TABLE OF CONTENTS

ILLINOIS LEGISLATION

NON-LEGISLATIVE MATTERS

ILLINOIS CASE LAW

WILLS

ATTORNEYS

ILLINOIS PROPOSED BILLS

ILLINOIS LEGISLATION

1. Public Act 100-0085: Posthumous Children

Public Act 100-0085 was enacted to clarify the treatment of posthumously conceived children for inheritance purposes. Black's law dictionary defines "posthumous child" as a "child born after the *father's* death." The definition did not contemplate the possibility of birth after the *mother's* death, probably due to posthumous conception using genetic materials after a parent's death being a relatively new phenomenon. Historically the term "posthumous child" has referred to a child conceived during the life of both parents and then born after the father's death. Certainly, however, a child both conceived and born after the father's death would fit into the definition of posthumous child.

Prior to amendment effective January 1, 2016, 755 ILCS 5/2-3 provided as follows:

> § 2-3. Posthumous child. A posthumous child of a decedent shall receive the same share of an estate as if the child had been born in the Decedent's lifetime.

Did this provision apply to posthumously conceived children? The Illinois Parentage Act of 2015, effective January 1, 2016, provided: "The rights of a posthumous child to an inheritance or to property under an instrument shall be governed by the provisions of the Probate Act of 1975." The Illinois Parentage Act of 2015 also revised 755 ILCS 5/2-3 to read as follows:

> § 2-3. Posthumous child. A posthumous child of a decedent shall receive the same share of an estate as if the child had been born in the Decedent's lifetime; provided that such posthumous child shall have been in utero at the decedent's death.

Public Act 100-0085 amends 755 ILCS 5/2-3 to provide that *for purposes of intestate succession*, a "posthumous child not in utero at the decedent's death" will receive an intestate share if the following conditions are satisfied:

> (1) The child is born of the decedent's gametes, whether those gametes form an embryo before or after the decedent's death ("gametes").
>
> (2) The child is born within 36 months of the death of the decedent.
>
> (3) The decedent had provided consent in writing to be a parent of any child born of such gametes posthumously and had not revoked the consent prior to death.
>
> (4) The administrator of the estate receives a signed and acknowledged written notice with a copy of the written consent attached within 6 months of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever event occurs first, from a person to whom such consent applies that:
>
>> (i) the decedent's gametes exist;
>>
>> (ii) the person has the intent to use the gametes in a manner that could result in a child being born within 36 months of the death of the decedent; and

(iii) the person has the intent to raise any such child as his or her child.

These requirements "impose no duty on the administrator of an estate to provide notice of death to any person and apply without regard to when any person receives notice of the decedent's death."

With respect to determining the property rights of any person under any instrument, the presumption is that a posthumous child "not in utero at the decedent's death" is not treated as a child of the decedent, unless:

(1) the intent to include the child is demonstrated by the express terms of the instrument by clear and convincing evidence; or

(2) the fiduciary or other holder of the property treated the child as a child of the decedent for purposes of a division or distribution of property made prior to January 1, 2018 under the instrument based on a good faith interpretation of Illinois law regarding the right of the child to take property under the instrument.

Public Act 100-0085 became effective January 1, 2018, for intestate estates of decedents who die after January 1, 2018, and with respect all instruments executed before, on, or after January 1, 2018.

2. Public Act 100-0519: Amendment to Principal and Income Act

Public Act 100-0519 amends sections 10 and 15 of the Principal and Income Act (760 ILCS 15/10 and 15/15), to provide that "…with respect only to nontrust estates described in Section 15 of this Act, for oil or gas from non-coal formations, proceeds from the sale of such minerals produced and received as royalty, overriding royalty, limited royalty, working interest, net profit interest, time-limited interest or term interest, or lease bonus shall be deemed income."

3. Public Act 100-0478: Amendment Regarding Awards for Adult Dependent Children

Public Act 100-0478 amends Sections 15-1 and 15-2 of the Probate Act (755 ILCS 5/15-1 and 5/15-2) regarding awards for adult dependent children. The amendment removes the generic phrase "adult dependent children" from 15-1(a) and 15-2(a) and (b), and adds new Sections 15-1(a-5) and 15-2(b-5). These sections provide that an award is allowable "for each child of the decedent who is likely to become a public charge and was financially dependent on the decedent." The minimum amount of an award for such a child is $5,000, which is a decrease from the prior minimum amount of $10,000 (which remains the minimum amount for each minor child).

