

# **AVOIDING LANDMINES: APPELLATE JURISDICTION AND THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGES ACT**

Written By: Gregory C. Maksimuk

## **I. Introduction**

Appellate courts have a duty to consider *sua sponte* whether they have jurisdiction over an appeal and to dismiss the appeal if jurisdiction is lacking.<sup>1</sup> As one justice aptly put it, jurisdiction “is not a right possessed by the parties, but a prerogative of the court...”<sup>2</sup> It has been over 20 years since the Supreme Court in *In re Marriage of Leopando* addressed the issue of appellate jurisdiction in dissolution of marriage proceedings, and yet preserving appellate jurisdiction in those proceedings continues to perplex even seasoned practitioners.<sup>3</sup> This perplexity combined with the fact that a court lacking jurisdiction, cannot confer any relief, even from prior judgments that are void, has made appellate jurisdiction a potential malpractice landmine for any attorney practicing in the area of family law.<sup>4</sup> This article examines the law concerning the preservation of appellate jurisdiction in dissolution of marriage proceedings as it is commonly faced by family law practitioners.

## **II. Basis for Appellate Jurisdiction**

It is incumbent upon litigants to comply with the Illinois Supreme Court Rules to properly preserve appellate jurisdiction.<sup>5</sup> Appellate jurisdiction is conferred and controlled by the Illinois Supreme Court Rule 300 series and Article VI, Section 6 of the Constitution of the State of Illinois. Illinois Supreme Court Rules 301, 303, and 304 are the rules most frequently used to vest appellate jurisdiction. Illinois Supreme Court Rule

301 permits the appeal of every final circuit court judgment in a civil case as a matter of right; the appeal is initiated by the filing of a notice of appeal. <sup>6</sup> Illinois Supreme Court Rule 303 governs the procedure for appeals from final judgments as to all matters in a circuit court, and Illinois Supreme Court Rule 304 governs the procedure for appeals from final judgments that do not dispose of the entire proceeding but do finally resolve some portion of the proceedings. <sup>7</sup>

Supreme Court Rule 303 requires that a notice of appeal be filed with the circuit court within 30 days after entry of a final judgment or after the resolution of a timely filed post-trial motion. <sup>8</sup> A notice of appeal filed under Rule 303 is still considered timely when it is filed after a court announces a decision but before entry of a judgment. <sup>9</sup> The notice here is treated as filed on the date of the entry of the judgment. <sup>10</sup> Also the notice is considered timely if it is filed before the disposition of the last pending postjudgment motion, or any separate claim. <sup>11</sup> The notice here becomes effective when the order disposing of the postjudgment motion or claim is entered. <sup>12</sup>

Supreme Court Rule 304(a) allows appeals from final judgments as to one or more but fewer than all parties or claims and is proper only if the trial court “makes an express written finding that there is no just reason for delaying either enforcement or appeal or both.” <sup>13</sup> Subsection (b) of the rule governs specific appeals from final judgments as to one or more but fewer than all parties or claims and does not require a special finding. <sup>14</sup>

The foregoing rules set the initial framework for obtaining appellate jurisdiction in any civil proceeding. These rules are the source of the evolving body of law that

addresses appellate jurisdiction under the Illinois Marriage and Dissolution of Marriages Act (IMDMA).

### **III. Jurisdiction in Dissolution of Marriage Proceedings**

In dissolution of marriage proceedings, the basic issues a court must resolve are all part of a single unified claim.<sup>15</sup> The issues in a dissolution case, including custody and support, “do not represent separate, unrelated claims; rather, they are separate issues relating to the same claim.”<sup>16</sup> As a result, orders resolving individual issues in dissolution proceedings are not appealable -- even with a finding under Supreme Court Rule 304(a) -- until the trial court resolves the entire dissolution claim.<sup>17</sup> Thus, an appeal from a judgment for dissolution of marriage is not ripe when other related issues remain unresolved or have been reserved. Simply put, all issues must be resolved before a judgment becomes final and appealable.<sup>18</sup>

