to adopt this reasoning, or any other reasoning, which furthers a policy whereby substitution orders receive merits review as soon as possible.

This procedure would be particularly important in family law. When erroneous denials of substitution motions are made, the emotional consequences are devastating—the parties and their children, already enmeshed in litigation, are told our procedures require them to re-litigate everything all over again. And that says nothing of the financial consequences to the family, where their personal assets and income fund the litigation fighting about those same assets and income. Take, for example, In re Marriage of Peradotti, where the erroneous substitution denial resulted in vacature of not only the dissolution judgment, but the parental allocation judgment as well, and remand for a full do-over. 2018 IL App (2d) 180247, ¶¶ 19-37. Or Crecos, where the judge's early misstep resulted in years of post-judgment litigation being voided. 2015 IL App (1st) 132756, ¶ 29. Or Paclik, where the minor children lost the protections afforded to them by the Domestic Violence Act because a substitution motion was denied in error. 371 Ill. App.

[2] In what can be described as a stand-alone case, the First District in Williams by Williams v. Leonard, 2017 IL App (1st) 172045, directly reviewed the merits of an order denying a motion for substitution of judge. In Williams, the defendant in a refiled case, moved for substitution of judge as of right. Id. ¶ 4. The plaintiff had voluntarily dismissed the original suit and the refiled case was assigned to the same judge who had presided over and had made substantive rulings in the original action. Id. ¶¶ 3-4. The defendant filed an appeal pursuant to Supreme Court Rule 307(a)(1) from the order denying a motion for substitution of judge. Id. ¶ 5. The First District affirmed the denial on its merits but without any discussion of the basis for its appellate jurisdiction to do so.

3d at 898. These outcomes were avoidable had there been a clear and direct path to the Appellate Court from the substitution order.

Our Legislature has said the goals of the Illinois Marriage and Dissolution of Marriage Act include efforts to "mitigate the potential harm to spouses and their children caused by the process of an action brought under this Act, and protect children from exposure to conflict and violence." 750 ILCS 5/102(4). It is also to "make reasonable provision for support during and after an underlying dissolution of marriage, legal separation, parentage or parental responsibility allocation action..." 750 ILCS 5/102(8). An appellate procedural regime that creates family law outcomes like Peradotti, Crecos and Paclik is antithetical to those goals.

The Academy urges this Court to make this aspect of appellate jurisdiction not only fair and equitable, but efficient and more predictable. Most family law cases will *not* have the opportunity of an interlocutory appeal (like in this case) where substitution issues may be decided prior to entry of a final judgment. This Court could accomplish these ends by declaring that substitution orders are "injunctions" for purposes of Supreme Court Rule 307(a)(1). Alternatively, this Court could amend its Rules to provide for a direct appeal of substitution orders perhaps by creating a new class of orders appealable pursuant to Supreme Court Rule 306. People v Deroo, 2022 IL 126120, ¶ 40 (recognizing this Court's authority to bypass the rulemaking procedures of Supreme Court Rule 3 and utilize a case before it to adopt a Rule change). Any such direct appeal should be subject to expedited procedures given the exigencies presented by these cases.

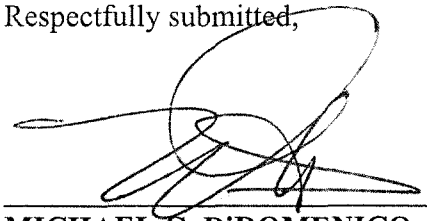
The Academy recognizes that appeals pursuant to Supreme Court Rules 306 and 307 are permissive, not mandatory. Law Offices of Jeffrey M. Leving, Ltd. v. Cotting,

345 Ill. App. 3d 495, 499 (2003); Salsitz v Kreiss, 198 Ill. 2d 1, 11-2 (2001). However, given the stakes involved, the direct appeal of these orders should be made mandatory. If the appeal is not taken, the substitution issue should no longer be permitted to show up years later as issue #1 in the appeal from the final judgment, with the accompanying potentiality to render everything void. The backshot of these suggestions would be an increased workload for the Appellate Court. However, the Academy believes that eliminating the absurd procedural outcomes discussed herein compels such change.

PRAYER

WHEREFORE, *Amicus* prays that this Honorable Court reverse or vacate that portion of the Appellate Court's summary order refusing to hear the merits of Mr. Arjmand's challenges to the orders denying his motions for substitution of judge, remand back to the Appellate Court for its consideration of the merits of those challenges, and for such other, further, and different relief as this Court in its equity deems just and proper.

Respectfully submitted,



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and	)	
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Respondent	)	
(Morgan Stanley Smith Barney LLC, Morgan Stanley & Co., LLC, Morgan Stanley & Co., Inc., Morgan Stanley Investment Management, Inc., Bryan Estes, and Stogsdill Law Firm, PC,	)	**The Honorable Timothy J. McJoynt, Judge Presiding.**
Defendants-Appellees).	)	

CERTIFICATION OF BRIEF

I certify that this *amicus 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, appendix, and this certification, is 8 pages.

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Defendants-Appellees).	)	

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on March 2, 2023, there was filed electronically with the Clerk of the Supreme Court of Illinois, the following: ***BRIEF AMICUS CURIAE OF THE ILLINOIS CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS***.

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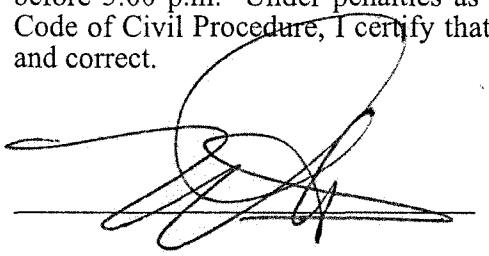
CERTIFICATE OF DELIVERY

I, a licensed Illinois attorney, hereby certify that on March 2, 2023, I caused the foregoing Notice of Filing, Motion for Leave to File Amicus Brief and Brief Amicus Curiae of the Illinois Chapter of the American Academy of Matrimonial Lawyers to be filed with the Odyssey EFile System and served said documents upon the persons named on the attached Service List by electronic mail at 33 N. Dearborn, Chicago, Illinois at or before 5:00 p.m. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct.



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In re Marriage of Arjmand
DuPage County Case No. 09-D-1168
Second District Appellate Court Case No. 2-21-0285
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