4. Public Act 100-0483: Guardianship Training Program

Public Act 100-0483 requires the State Guardian to provide a training program that outlines the duties and responsibilities of guardians appointed under Article XIa of the Probate Act (related to disable adults; not Article XI related to minors). The training program shall be offered to courts at no cost, and shall outline the responsibilities of a guardian and the rights of a person with a disability in a guardianship proceeding under Article XIa of the Probate Act of 1975.

The order of appointment of a guardian of the person in any county with a population of less than 3 million shall include the requirement that the guardian of the person complete the training program as provided in Section 33.5 of the Guardianship and Advocacy Act that outlines the responsibilities of the guardian of the person and the rights of the person under guardianship and file with the court a certificate of completion one year from the date of issuance of the letters of guardianship, except that: (1) the chief judge of any circuit may order implementation of another training program by a suitable provider containing substantially similar content; (2) employees of the Office of the State Guardian, public guardians, attorneys currently authorized to practice law, corporate fiduciaries, and persons certified by the Center for Guardianship Certification are exempt from this training requirement; and (3) the court may, for good cause shown, exempt from this requirement an individual not otherwise listed in item (2).

In other counties, the court may, upon conclusion of the hearing pursuant to 755 ILCS 5/11a-21, require the guardian to complete the training program.

NON-LEGISLATIVE MATTERS

1. Circuit Court of Cook County General Order 1.2,2.1 – County Department

Revised to Include Certain Criminal Offenses to be Heard by Probate Division

General Order No. 1.2,2.1 – County Department, issued by the Circuit Court of Cook County, has been amended as of January 11, 2018, to provide that the Probate Division "hears actions and proceedings" concerning certain criminal offenses in which the victim is an elderly person. Paragraph (e)(10) of General Order 1.2,2.1 now provides:

> The Probate Division hears actions and proceedings concerning the following
>
> *   *   *
>
> 10. in matters involving elderly persons, as defined by the rules of this court and relevant statutes:
>
> *   *   *
>
> c. the following criminal offenses which the victim is an elderly person:
>
> i. any felony in which the victim is an elderly person
>
> ii. criminal abuse or neglect of a person with a disability
>
> iii. theft
>
> iv. aggravated identity theft
>
> v. forgery
>
> vi. burglary
>
> vii. residential burglary
>
> viii. aggravated home repair fraud
>
> ix. possession of lost/mislaid credit/debit card
>
> x. possession of another's credit/debit card
>
> xi. criminal housing management
>
> xii. aggravated criminal housing management
>
> xiii. violation of an order of protection
>
> xiv. criminal trespass to a residence
>
> xv. criminal damage to property
>
> xvi. possession of a stolen motor vehicle
>
> xvii. aggravated possession of a stolen motor vehicle

<u>ILLINOIS CASE LAW</u>

WILLS

1. <u>In re Estate of Scherr</u>, 2017 IL App (2d) 160889 (June 28, 2017)

Renunciation of will remains effective after death of surviving spouse.

In *Scherr*, the circuit court sustained an objection to the renunciation of the will of Marjorie Friedman Scherr by her spouse, George Scherr. Marjorie died on September 5, 2015. George filed a petition for probate and letters of office on January 5, 2016. The will had been drafted during Marjorie's first marriage, and Marjorie's children were the surviving legatees under the will. On April 1, 2016, George filed a renunciation of the will. George then died on May 23, 2016.

Marjorie's children filed an objection to the renunciation, arguing the following: "(1) respondents were not given notice of the filing of the renunciation, and it was only after George died that their attorney was provided with a copy of the renunciation; (2) the legislative purpose behind allowing a renunciation is to provide for a surviving spouse during that person's lifetime; and (3) this court recently stated that a renunciation abates upon the death of a surviving spouse, even if it was filed before that spouse's death (see *In re Estate of Mondfrans*, 2014 IL App (2d) 130205, ¶ 3)."

The trial court rejected petitioner's (the trustee of George's trust) position that filing is sufficient to complete the renunciation. The trial court "explained that it hears 'objections to renunciations all the time,' based on issues like premarital agreements or divorce decrees [and] then reasoned, 'So renunciation still has to be approved by the court.'" The renunciation had not come before the court was "was not approved yet," according to the trial court.

