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DOMESTIC VIOLENCE

RULE 23 ROUNDUP

Is a "True Threat" Required?

THE EVOLUTION OF A "DATING RELATIONSHIP"

Did the 1st District's decision in *McClellan v. Hull* raise the bar for relief?

DEADNAMING THE TRANSGENDERED

The Nita A. Decision

Harrassment or Free Speach?

Is Deadnaming Abuse?

Is 3.5 Years Too Long To Wait for a Plenary Hearing?

Are False Accusations Actually Punished?

What's a Dating Relationship?

And Much Much More...

Caveat Emptor:

Last November when I issued my cheat sheet covering 50/50 cases, I had no idea how popular it would be with colleagues. To be fair, these are a bit of a pain to put together, and the extra labor has shifted my channel into a (at least for now) monthly broadcast.

Now to be fair, like all things in life, you get what you pay for. And I do these, cheap as free. And although I like to believe I've taken appropriate care in drafting these newsletters, these aren't treatises. Nor is my name Gunner Gitlin. So please appreciate the limitations of this free guide.

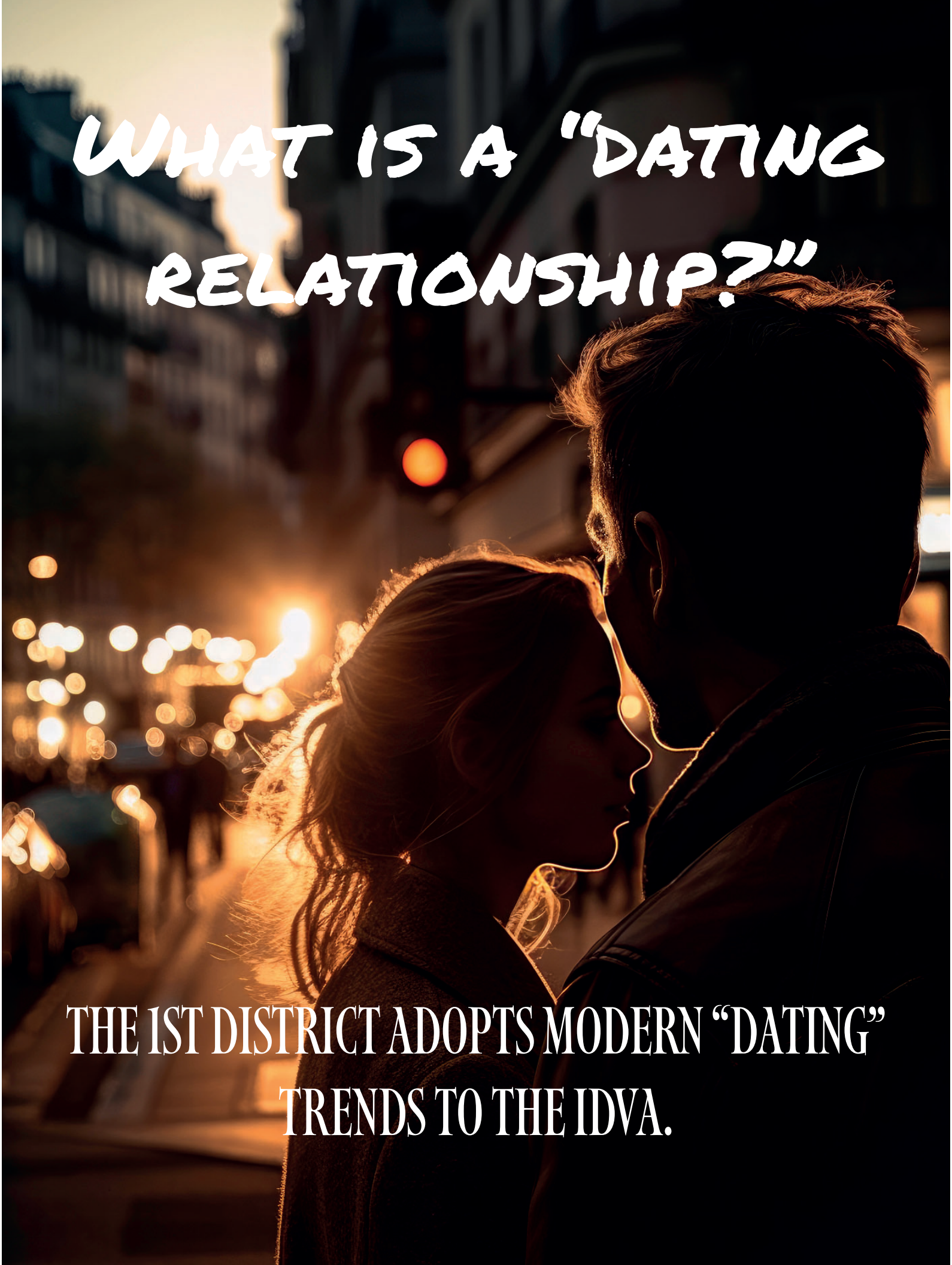
Nevertheless, I have tried to gather up every relevant or interesting published options or Rule 23 order from January 1, 2023 thru January 28, 2024 (although I left a handful out because they covered already traveled ground) and present them in an aspirationally concise and easy to follow format.