Determining when an appeal is ripe is the primary concern in securing appellate jurisdiction over dissolution of marriage proceedings. The difficulty in determining ripeness lies in determining which issues are related and which are incidental/unrelated to the single unified claim presented by a petition for dissolution of marriage proceeding. For example, courts have held that a judgment for dissolution of marriage is not final and appealable if it reserves jurisdiction for the purposes of: 1) entering a joint parenting agreement<sup>19</sup>; 2) resolving property distribution, classification of nonmarital/marital property, maintenance, child support, and attorney fees<sup>20</sup>; or 3) resolving visitation, post-high-school education expenses, and maintenance.<sup>21</sup> In instances of joint custody it is

important to recognize that the entry of a joint parenting agreement is not merely incidental to the final judgment, but rather is a requirement for a final judgment.<sup>22</sup>

While the law of appellate jurisdiction at first blush appears to be clear, its application in reality is much more muddled. Most problems in this area result from the reservation of jurisdiction over parts of a judgment for dissolution of marriage. For example, trial courts often decide an issue but “reserve” future review of the issue.<sup>23</sup> In contrast, the IMDMA uses the word “reserves” specifically for instances where the court is bifurcating the judgment.<sup>24</sup>

The distinction as to the meaning of reserves has significant implications. An order bifurcating a judgment for dissolution of marriage is appealable only with a Supreme Court Rule 304(a) finding; however, the appeal is limited to the propriety of the bifurcation.<sup>25</sup> Conversely, if a court reserves issues in the judgment, the appeal may not be ripe due to the lingering reservation of issues.<sup>26</sup> Nonetheless, where it is unmistakable a trial court is using the word “reserves” in a sense that does not defeat the finality of the judgment, the appellate court will not frustrate that intent by adhering to the strict meaning of the word “reserves” as referenced in the IMDMA.<sup>27</sup> Simply put confusion abounds in preserving jurisdiction in a dissolution of marriage proceeding. As a result, an analysis of specific issues addressed by Illinois courts over the years is instructive and provides a helpful guide for avoiding a potential landmine.

#### **IV. Specific Issues of Appellate Jurisdiction in Dissolution of Marriage Proceedings**

Based on reported appellate court decisions the following appellate jurisdiction issues have been addressed in the dissolution of marriage context in recent years: post-

decree proceedings, interlocutory custody orders, interim attorney fees, final attorney fees, attorney fees and time for filing appeal, contempt findings, denial of contempt petitions, declaratory judgments for premarital agreements, and injunctions. The following is an overview of the disposition of those specific individual jurisdictional issues.

**How is Appellate Jurisdiction Treated for Post-Decree Proceedings Under the IMDMA?** The short answer depends on which district one appeals to. There is a disagreement among the districts on the issue of when jurisdiction is proper in post-decree cases. The Second and Fourth District Appellate Courts have held that if an order finally resolves a separate claim (or postdissolution motion) but leaves pending other claims, the trial court must make a Rule 304(a) finding before the order is immediately appealable.<sup>28</sup> Otherwise, the appeal is not proper until all claims have been finally resolved.<sup>29</sup> This rule applies regardless of whether the issues are raised, in a single petition or separate petitions.<sup>30</sup> However, in the First District, each claim (or postdissolution motion) is independently appealable upon final disposition of the individual claim without the necessity of a Rule 304(a) finding.<sup>31</sup>

**How are Interlocutory Custody Orders Appealed?** Illinois Supreme Court Rules 306 and 306A apply to the appeals of custody orders.<sup>32</sup> Rule 306 is the vehicle used to seek review of interlocutory custody orders and it outlines the procedure to be followed in petitioning the court for leave to appeal.<sup>33</sup> While ordinarily interlocutory orders are not appealable, leave to appeal may be allowed under this rule. Rule 306A

addresses the procedures to be followed by the trial and appellate courts to ensure the expedient review of child custody cases.<sup>34</sup> In order to comply with Rules 306 and 306A, a party must file a petition for leave to appeal in the appellate court, as well as, a notice of interlocutory appeal in the trial court within five business days after the entry of the order.<sup>35</sup>