On appeal, petitioner relied on the plain language of section 5/2-8 of the Probate Act, which reads in pertinent part as follows:

> *In order to renounce a will, the testator's surviving spouse must file in the court in which the will was admitted to probate a written instrument signed by the surviving spouse and declaring the renunciation.* The time of filing the instrument is: (1) within 7 months after the admission of the will to probate or (2) within such further time as may be allowed by the court if, within 7 months after the admission of the will to probate or before the expiration of any extended period, the surviving spouse files a petition therefor setting forth that litigation is pending that affects the share of the surviving spouse in the estate. *The filing* of the instrument is a complete bar to any claim of the surviving spouse under the will.
>
> 755 ILCS 5/2-8(b) (emphases added by appellate court)

The statute plainly states that the *filing* of the renunciation is the operative act in effectuating the renunciation. "Nowhere does it state that anything else, such as judicial approval, is required." Further, "[t]he meaning of 'file' is not obscure." The court held that section 5/2-8 is not ambiguous, that the renunciation was complete when it was filed, and that George's subsequent death was immaterial. The renunciation could still be challenged and undone, but pursuant to the statute, if it were to stand, it would be effective as of the date it was filed.

2. <u>Morrow v. Pappas</u>, 2017 IL App (3d) 160393 (October 30, 2017)

Third District Appellate Court holds that plaintiffs alleging tortious interference with an expectancy could not establish an expectancy when they were not aware of prior will's gifts to them.

Morrow v. Pappas is a Third District Appellate Court opinion regarding an action for tortious interference with an expectancy, and whether the testamentary exception to the attorney-client privilege applies to such an action.

Decedent Dorelle Denman executed a will on March 27, 2012 naming the five plaintiffs and one of the defendants as beneficiaries. Dorelle's attorney who drafted the will was named as executor and was also named as Dorelle's property power of attorney. On May 12, 2012, Dorelle fell and broke her hip and was admitted to the hospital. Her health worsened, and she was transferred to a skilled nursing facility. Dorelle returned home after about a month but returned to the hospital on June 12, 2012, and was transferred between hospitals and rehabilitation facilities until the middle of August, at which time she met with her attorney and Steward, a trust officer at the First National Bank of Ottawa, to talk about her business affairs generally. Steward managed all of Dorelle's business affairs.

Dorelle executed a second will on September 13, 2012, removing the five plaintiffs as beneficiaries, adding Pappas as a beneficiary, and leaving defendant Burrows as a beneficiary. The second will also appointed the First National Bank of Ottawa as executor. Dorelle owned and operated a hotel, including a restaurant, and two bed and breakfast establishments. Pappas was an employee of Dorelle and managed the restaurant in the hotel. Deposition testimony indicated that Dorelle contacted Steward about changes she wanted to make to her will, and that Dorelle attended a meeting with her attorneys to discuss the changes she wanted to make. Further testimony from the attorney was, according to the court, as follows:

> They discussed her properties, her debts, and the extent that her property should be divided among Pappas and Burrows. Denman did not indicate to the Cantlins or to Steward that she was being pressured to change her will, and she did not indicate that she was influenced by anyone to make changes to her will. Cantlin testified that during this meeting she appeared lucid, competent, and rational and knew exactly what she wanted to do regarding her estate plan. After discussing these changes, Cantlin advised Denman that they would redraft the will and bring it back for execution on the next day.

In addition, the court cited testimony of a physician who had met with Dorelle on the day the will was executed to discuss the execution of a do not resuscitate order (DNR), who testified that Dorelle was "alert, competent, aware of her physical health, and was able to understand and articulate her wishes about her end of life care. Dorelle executed the DNR on the same date as the second will. Further testimony from the witnesses to the will appeared to support Dorelle's capacity. Dorelle died on September 25, 2012, and the September will was filed the next day.

Plaintiffs filed their complaint on September 24, 2013, alleging intentional interference with testamentary expectancy, conspiracy, fraud, malpractice, and breach of fiduciary duty. The defendants were Pappas and Burrows, beneficiaries under the September will, Steward the trust officer, First National Bank of Ottawa, and the attorney.

The trial court dismissed the counts for conspiracy, fraud, and breach of fiduciary duty against Steward and FNB, but did not dismiss the intentional interference counts or the legal malpractice count. During discovery, the plaintiffs filed a motion to compel production of Steward and FNB, arguing that they improperly claimed attorney-client privilege. The trial court denied plaintiff's motion to compel. The defendant's moved for summary judgment and the court granted summary judgment in their favor. Attached to the motions for summary judgment were affidavits from Steward, the attorney, the doctor, and the witnesses to the will.

Plaintiffs sought reversal of the summary judgment ruling because there were issues of material fact regarding the tortious interference claims. Pappas argued that "the plaintiffs [did] not have any knowledge of tortious conduct by her." Burrows argued that plaintiffs cannot prove their expectation [sic] existed under the March will because none of the plaintiffs were aware that they stood to inherit under the March will. Steward and FNB argued that plaintiffs are unable to establish an expectancy under the valid September Will that revoked the March Will.