With that said, I have two requests of you dear reader. One, do not use this cheat sheet as a substitute for reading the decisions. As an appellate lawyer, I can assure you that trying to summerize a complicated dispute into a couple sentences is next to impossible. Family law is complicated - if it wasn't, we'd all be out of a job.

Instead, look at these summaries as "starting points" in your legal research. For example, you may not have much need of cases that discuss forum shopping, but perhaps you have pending matter where "judicial notice" is an issue. This guide can't give you all the nuances, but it will identify where you need to start.

Second, please, with tears in my eyes, do not treat these digital summaries as the end all be all. Telling a judge "but David said..." will play out about as well as expected at hearing.

In closing, thank you for your continued interest - and I hope you enjoy this month's installment.



What is a "dating relationship?"

THE 1ST DISTRICT ADOPTS MODERN "DATING" TRENDS TO THE IDVA.

We recognize that the definition of a dating relationship has evolved over time and continues to evolve. The trend of not defining a relationship is growing more and more common, and the term "dating" has come to be a catch-all.

I suppose we can blame Tinder (or whatever program(s) today's generation uses) for muddying the waters on what is, or isn't, a dating relationship.

This term was inserted into the statute nearly 30 years ago, and only recently has it attracted the attention of the reviewing Court. In November of 2023, the 1st District, 6th Division issued its decision in *Bujdoso v. Lenington*, 2023 IL App (1st) 221236-U. In *Lenington*, the parties briefly dated in 2016, although there is a dispute as to whether there was one date, or three. In either event, by May of 2016, they were no longer seeing each other.

Fast forward 4 years, where the Respondent made a series of video posts featuring a character very similar to the Petitioner (both parties were briefly exploring comedy careers in 2016) who was "gunned down" by the Respondent's character. Both characters in these broadcasts were portrayed by the Respondent. And the opinion infers the videos were deliberately provacative.