Typically solely filing a notice of appeal and failing to file a petition for leave to appeal will not properly invoke appellate jurisdiction.<sup>36</sup> That being said, the Illinois Supreme Court has indicated that even if an appellate court finds its jurisdiction has not been properly invoked it should consider the propriety of a custody order under Rule 306 in order to resolve the custody question as quickly and economically as possible.<sup>37</sup> As a result, certain appeals have been recharacterized as petitions for leave to appeal pursuant to Rule 306 where the parties seeking review have relied on erroneous law in failing to properly invoke Rule 306.<sup>38</sup>

Despite the foregoing, a custody order does not constitute a final judgment as to a separate claim in a dissolution proceeding.<sup>39</sup> Rule 306A does not bestow jurisdiction on the appellate court absent a final order.<sup>40</sup> Additionally, Rule 306A(a)(1) which provides for the appealability of “initial final custody orders” does not overrule or change prior case law which held a custody order does not constitute a final judgment as to a separate claim in a dissolution proceeding.<sup>41</sup> A strict compliance with both Rules 306 and 306A should avoid a dismissal on appellate jurisdictional grounds.

**Are Interim, Disgorgement, Contribution, and/or Final Setting Attorney Fees Orders Final and Appealable?** Neither an interim attorney fee award nor a

disgorgement order entered requiring the disgorgement of monies allocated for interim attorney fees are final and appealable orders.<sup>42</sup> However, an order for contribution to attorney fees pursuant to 750 ILCS 5/503(j) or a final order of attorney fees pursuant to 750 ILCS 5/508(c) are both considered final judgments on attorney fees for the purposes of appeal.<sup>43</sup> “The reason orders awarding contribution or a final setting of fees are appealable, while interim orders are not, is clear: the trial court can effectively undo any interim attorney fee award and related disgorgement by restoring fees to the attorney who previously relinquished his fees to opposing counsel.”<sup>44</sup> With regard to disgorgement orders, the only consequence in the case of a 750 ILCS 5/508(c) petition, is that the former client, not the opposing party, pays to replace any disgorged fees.<sup>45</sup>

**Does filing an Attorney Fee Petition Extend the Time for Appealability of a Judgment?** A post-decree petition for attorney’s fees sought from an adverse party ordinarily extends the time to appeal dispositions of post-decree claims (from which the request for attorney’s fees is derived) unless a Supreme Court Rule 304(a) finding is made.<sup>46</sup> However, a petition for attorney’s fees filed by one’s own attorney pursuant to 750 ILCS 5/508(c) does not extend the time to appeal a post-decree claim as it is considered a separate, distinct cause of action.<sup>47</sup>

**Is a Finding of Contempt Immediately Appealable?** A contempt proceeding is an original special proceeding, collateral to and independent of the case in which the contempt arises.<sup>48</sup> Illinois Supreme Court Rule 304(b)(5) allows the appeal of orders finding a person or entity in contempt of court which imposes a monetary or other

penalty.<sup>49</sup> While it may seem obvious, the case law has shown it is important to note the imposition of a monetary fine or some form of penalty/punishment is prerequisite for a finding of contempt to be immediately appealable.<sup>50</sup> Under Rule 304(b)(5) a party held in contempt may appeal the ruling even in the absence of language of making an express finding of no just reason to delay enforcement or appeal.<sup>51</sup> However, in an appeal taken pursuant to Rule 304(b)(5) the only order that is subject to appellate review is the order finding a party in contempt.<sup>52</sup> An appeal of a contempt finding cannot be used to challenge all other orders in the underlying case from which the contempt arises.<sup>53</sup> That being said, the review of a contempt finding necessarily requires review of the order upon which it is based.<sup>54</sup>

**Is the Denial of a Contempt Petition Immediately Appealable?** While the finding of contempt is immediately appealable, a party cannot appeal the denial of a contempt petition prior to entry of a final judgment on all claims without a Rule 304(a) finding.<sup>55</sup> The denial of a petition for an order to show cause filed during postdissolution proceedings is not a final and appealable order when other postdissolution proceedings are still pending, thus, such an order is not immediately appealable unless a Rule 304(a) finding is made.<sup>56</sup> The fact that a contempt proceeding is an original special proceeding that is collateral to and independent of the case from which the contempt arises, merely establishes that the denial of the petition amounts to a final judgment as to a claim within the meaning of Rule 304(a).<sup>57</sup>