Plaintiffs argued that the "allegation that a prior will existed is a sufficient allegation of an expectancy," quoting *In re Estate of DiMatteo*, 2013 IL App (1st) 122948, and citing the Illinois Supreme Court's decision in *DeHart v. DeHart*, 2013 IL 114137. The appellate court in this case distinguished *DiMatteo* and *DeHart* – cited regarding the existence of an expectancy – on the basis that in both of those cases a will contest had been filed in addition to a claim for tortious interference with an expectancy. "If a challenger to a will fails to initiate a direct proceeding to contest the will within the six-month statutory time period, the validity of the will is established for all purposes." (citing *Ellis v. Ellis*, 236 Ill. 2d 45, 50 (2009)). The appellate court also cited *Ellis* for the proposition that the 6-month will contest period "also operates to prohibit the filing of a tort claim like the one filed by the plaintiffs, unless the plaintiffs can demonstrate that the probate proceedings were not available to them due to the tortious conduct of the defendants and that the probate proceedings would not have provided them with complete relief." Nothing in the opinion suggested that the defendants' motions to dismiss were based on a statute of limitations, and to the extent they were, they were denied with respect to the counts remaining for summary judgment.

This court described *Ellis* generally as follows:

> In *Ellis*, the plaintiff asserted that a will contest was not filed because the plaintiff was unaware that it was named a beneficiary under the prior will. The trial court allowed the tort of tortious interference with testamentary expectancy to proceed even though a will contest was not filed within the statutorily prescribed time limits because the plaintiff did not have a fair opportunity to contest the will. The court determined there was fraudulent conduct on the part of the respondent that prevented the plaintiff from filing a will contest. The trial court also found the defendant's tortious conduct had caused the decedent to transfer property to the defendant prior to death and therefore a will contest would not have afforded the plaintiff with sufficient relief because the remedy available in probate does not extend to inter vivos transfers of property.

(Internal Citations Omitted).

Plaintiffs had analogized their case to the holding in *Ellis*, arguing that "they did not file a will contest because they were not aware that they were named beneficiaries under the March will [until after the six-month period for contesting the September will expired]." The court wrote that, under *Ellis*, in order for the plaintiffs to proceed with their tort claim after the six-month period to contest the September Will expired, they would have to demonstrate that the will contest was made unavailable to them, and to do so they would have to "show that the defendants' tortious conduct, such as inducing the decedent to change her will, was not discovered until after the expiration of the time to contest the validity of the will."

After going off on this tangent to distinguish *DiMatteo and DeHart* on a basis related to the limitation period for filing a will contest, the court concluded that it was *not* the six-month deadline for filing a will contest that prevented plaintiffs from bringing the tort action, but a conclusion by the court that the plaintiffs had not shown any tortious conduct on the part of the defendants to intentionally interfere with the plaintiff's expectancy. The court went on in its opinion, after stating that "extensive discovery was conducted in this case," and after reviewing discovery responses and deposition transcripts, to conclude the following:

- That the plaintiffs have not shown that any of the *defendants* knew that the March will existed or that the March Will devised certain property to the plaintiffs.
- Nothing suggested *Pappas* was aware of the contents of the September will or that she stood to inherit under the will
- *Pappas did not have any expectation* that Denman would be naming her as a beneficiary under the September Will.
- "As to Burrows, all plaintiffs admitted in discovery that they had no knowledge of Burrows exerting influence on [Dorelle] with intention to change her will or to persuade [Dorelle] to change her estate plan to his benefit."
- "There is no evidence in the record to suggest that any of the *defendants* knew about the contents of the March Will or that any of the *defendants* knew they stood to inherit under the March Will, and no evidence to suggest that the defendants acted fraudulently in concealing the March Will from the plaintiffs or that they acted in the direction, production, or execution of the will to persuade [Dorelle] to name them as beneficiaries and disinherit the plaintiffs."

None of this seems relevant to the issue as to whether *plaintiffs* had an expectancy for purposes of satisfying the "existence of expectancy" element of a tortious interference claim. Yet, the court concluded the issue by writing, "[b]ecause the first element of the existence of the expectancy is dispositive of the issue of tortious interference with testamentary expectancy, no further analysis under the tort action is necessary. We find the plaintiffs have not asserted an expectancy and therefore, summary judgment entered in favor of the defendants on those counts was properly granted."