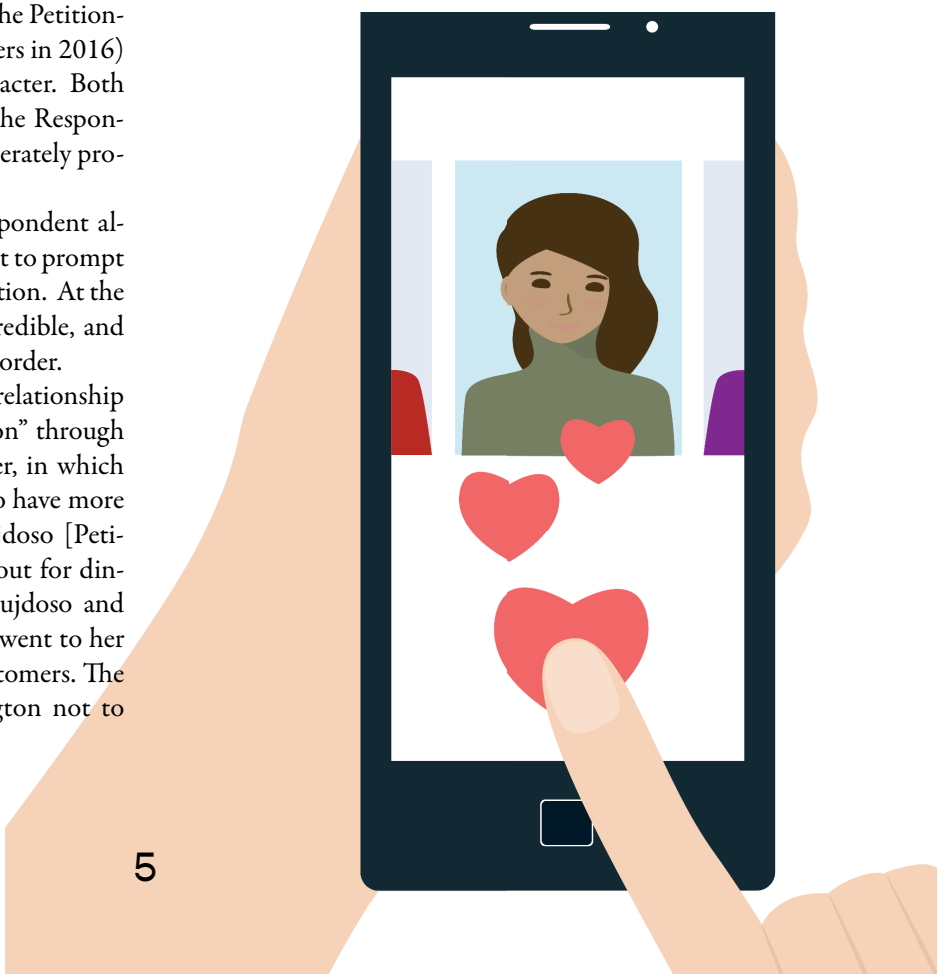
That, along with some other posts by the Respondent alluding to his mental health problems, were sufficient to prompt the Petitioner to seek an emergency order of protection. At the plenary hearing, the court found the Petitioner credible, and the Respondent, not so much - and issued a 2-year order.

