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## With big time settlements verdicts, will divorce lawyers be in middle?

October is a much anticipated month for the plaintiff's trial lawyer bar in Illinois — being typically when the Chicago Lawyer magazine releases its annual Jury Verdict Reporter settlements issue and everyone learns who took second place behind Power Rogers & Smith LLP.

The firm for the 10th consecutive year secured the top spot with more than \$246 million in settlements this year and last.

Aside from some incredibly remarkable results across the board, including (if you will indulge me) my wife, Marisa Schostok, and her colleagues at Dudley & Lake LLC recovering more than \$23.6 million for their clients, this year's survey details notable trends that caught my attention as a divorce and family law litigator.

When spouses get divorced, their assets and liabilities are valued and allocated between them. The property allocation element of a divorce case is governed by Section 503 of the Illinois Marriage and Dissolution of Marriage Act, which draws effectively two characterizations of property: marital property and nonmarital property. Put simply, marital property is presumptively all property acquired by a spouse during the marriage.

To succeed on a claim for nonmarital property, a spouse must prove that the property in question was acquired either (a) before the marriage and was, with only minor exceptions, never placed in a form of joint title or otherwise commingled with marital property, or (b) during the marriage, as a result of, for example, an inheritance, a gift, in exchange for other nonmarital property, with the income generated by nonmarital property without the contribution of personal efforts, through the use of nonmarital property as the sole collateral for a loan or property segregated by valid agreement (e.g. pre- or post-nuptial agreement).

The JVR report shows a marked increase in the number and value of personal-injury settlements with a total of 628 settlements in 2019 compared to 540 settlements in 2018.

Of the 628 settlements in 2019, 333 cases were medical-malpractice lawsuits, which resulted in 254 settlements totaling \$665,547,270. The year 2018 yielded 157 settlements totaling \$396,254,646. The value of these cases alone increased by more than 60% from 2018 to 2019, fueled in large to part by \$20 million-plus settlements by Power Rogers & Smith LLP, Philips Law Offices, Clifford



### MODERN FAMILY

BRETT M. BUCKLEY

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Law Offices, Salvi, Schostok & Pritchard P.C. and, of course, another shameless plug for my wife's shop, Dudley & Lake LLC. The net of this data is more cases and more money recovered for victims of personal-injury actions.

The takeaway for divorce litigators and judges in the field is that the number of divorce cases involving the characterization, valuation and division or allocation of personal-injury settlements logically could rise incrementally.

And, if the numbers contained in the JVR issue are an indicator, the million-dollar question is: Does recovery in a PI lawsuit qualify as marital or nonmarital property?

The list of ways to acquire nonmarital property in Section 503 makes no reference to personal-injury settlements or verdicts, but the issue is discussed in fairly recent case law.

The general rule is that if the cause of action accrued during the marriage, the settlement proceeds are marital property. See, e.g., *In re Marriage of DeRossett*, 173 Ill.2d. 416 (1996), and *In re Marriage of Drone*, 217 Ill.App.3d 758 (1991).

What happens if someone is injured prior to the marriage but files a lawsuit after the marriage? Or, what if a spouse is injured during the marriage, files a lawsuit and shortly thereafter files for divorce long before the personal-injury action is close to conclusion?

Many plaintiff's trial lawyers will, with frustration, acknowledge that a catastrophic medical-malpractice action could take between three and five years before resolution. Contrast that timetable with the life span of a divorce case, which is much shorter (we hope); for example, Lake County Circuit Court's case management

system puts even the most complex of divorce cases on a 19-month track from the date of filing to conclusion. Generally, a cause of action accrues when facts exist that allow a person to maintain an action against another. *In re Marriage of Dettore*, 86 Ill.App.3d 540 (1980).

Perhaps the most recent illustration of the complexity in the allocation lawsuit proceeds relative to the accrual of a cause of action is found

in *In re Marriage of Rivera*, 2016 IL App (1st) 160552.

In *Rivera*, the husband was convicted of murder in 1993. He married his wife while incarcerated in 2000. In 2012, the conviction was overturned and the husband was released from prison. In December 2012, he filed a wrongful-conviction lawsuit. In 2014, the husband filed for divorce. In March 2015, the wrongful-conviction lawsuit was settled for approximately

\$20 million.

The critical inquiry in *Rivera* related to the accrual of the cause of action. Did the claim arise when the husband was convicted in 1993, or when the conviction was overturned in 2012? Quite literally a multimillion-dollar question.

The circuit court found the lawsuit proceeds to be non-marital property based on the injury (the wrongful conviction) occurring prior to the

marriage. However, answering a certified question, the appellate court held that the classification of a cause of action as marital or nonmarital property depends on whether the claimant had a right to file a claim for damages during the marriage, which did not arise as a property interest for the husband until the conviction was overturned; thus, the lawsuit proceeds were deemed to be marital property.