The trial court had also denied the plaintiffs' motion to compel document production, which was withheld by Steward and FNB due to the assertion of attorney-client privilege. The trial court concluded that the privilege applied to the documents because Steward and FNB were "agents" of Dorelle and the attorney, per *Adler v. Greenfield*, 2013 IL App (1^{st}) 121066. The trial court also determined that the "testamentary exception" to the attorney client privilege did not apply, because, under *Ellis*, once the will is admitted with no contest, the "validity of the will is established for all purposes," thus the rationale for the exception no longer applies because the distribution scheme that decedent intended was actually going into effect. The appellate court upheld the trial court's denial of the motion to compel, holding that "in the absence of [a] contest to an instrument, we will not apply the narrow exception to the attorney-client privilege.

COMMENT: A dissenting opinion disagreed with the majority's conclusion that the mere existence of the March will is insufficient to establish the expectancy element of the plaintiff's tort claim, writing that "[i]t is well-settled that the existence of a expectancy is sufficiently pled where the plaintiff alleges the existence of a prior will." (citing *DeHart and DiMatteo*). The dissent is plainly correct and the majority opinion was plainly incorrect, had it actually ruled on that basis.

The dissent also rebutted the majority opinion's analysis of the application of the six-month deadline for a will contest applying to the tort claim, and wrote that *Ellis* stood for the proposition that applying the six-month will contest limitation period to a tort claim was erroneous as a matter of law. *Ellis* created a narrow exception to this – where a will contest would have afforded the plaintiff the relief sought and the plaintiff forgoes an opportunity to file a tort claim within the six-month period for will contest. Even then, the exception (*applying* the six-month deadline) is "clearly limited … to instances where the plaintiff had sufficient knowledge of the facts necessary to contest the will during the six-month time for filing a will contest, but chose not to do so." In this case, the dissent writes:

> In the instant matter, the record reveals no facts which would support a finding that the plaintiffs had sufficient knowledge of the facts necessary to contest the will during the six-month time period for filing a will contest. The plaintiffs' case rests upon the existence of the March Will and their knowledge of its existence. There is nothing in the record to establish conclusively that any of the plaintiffs had knowledge of the existence of that will or their status under that will within the six-month time period for filing a will contest. Without clear evidentiary proof that such knowledge existed, there is no basis upon which to conclude that the plaintiffs could have presented their claim within the statutory period. At best, the matter of plaintiffs' knowledge is a matter of disputed fact. Thus, the circuit court erred, as a matter of law, in granting summary judgment on the tortious interference counts.

Again, the dissent is correct here, but again, it appears that the six-month limitation period was also not the basis of the majority's ruling. Indeed, after it's lengthy analysis, the majority concluded that it was *not* the six-month will contest limitation that resulted in summary judgment for defendants, but rather it was the evidence obtained in discovery supporting the court's conclusions in the bullet points above.

The dissent also disagreed with the majority's conclusion that the testamentary exception to the attorney-client privilege could not apply to a claim for intentional interference with an expectancy, stating that "courts have allowed parties seeking information from attorneys regarding deceased clients to access that information where the cause of actin included tortious interference with a testamentary expectancy, citing *DeHart*, 2013 IL 114137, and a contest involving an *inter vivos* trust, citing *Eizenga v. Unity Christian School of Fulton*, 2016 IL App (3d) 150519.

In sum, obviously the existence of the March will naming plaintiffs as beneficiary satisfied the expectancy element of a claim for tortious interference. As pointed out by the dissent, the plaintiffs had no opportunity to address material facts regarding their knowledge of the March will or any opportunity to have timely filed a will contest. The majority in this case, after "review of the discovery responses and deposition transcripts," simply concluded that there was no way the plaintiffs would be able to establish tortious conduct by the defendants. Perhaps, given the

TRUSTS

1. Centrue Bank v. Voga, 2017 IL App (2d) 160690 (June 22, 2017)

Doctrine of election does not prevent challenge to trust amendment by agent under power of attorney where power lacked requisite specific reference to trust; court refused to allow estate tax apportionment offset due to special use valuation under Internal Revenue Code § 2032A.

Leroy Voga had four children, Lyle, Larry, Lois, and Linda. He also had a companion, Shirley. In 2003 Leroy executed a revocable trust making gifts of separate parcels of real property to Lyle, Larry, and Linda (but not Lois), and providing a life estate in his Arizona residence to Shirley. Each child would receive 25% of the residue. Leroy also executed a power of attorney naming Linda as agent.

In September, 2006, Linda, as agent under the power of attorney, executed an amendment to Leroy's trust, which added a bequest of ""an amount of cash … equal to the average fair market value by certified appraisal of the farm real estate gifted to [Linda] … and the farm real estate gifted to [Larry][.]"