**Is an Order Denying/Granting a Petition for a Declaratory Judgment Regarding the Validity and Construction of a Premarital Agreement Appealable Prior to Entry of a Judgment for Dissolution of Marriage?** A declaratory judgment request raises a claim separate and distinct claim from a dissolution of marriage claim, which by its nature seeks non-declaratory relief.<sup>58</sup> As a result a declaratory judgment order related to the validity and construction of a pre-marital agreement is appealable prior to entry of a judgment for dissolution of marriage with an Illinois Supreme Court Rule 304(a) finding.<sup>59</sup> This rule is premised on the principle that the request for a dissolution of marriage and the request for a declaratory judgment on the validity and interpretation of a premarital agreement are not so closely related that they must be deemed part of a single unified claim for relief (a petition for dissolution of marriage).<sup>60</sup>

**Is the Disposition of a Petition for an Injunction in a Dissolution Action Immediately Appealable?** Interlocutory orders “granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction” are appealable pursuant to Illinois Supreme Court Rule 307(a)(1).<sup>61</sup> For the purposes of appellate jurisdiction under Rule 307(a)(1) a petition for an injunction is considered disallowed or refused if the petition is denied or dismissed.<sup>62</sup>

## **V. Conclusion**

Although it has been in excess of 20 years since *Leopando* was decided, the area of appellate jurisdiction in IMDMA cases has been an ever changing body of law. Based on Supreme Court rule changes and case law, there are some practical points that a family

law practitioner should consider to avoid the potential landmine of failing to preserve appellate jurisdiction:

- 1) Strictly comply with the terms of the Illinois Supreme Court Rules. While this may seem obvious it is apparent by the case law that in practice this fundamental point is often overlooked.
- 2) When in doubt *file* a notice of appeal. It is better to be cautious, even if that means two notices of appeal are filed for the same action, claim, or issue. If the notice is filed while other proceedings are pending in the trial court that relate to the same facts, consider filing a motion in the appellate court to stay the appeal pending procurement of a final and appealable order. In this practitioner's experience these motions have been granted and will toll the briefing schedule and other deadlines set out by the Illinois Supreme Court Rules and the appellate court. However, beware that there is a question whether or not the appellate court has jurisdiction to enter a stay order if the notice of appeal is not timely or effective.
- 3) Remember: dissolution of marriage proceedings are all part of a unified claim and a custody order does not constitute a final judgment as to a separate claim in a dissolution proceeding. If every issue has not been resolved in the underlying dissolution of marriage proceeding the appeal will not be ripe. However that being said refer to point 2 above. Better safe than sorry!
- 4) Beware of reserved issues in the judgment for dissolution of marriage and its affect on appealability. The reservation of issues in a judgment for dissolution of marriage is common and may significantly affect appellate jurisdiction.
- 5) Finally, be conscious of which district a case would be appealed to in post-decree proceedings. The district you are in will dictate when you should file your notice of appeal and whether a Rule 304(a) finding is a prerequisite.

In recent years courts have created a body of law refining the mystifying area of appellate jurisdiction in dissolution of marriage proceedings. Generally speaking, the ultimate rulings have been consistent with a plain reading of the Illinois Supreme Court Rules and the dictates of *Leopando*.<sup>63</sup> Modifications to the Illinois Supreme Court

Rules have assisted practitioners by allowing certain leeway in accessing the appellate courts, however, the issues confronting practitioners in this thorny area are far from resolved. While this area of law is continually changing, the tried and true practice of strictly applying the rules of the Illinois Supreme Court is often the best approach to preserving appellate jurisdiction in cases arising under the IMDMA.

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*Gregory C. Maksimuk is an attorney for the Peskind Law Firm. He attended Bradley University in Peoria, Illinois, where he received a Bachelor of Science in business management and administration with a focus on legal studies in business and a minor in economics. He obtained his Juris Doctor from The John Marshall Law School in Chicago, Illinois. His practice, as well as that of the Peskind Law Firm, concentrates on complex family law issues involving division of property, valuation and division of closely held companies, custody, parentage, appeals, and related issues. He is also the co-chair of the New Lawyers Committee of the Kane County Bar Association and is the recipient of the Kane County Bar Association Outstanding New Lawyer Award for 2008.*

### **ENDNOTES**

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<sup>1</sup> *In re Marriage of Mardjetko*, 369 Ill.App.3d 934, 935, 861 N.E.2d 354, 355 (2d Dist. 2007) citing *In re Marriage of Link*, 362 Ill.App.3d 191, 192 (2d Dist. 2005).