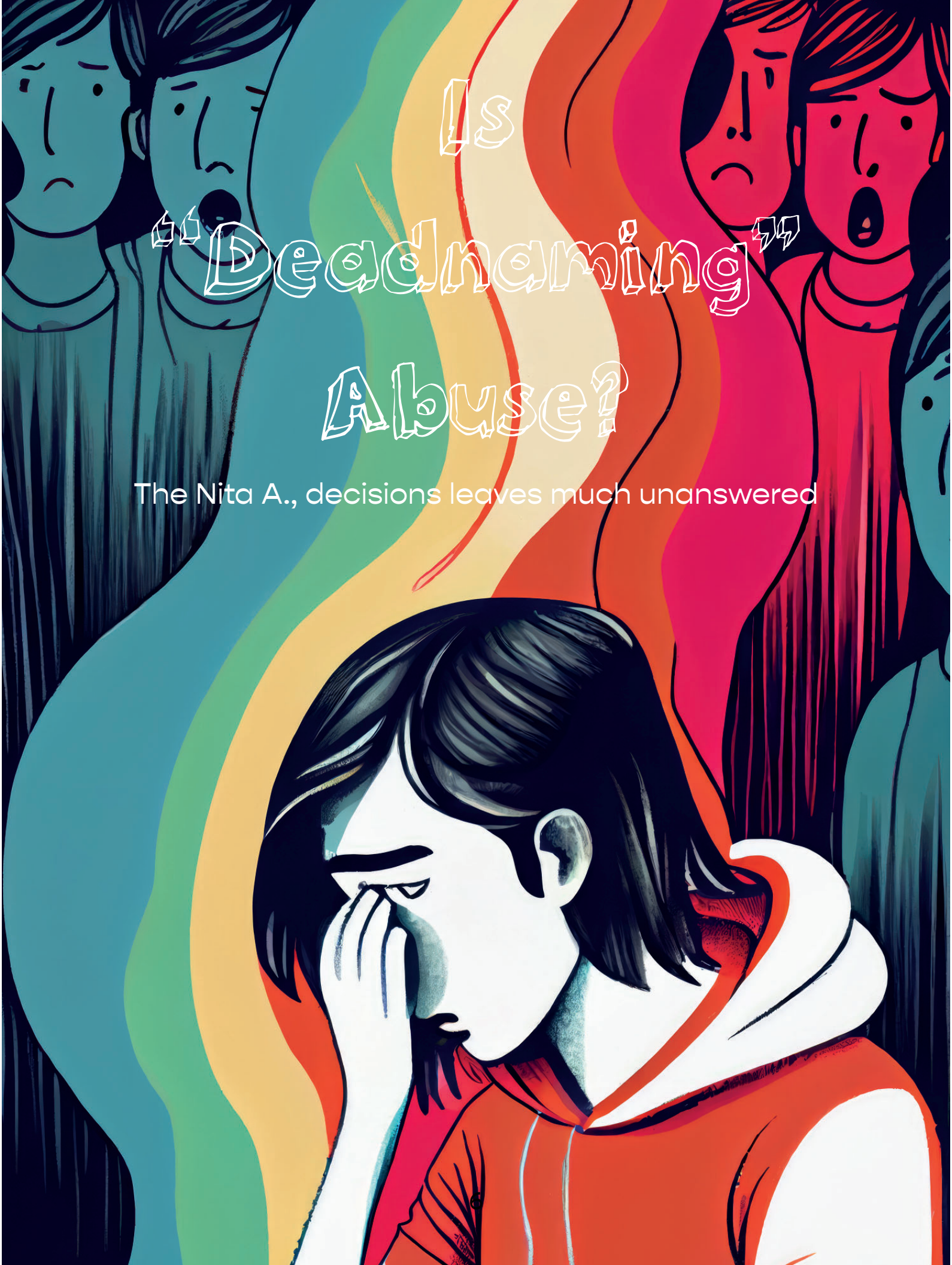
The court held that the parties had a dating relationship based on "approximately 75 days of communication" through text messages, telephone, and Facebook Messenger, in which Lenington [Respondent] "was initiating a desire to have more than a professional relationship" by asking if Bujdoso [Petitioner] was single and whether she wanted to go out for dinner, then doing so. The court also found that Bujdoso and Lenington went on two additional dates when he went to her workplace and stayed past the time for regular customers. The parties communicated until Bujdoso told Lenington not to contact her. *Lenington* at ¶ 46.

Five weeks later, the same division (and nearly the same panel) issued its opinion in *McClellan v. Hull*. In a somewhat stark contrast, the Court reversed the trial court's finding of a Dating Relatiobshup. In *Hull,* the parties met twice, and were intimate during one of the encounters (although there is a dispute whether it was consentual). The Petitioner, for his part, denied he was in a dating relationship with the Respondent in court.

The *Hull* Court makes no mention of it's recent holding in *Lenington*. Instead, the Court notes that "[y]oung people routinely do not consider going on dates with someone to equate being in a relationship with them, no matter the time frame. The determinations of whether parties are in a dating relationship for purposes of the Domestic Violence Act will continue to be decided on a case-by-case basis, as each case presents its own set of circumstances, and we will continue to interpret 'dating relationship' not to include casual or potential relationships based on the precedent in this State." *Id.* at ¶ 67

So what is a dating relationship? The most we get from *Hull* is what ISN'T. Namely friends with benefits, or casual intimiate relationships that lack mutual "romantic reciprocity." *Id.* at ¶ 65.





Is "Deadnaming" Abuse?