In February, 2007, the four Voga siblings signed an agreement naming themselves co-trustees of the trust. Presumably, Leroy died between September, 2006 and February, 2007. Centrue Bank filed an interpleader action claiming that the agreement naming the four co-trustees was invalid because it lacked the signature of Shirley, a primary beneficiary of the trust. In August, 2010, Lyle filed a 13-count countercomplaint against Larry, Linda, and Lois.

Lyle file a motion for judgment on the pleadings under section 2-615(e) on two counts, which alleged that Leroy's POA was not in the statutory form and that the POA did not specifically mention Leroy's trust as an instrument that Linda could modify, as required by 755 ILCS 45/2-9. Lyle further alleged that the POA was a "common law power of attorney" and thus expired prior to the execution of the amendment due to Leroy's incapacity. Lyle asked for a finding that the trust amendment was void. None of Larry, Linda or Lois filed an objection to the motion.

Linda did not appear at the hearing on the motion. At the hearing, Lois's attorney informed the court that Larry and Linda had executed assignments to Lois of a portion of each of their residuary interests in the trust "up to the amount that is equal to one-fourth (1/4) of the value of the [gift of cash to Lois in the amendment]." Each assignment stated, "This Assignment is made in respect of and pursuant to [the] Amendment, which I believe reflects my father's [Leroy's] wishes, regardless of whether the Amendment is valid." Council for Lois conceded that Lyle was "correct technically" that Linda as agent was probably without power to amend the trust. The court granted Lyle's motion on July 14, 2011. In granting the motion, the court entered a proposed order prepared by Lyle that contained findings of fact that reiterated allegations of Lyle's countercomplaint.

Six months later, Linda filed a motion to vacate the order granting Lyle's motion. In the meantime, Lyle had filed a complaint in federal court, in the Northern District of Illinois, alleging a breach of fiduciary duty by Linda as trustee of the trust, based in part on the POA and the amendment. Lyle responded to Linda's motion to vacate and claimed that the July 14, 2011 order was a final judgment and that Linda failed to file her motion within 30 days. Lyle was using the July 2011 judgment in the federal court to establish that Linda violated her fiduciary duty. Larry and Lois both agreed with Linda. The judge granted the motion to vacate.

Then Larry and Lois filed a motion to dismiss the count of Lyle's complaint alleging that the POA did not give Linda the power to amend the trust pursuant to the doctrine of election, citing the First District case *Estate of Boyar*, 2012 IL App (1st) 111013, which held that the doctrine applies to trusts as well as wills. While the case was pending, the Illinois Supreme Court reversed the First District *Boyar* opinion, and declined to hold whether the doctrine of election applies to trusts, because under the facts of that case the elements of the doctrine would not have been met anyway. *In re Estate of Boyar*, 2013 IL 113655.

Larry and Lois pressed the issue in this case, arguing that the doctrine of election applies to trusts and barred Lyle from challenging the trust amendment because he "received and continued to receive benefits from the Trust Estate." Larry and Lois also asked for a declaration that, under the Trust's no-contest clause, Lyle forfeited any interest in the Trust. The trial court granted Larry and Lois's motion to dismiss, holding that doctrine of election applies to trusts and Lyle's acceptance of benefits conferred by the trust precluded him from challenging the terms of the trust that conveyed benefits upon him. However, the trial court declined to enforce the no contest clause against Lyle because it would be "unfair and unjust" to do so.

In February, 2013, Lyle filed a 5-count amended countercomplaint against Larry, Linda, and Lois, seeking an accounting and alleging breach of fiduciary duty by Larry and Lois. The amended countercomplaint also sought apportionment of liability for estate taxes, alleging that Lyle had made a § 2032A special valuation election for the farmland that he received under the trust, which resulted in reduced tax liability "for that land." Larry filed an affirmative defense asserting that Lyle's own failure to act with equity barred his claims that Larry and Lois breached their fiduciary duties.

Lyle moved for summary judgment on the count regarding tax apportionment. The trust provided that ""all expenses, claims and taxes attributable to any specifically distributed property shall be apportioned to the share of the beneficiaries of such specific distributions." The court denied Lyle's motion, ruling that "estate tax liability shall be pro-rated based on the amount of estate tax generated by the value of the assets received by each beneficiary."

After a bench trial, the court found that Lyle's breach of duty claim was defeated by his own "unreasonable conduct," specifically his "fail[ure] to communicate with his siblings regarding the tax obligations due to [the Internal Revenue Service] and State of Illinois" and his "fail[ure] to account for his dealings with the [T]rust."