<sup>2</sup> *In re Marriage of Duggan*, 376 Ill.App.3d 725, 732, 877 N.E. 2d 1140, 1146 (2d Dist. 2007).

<sup>3</sup> *In re Marriage of Leopando*, 96 Ill.2d 114 (1983).

<sup>4</sup> See *In re Marriage of Ehgartner-Shachter and Shachter*, 366 Ill.App.3d 278, 289, 851 N.E.2d 237, 247 (1st Dist. 2006).

<sup>5</sup> *In re Marriage of Sharp*, 369 Ill.App.3d 271, 276-77, 860 N.E.2d 539, 545 (2d Dist. 2006) citing in part *Estate of Roth v. Illinois Farmers Insurance Co.*, 202 Ill.2d 490, 494-95, (2002).

<sup>6</sup> ILCS S. Ct. Rule 301 (1994).

<sup>7</sup> See ILCS S. Ct. Rule 303 (2007) and ILCS S. Ct. Rule 304 (2006).

<sup>8</sup> ILCS S. Ct. Rule 303(a).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* See the revisions to subsections (a)(1) and (a)(2) both of which became effective May 1, 2007.

<sup>13</sup> ILCS S. Ct. Rule 304(a).

<sup>14</sup> ILCS S. Ct. Rule 304(b).

<sup>15</sup> *Mardjetko*, 369 Ill.App.3d at 935-36 citing *Leopando*, 96 Ill.2d at 118-20.

<sup>16</sup> *In re Marriage of Capitani*, 368 Ill.App.3d 486, 488, 858 N.E.2d 547, 549 (2d Dist. 2006), appeal denied 223 Ill.2d 631 (2007), citing *Leopando*, 96 Ill.2d at 119.

<sup>17</sup> *Mardjetko*, 369 Ill.App.3d at 936 citing *Leopando*, 96 Ill.2d at 119. See *Link*, 362 Ill.App.3d at 192.

<sup>18</sup> *Capitani*, 368 Ill.App.3d at 488 citing *In re Marriage of Watling*, 183 Ill.App.3d 18, 21-22 (2d Dist. 1989).