The Nita A., decisions leaves much unanswered

They gave Pandora a box. Prometheus begged her not to open it. She opened it. Every evil to which human flesh is heir came out of it.

-Kurt Vonnegut

The Court in *Nita A.*, takes it's definition of deadnaming from a 2021 Law Review Article written by Christiana Prater-Lee entitled *#Justice4Layleen: The Legal Implications of Polanco v. City of New York*, 47 Am. J.L. & Med. 144, 145 n.18 (2021). The article itself is scant on details of what does, or doesn't consitute a deadname - as it's main focus was on the death of an inmate at Riker's Island due to medical neglect. The law review article referenced in the *Nita A.*, decision leads to a footnote that cites to the definition given by Merriam-Webster ("[a] deadname is the name given at birth to a trans individual that they no longer use after transitioning." Deadname, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/deadname).

The decision makes clear that a calling a transgendered person by their deadname could be considered harrassment under the IDVA;

"The use of a transgender person's deadname is disrespectful. *[#Justice4Layleen: The Legal Implications of Polanco v. City of New York*, 47 Am. J.L. & Med. 144, 145 (2021)]. Harassing A.A. to not express their identity as transgender is not a reasonable or necessary purpose, and A.A.'s uncontested testimony was that Nita's behavior caused emotional distress. See 750 ILCS 60/103(1), (7) (West 2020). The evidence clearly established abuse as the Act defines it and supported the trial court's decision to issue an order of protection." Id at ¶ 49

The connundrum of Nita A., is that there are many unanswered questions. Such as, are transitory name changes eligible? For example, will it suffice that Person A wishes to be called Salley on Monday, and Mandy on Tuesday, in order to invoke the protections of the Illinois Domestic Violence Act? Or is a legal name change required before a party can invoke the grounds of harrassment?

Can a woman who resumes their maiden name upon divorce use the protections of Nita A., in instances where the ex spouse continues to refer her to he former married name? If not, how would such a policy not violate the US Constitution's equal Protection Clause?

And finally, does Nita A., violate the 1st Amendment? In 2018, California sought to criminalize deadnaming. The court's overturned it on basis it violated the first amendment. See *Taking Offense v. California*, 66 Cal. App. 5th 696 (2001):

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Generally, the free speech clause protects a wide variety of speech a listener may find offensive, including insulting speech based on race, national origin, or religious beliefs. (See, e.g., *Brandenburg v. Ohio* (1969) 395 U.S. 444, 448-449, 89 S.Ct. 1827, 23 L.Ed.2d 430 ; *Cantwell v. Connecticut* (1940) 310 U.S. 296, 308, 60 S.Ct. 900, 84 L.Ed. 1213 ; *Saxe v. State College Area Sch. Dist.* (3d Cir. 2001) 240 F.3d 200, 206.) Our Supreme Court has observed, "[s]urely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." (*Cohen v. California* (1971) 403 U.S. 15, 25, 91 S.Ct. 1780, 29 L.Ed.2d 284.) " '[I]nsults may contain a point of view that the speaker is entitled to express and his audience to hear. "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 152, (1999) (conc. opn. of Werdeger, J.) (Aguilar).) *Taking Offense v. States*, 66 Cal.App.5th 696, 707 (2021)

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These questions are not trivial; if a party violates an order of protection in Illinois, incarceration is a very real possibility. See 720 ILCS 5/12-3.4 (d). And so far, the courts have provided us limited guidance on what is, or isn't, deadnaming. Until further case law developes, or the legislature steps in, the burden of ascertaining the limits of pronoun use rest in the lap of the trial court.

Rule 23 Roundup

From "True Threat" To Punishing False Accusations, Here are 10 Decisions You May Find Useful:

True Threat Not Required. *Skinner v. Yusef*: 2023 IL App (5th) 220835-U.

The Respondent argued none of his acions, which included standing outside the Petitioner's residence at 4am, and calling her repeatedly, constituted a true threat. On appeal, the reviewing Court notes the IDVA does not require such a finding before issuing a plenary OP. *Id.* at ¶ 19 In additional, under the IDVA, calling someone repeatedly is presumed abuse. *Id.* at ¶ 23

How long is too long to hold a hearing on a plenary OP? *Hampton v. Williams*; 2023 IL App (1st) 220942-U.