Lyle appealed the court's vacating of the July 2011 judgments in his favor, the granting of the motion to dismiss count V of Lyle's amended countercomplaint based on the doctrine of election, the finding against his breach of fiduciary duty claim in the bench trial, and the denial of his motion for summary judgment on estate tax apportionment.

Lyle argued that the trial court erred in vacating the original order granting his motion for judgment on the pleadings because more than 30 days had passed before Linda filed her motion to vacate. Because the motion was filed more than 30 days after the order, Lyle contended, Linda's motion was governed by section 2-1401. Section 2-1401 allows a challenge to the final judgment more than 30 days after it is entered, but requires "specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition."

The court disagreed and held that the July, 2011 order was a final judgment as to fewer than all parties or claims, which required the "special language" under Supreme Court Rule 304(a) to be immediately appealable. Because the trial court made no Rule 304(a) finding with respect to the judgment in favor of Lyle on counts IX and X, the judgment remained subject to revision.

On the other hand, the appellate court reversed the dismissal of count V of Lyle's amended countercomplaint – challenging the trust amendment as invalid because the POA did not grant Linda the power to amend the trust – and held that the doctrine of election did not apply to Lyle's challenge to the trust amendment. Just as the Supreme Court in *Boyar II* abstained from deciding whether the doctrine of election applies to trusts, the court here "declined to decide whether to follow *Boyar I*'s holding that the doctrine of election applies to trusts." Also like *Boyar II*, the court found that even if the doctrine applies to trust, the undisputed facts of this case to not satisfy the basic requisites of the doctrine.

The court cited *Boyar II*'s summation of the doctrine: "Properly understood, the doctrine of election is triggered in the context of wills only when there are two different benefits to which a person is entitled, the testator did not intend the beneficiary to take both benefits, and allowing the beneficiary to claim both would be inequitable to others having claims upon the same property or fund." Here, the appellate court wrote, "the trial court found that Lyle made an election through 'acceptance of the benefits conferred by the Trust,' but the court identified no facts suggesting that Lyle's acceptance of those benefits was an election between inconsistent and alternative claims to trust property, 'one founded on the trust document and the other predicated on some right existing independent of the document.''"

Lois also argued that the broader principle of equity, the "general rule of preclusion or estoppel," applied as a grounds for dismissal of count V of Lyle's amended countercomplaint. "The well-settled equitable doctrine in this State *** is that any person who voluntarily accepts a beneficial interest under a will is held thereby to ratify and confirm the entirety of the will which conferred the benefit. In other words, the beneficiary may not accept a bequest of the testator and at the same time set up any right or claim which would defeat or prevent the full operation of the will." (citing *Kyker v. Kyker*, 117 Ill. App. 3d 547, 551 (2nd Dist. 1983)).

The court wrote that, "consistent with their conceptual overlap, the estoppel principle and the doctrine of election share the same two longstanding exceptions." The court held that the exception, providing that even though a person accepts a benefit under a will, she is not precluded from questioning the validity of any provisions that are contrary to the law or public policy, applied to Lyle in this case and did not prevent him from challenging the trust amendment. Because section 45/2-9 of the Power of Attorney act does not allow an agent to revoke or amend a trust "without specific authority and specific reference to the trust in the agency," and Leroy's POA did not comply with that statutory provision, Lyle's challenge could go forward because "it meets the exception to the estoppel principle for claims alleging that a trust provision violates law or public policy."

Because the court reversed the dismissal of Lyle's count challenging the trust amendment, it also remanded the remaining counts for a retrial, as they were "intertwined in the trial court's adjudication.

Finally, although the court remanded for a new trial on the estate tax apportionment issue, it decided that the tax apportionment raised a question of law chose to address that question. "The issue is how to treat the tax benefit incurred by Lyle's obtaining a reduced valuation, pursuant to section 2032A, for the farmland gifted to him." On this issue, the court recited the language of the trust that provided, ""all expenses, claims, and taxes attributable to any *specifically* distributed property shall be apportioned to the share of the beneficiaries of such *specific* distributions." (emphasis added). The court then wrote "that the trial court computed the *total estate assets* and total federal tax liability, and it then assigned tax liability to each sibling according to the portion that the sibling received of the *total estate assets*: Linda, 28.23%, Larry, 17.39%, Lyle, 41.50%, and Lois, 12.88%." (emphasis added). The court held that the trial court did not err in declining to grant Lyle an offset to his proportionate liability for the federal estate tax, because the "clear import" of the trust language is that beneficiaries are liable for taxes proportionate to the share they receive of the "trust assets."