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- <sup>19</sup> *Id* at 487.
- <sup>20</sup> *In re Marriage of Sproat*, 357 Ill.App.3d 880, 881, 830 N.E.2d 843, 843-44 (2d Dist. 2005), appeal denied 216 Ill.2d 735 (2005).
- <sup>21</sup> *Mardjetko*, 369 Ill.App.3d at 935-36.
- <sup>22</sup> *Capitani*, 368 Ill.App.3d at 487.
- <sup>23</sup> *Mardjetko*, 369 Ill.App.3d at 937.
- <sup>24</sup> *Id.*
- <sup>25</sup> *Id* at 936 relying on *In re Marriage of Bogan*, 116 Ill.2d 72, 75-76 (1986).
- <sup>26</sup> *Id* at 935-36.
- <sup>27</sup> *Id* at 937.
- <sup>28</sup> *In re Marriage of Gaudio*, 368 Ill.App.3d 153, 157-58, 857 N.E.2d 332, 335-36 (4th Dist. 2006) and *In re Marriage of Alyassir*, 335 Ill.App.3d 998, 1000-01, 782 N.E.2d 978, 979-80 (2d Dist. 2003); See also *In re Marriage of Duggan*, 376 Ill.App.3d 725, 877 N.E. 2d 1140 (2d Dist. 2007).
- <sup>29</sup> *Id.*
- <sup>30</sup> *Id.*
- <sup>31</sup> *In re Marriage of Carr*, 323 Ill.App.3d 481, 485, 752 N.E.2d 1181, 1184-85 (1st Dist. 2001).
- <sup>32</sup> ILCS S. Ct. Rule 306 (2003) and ILCS S. Ct. Rule 306A (2005).
- <sup>33</sup> *In re Marriage of Kostusik*, 361 Ill.App.3d 103, 109, 836 N.E.2d 147, 153 (1st Dist. 2005).
- <sup>34</sup> *Id* citing *Sproat*, 357 Ill.App.3d at 883.
- <sup>35</sup> *Id* at 111.
- <sup>36</sup> *Id* at 112.
- <sup>37</sup> *Id* citing *In re Custody of Purdy*, 112 Ill.2d 1 (1986).
- <sup>38</sup> *Id.*
- <sup>39</sup> *Sproat*, 357 Ill.App.3d at 882 citing *Leopando*, 96 Ill.2d at 118.
- <sup>40</sup> *Id* at 881.
- <sup>41</sup> *Id* at 883 relying on *Leopando*, 96 Ill.2d at 118.
- <sup>42</sup> *In re Marriage of Johnson*, 351 Ill.App.3d 88, 96, 98, 812 N.E.2d 661, 667, 669 (1st Dist. 2004) citing in part *In re Marriage of Oleksy*, 337 Ill.App.3d 946, 950 (1st Dist. 2003).
- <sup>43</sup> *Id* at 97 referencing *In re Marriage of Suriano & LaFeber*, 324 Ill.App.3d 839 (1st Dist. 2001); *In re Marriage of Devick*, 335 Ill.App.3d 734 (2d Dist. 2002); and *In re Marriage of King*, 208 Ill.2d 332 (2003).
- <sup>44</sup> *Id* at 97-98.
- <sup>45</sup> *Id* at 98.
- <sup>46</sup> *Ehgartner-Shachter*, 366 Ill.App.3d at 285-86 relying on *F.H. Prince & Co. v. Towers Financial Corp.*, 266 Ill.App.3d 977, 983 (1st Dist. 1994).
- <sup>47</sup> *Id* at 286.
- <sup>48</sup> *Id* at 969 citing *Scott v. Silverstein*, 87 Ill.2d 167 (1981).
- <sup>49</sup> ILCS S. Ct. Rule 304(b)(5).
- <sup>50</sup> See *In re Marriage of Knoerr*, 377 Ill.App.3d 1042, 879 N.E.2d 1053 (2d Dist. 2007) and *In re Marriage of Schwieger*, 379 Ill.App.3d 687, 883 N.E.2d 556 (2d Dist. 2008).
- <sup>51</sup> *In re Marriage of Carrillo*, 372 Ill.App.3d 803, 813, 867 N.E.2d 70, 78 (1st Dist. 2007) citing Illinois Supreme Court Rule 304(b)(5) and referencing *Nettleton*, 348 Ill.App.3d at 968.
- <sup>52</sup> *Nettleton*, 348 Ill.App.3d at 968 citing Illinois Supreme Court Rule 304(b)(5).
- <sup>53</sup> *In re Marriage of Nettleton and Terrell*, 348 Ill.App.3d 961, 968-71, 811 N.E.2d 260,267-69 (2d Dist. 2004) referencing in part *Bearden v. Hamby*, 240 Ill.App.3d 779 (1st Dist. 1992).
- <sup>54</sup> *Id* citing *Norskog v. Pfiel*, 197 Ill.2d 60, 69 (2001).
- <sup>55</sup> *Carrillo*, 372 Ill.App.3d at 813.
- <sup>56</sup> *In re Marriage of Colangelo and Sebela*, 355 Ill.App.3d 383, 388, 822 N.E.2d 571, 575 (2d Dist. 2005). See also *Carrillo*, 372 Ill.App.3d at 812-13.
- <sup>57</sup> *Id* at 388-89.
- <sup>58</sup> *In re Marriage of Best*, 228 Ill.2d 107, 113-15, 886 N.E.2d 939, 942-43 (2008).
- <sup>59</sup> *Id.*
- <sup>60</sup> *Id* at 115.
- <sup>61</sup> ILCS S. Ct. Rule 307 (2003).

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<sup>62</sup> *In re Marriage of Hartney*, 355 Ill.App.3d 1088, 1088, 825 N.E.2d 759, 761 (2005) referencing *In re Marriage of Centioli*, 335 Ill.App.3d 650, 653 (1st Dist. 2002).

<sup>63</sup> *Leopando*, 96 Ill.2d at 114-26.