The Respondent (dad) lost on every challenge - save one. The trial court continued the hearing on the plenary OP for nearly 3.5 years; some of those extensions were due to father's miscondunduct and COVID, but not all.

This delay alarmed the Appellate Court to such a degree that not only did they order the trial court to hold a hearing with all deliberate haste, they issued their mandate, immediately. *Id.* at ¶ 51 (To avoid any further delay, the mandate in this case shall issue immediately).

Do CONTESTED extensions require a material change in circumstances? *In re Marriage of Botero*, 2023 IL App (1st) 221576-U.

The Appellate Court reversed the trial court's extension of a plenary OP based (almost exclusively) on Petitioner's fear of Respondent. They note:

"In *Stapp v. Jansen*, 2013 IL App (4th) 120513, the fourth district of this court clarified that the 'no material change in relevant circumstances' language in section 220(e) applies only when the petitioner seeks an uncontested extension of an order of protection and has 'no application.'" *Id.* at ¶ 28

In English, Section 220(e) makes clear that in a case involving a contested motion to extend, the findings in the original order cannot be the basis for extending the order. See ¶ 32.

Is mental impairment or "temporary insanity" a defense to a plenary OP? *Shawnna S.W. v. Eric D.W.*, 2023 IL App (4th) 220852-U.

A one-off mental health episode caused by low potassium levels did not meet the threshold of "knowing conduct" under 750 ILCS 60/103(7) (West 2020).

Because the alleged abuse was confined to harrassment under the statute, the trial court's findings were not against the manifest weight of the evidence when it failed to issue a plenary OP. *Id.* at ¶ 56

Can a trial court rely on inconsistent statements when granting a plenary OP? *Gibson v Runkle*, 2023 IL App (5th) 230080-U.

The Petitioner gave differing, and sometimes conflicting accounts of a domestic incident involving her now ex boyfriend. For example, her testimony in her petition, interview with investigating officials, and the trial court didn't always match up. In affirming the trial court's granting of a plenary OP, the Appellate Court notes:

"Inconsistencies in statements and/or testimony taken at different times are not unusual and go to the weight to be given to the testimony by the trier of

fact, but do not destroy the credibility of the witness. *People v. Henderson*, 36 Ill. App. 3d 355, 368 (1976)."

That's not how judicial notice works. *Lasaker v. Klamczynski* 2023 IL App (2d) 220067-U

A domestic incident results in an injured foot. Each accuses the other of being the aggresser. Ultimately the trial court finds in favor of the Petitioner, and the Respondent appeals the 2-year plenary.

Notwithstanding the Rule 341 violations throughout the brief, Appellant's counsel asks the reviewing court to take "judicial notice" of a 911 call. It does not appear this call was part of the evidentiary record. Nor did they include it on the record on appeal. This latter part proves fatal:

"Illinois Rule of Evidence 201(b) provides, A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accurace cannot reasonably be questioned. Illinois Rule of Evidence 201(d) provides, a court shall take judicial notice if requested by a party and supplied with the necessary information. Even assuming, arguendo, that a 911 recording otherwise meets the criteria for judicial notice, respondent has not included the recording in the record on appeal, and we lack ready access to it. Accordingly, we deny the request to take judicial notice."

Forfeiture Kills Appeal. *In re Order of Protection of Cheryl B.* 2023 IL App (1st) 221240-U

The term forfeiture or forfeited is used by this decision 10 times. That's because the Respondent's brief at times failed to provide analysis to case law or statute. (Illinois Supreme Court "Rule 341(h)(7) requires a clear statement of contentions with supporting citation of authorities. Ill-defined and insufficiently presented issues that do not satisfy the rule are considered forfeited." Id. at ¶ 36.

Other objections to the plenary order of protection were forfeited because his attorney failed to raise them first before the trial court. (The father has forfeited review of this issue by failing to raise it with the trial court). Id. at ¶ 44. And again at ¶ 51

A good appeal can't fix a bad trial, and the cumulative impact of these trial missteps dooms his chance of a reversal.

In the last year, it appears the Appellate Courts have become less tolerant of petitioners who use the IDVA and Illinois' No Contact No Stalking Statute, for imprper purposes.

Unfounded No Contact/ No Stalking Petitions are sanctionable. *Amen v. Attiah*, 2023 IL App (2d) 220031-U

The IDVA "false statements" proviso in section 226 is a difficult feat to show at court. However, Illinois No Contact/No Stalking statute does not have this gatekeeper. Despite that, there is a dearth of decisions upholding sanctions for false allegations.

That is until the Attiah decision, where the trial court's sanction (it appears the petition was filed to stop or otherwise slow lawful social media criticism of a attorney running for public office) was upheld on appeal. The Appellate Court would go on to state:

"Rule 137 is intended to prevent the filing of false and frivolous lawsuits. The rule is designed to prohibit the abuse of the judicial process by claimants who make vexatious and harassing claims based upon unsupported allegations of fact or law but not to penalize attorneys or litigants who were zealous but unsuccessful." I*d.* at ¶ 47

Improper use of the IDVA to cut to the front of the line. *Sherwin v. Roberts*, 2023 IL App (4th) 220904-U

In Sherwin, dad's case against mom was very weak – although he itemized numerous issues in his petition seeking a protection order, he didn't testify to it at hearing. "Although [the petitioner] certified that everything in his petition was 'true and correct' under penalty of perjury, verified allegations do not constitute evidence except by way of admission (See 735 ILCS 5/2-605)" ¶ 69.

The Court went on to state that "Sherwin failed to present any evidence that would justify the issuance of an order of protection. Instead, he improperly utilized the Act to litigate custody issues. Accordingly, we remind the trial court and the parties that '[o]btaining an order of protection is not the proper procedure for resolving child custody or visitation issues.' *Radke v. Radke*, 349 Ill.App.3d 264, 269 (2004). Those issues should be resolved under the Illinois Marriage and Dissolution of Marriage Act)." ¶ 73.

Forum Shopping Should Not Be Encouraged. Watkins v Watkins, 2023 IL App (4th) 230311-U

Mom was denied an EOP in Morgan County (where the dissolution was also pending), then ran to Scott County. She filed an identical pleading, but this time was successful. Despite presenting the Scott County judge court papers showing identical proceedings were occurring in Morgan County, the trial court denied a motion to dismiss under 619(a)(3).

The Appellate Court reversed, and again issued another warning, stating: "[I]n this case, the court issued an order of protection with a duration of two months and eight days after [Petitioner] requested 'a brief order to hold things together until we can get in front of [the family court].' In *Sherwin*, we reminded the court and the parties" '[o]btaining an order of protection is not the proper procedure for resolving child custody or visitation issues.. *** We reiterate this reminder here." ¶ 35

More on 619(a)(3) Motions & Forum Shopping

Under section 2-619(a)(3), an action may be dismissed when "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3). The purpose of section 2-619(a)(3) is to prevent duplicative litigation. *Kellerman v MCI Telecommunications Corp.*, 112 Ill.2d 428, 447 (1986). When a party files a motion under section 2-619(a)(3), the trial court has discretion to determine whether dismissal is warranted. *In re Marriage of Murugesh,* 2013 IL App (3d) 110228, ¶ 20, (citing *Kellerman*, 112 Ill.2d at 447). Section 2-619(a)(3) does not require automatic dismissal even when the "same cause" and "same parties" requirements are met. *Murugesh*, 2013 IL App (3d) 110228, ¶ 20. In deciding whether to grant a motion to dismiss under section 2-619(a)(3), the court should consider several factors, including "comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the res judicata effect of a foreign judgment in the local forum." *Kellerman,* 112 Ill.2d at 447-48.