COMMENT: This case involves numerous issues involving breaches of duty, powers of agents with respect to a principal's trust, procedural issues and appealabililty of orders, and apportionment of estate taxes. On the estate tax apportionment issue, while the court remanded because "the trial court, giving proper consideration to Lyle's challenge to the Amendment, might well make a different disposition of the Arizona residence or other Trust assets," nevertheless held as a matter of law that Lyle would not be entitled to a reduction is his estate tax burden due to the § 2032A special valuation applied to his property. This ruling seems wrong for two reasons: first, the estate tax apportionment provision in the will refers to taxes attributable to *specific* distributions, i.e., of parcels of real estate. In that case, the estate tax incurred with respect to each specific property was to be allocated to the person receiving it. This calculation would certainly take into account the special use valuation. Second, even with the court determining that estate tax should be apportioned to each sibling according to the portion that the sibling received of the *total estate assets*, would the values to be used for apportionment of federal estate taxes by those as reported to the IRS on the estate tax return? It seems that whether the court were to "grant Lyle an offset" of simply apportion estate taxed based on values as finally determined for estate tax purposes, the result would be the same.

2. <u>Crampton v. Crampton</u>, 2017 IL App (3d) 160402 (November 21, 2017)

Plaintiff sufficiently pled undue influence.

In this appeal the court reviewed *de novo* the dismissal of a complaint for undue influence pursuant to § 2-615 of the Code of Civil Procedure. Plaintiffs, two children and three grandchildren of the decedent, Ruth, sued another child of the decedent, Robert, whom Ruth had named as her power of attorney, executor, and trustee of her revocable trust. Ruth's will gave all of her personal property to Robert. As trustee, Robert conveyed trust property to himself and one brother. None of the plaintiffs received anything from Ruth's estate.

Plaintiff's alleged: "Robert lived with Ruth from 2005 until her death; Ruth depended on Robert to assist with her healthcare and business matters; Robert and Ruth shared a joint bank account to which only Ruth contributed; Robert also had Ruth's card and personal identification number (PIN) to access her bank account; as a result of Ruth's reliance on Robert, he became the dominant party in their relationship; Robert secured a lawyer's services to prepare estate documents that devised all of Ruth's property to Robert; Robert sat next to Ruth when she executed her will, trust, and deed; Robert exploited his dominant relationship with Ruth in breach of their fiduciary relationship; Robert exerted undue influence over Ruth when she executed her estate documents."

The appellate court reversed the dismissal of the complaint, finding that the complaint alleged sufficient facts to plead a cause of action for undue influence, particularly when a fiduciary relationship is alleged.

3. <u>Houghtaylen v. The Russell D. Houghtaylen By-Pass Trust</u>, 2017 IL App (2d) 170195 (December 18, 2017)

Order construing codicil to will regarding exercise of power of appointment was final judgment under Supreme Court Rule 304(b)(1) and must have been appealed within thirty days.

The *Houghtaylen* case involved finality of a circuit court's order under Supreme Court Rule 304(b)(1) and the jurisdiction of the appellate court. Plaintiffs were three brothers who owned a one-half interest in a farm. They filed an action against defendants including the trustee of the Russell D Houghtaylen By-Pass Trust for the other one-half of the farm. Russell was plaintiffs' uncle, and together with plaintiffs' father, had deeded the farm to a land trust in 1970.

In the trust, Russell provided a life estate in the farm to his wife, Shirley, with distribution among Russell's then living nieces and nephews as appointed by Shirley in her will, with specific reference to "this Power of Appointment." Shirley executed a second codicil to her will in 2012 in which she described the farm in detail and stated her intent to give "all of [her] interest to the Houghtaylen Farm" to plaintiffs in equal shares upon her death, and gave the residue of her estate, "but excluding all property under which I have a power of appointment" to the trustee of the trust.

The trustee of the trust rejected the nephew's claim to the farm and argued that Shirley's second codicil was ineffective because it did not specifically refer to her power of appointment. The evidence of Shirley's intent regarding the farm was clear. The circuit court ruled in favor of plaintiffs on December 1, 2016.

Defendants filed a motion requesting a finding under Rule 304(a) that the December 1, 2016 order was immediately appealable. They did not, however, file an appeal or a motion directed against the December 1, 2016 judgment. At the hearing on the motion for a Rule 304(a) finding, the court explained that it had not "'willy-nilly' omitted a Rule 304(a) finding from its December 1, 2016, judgment [but] had believed that the judgment was immediately appealable under Rule 304(b)(1)." Defendants asserted that they asked for the 304(a) ruling out of an "abundance of caution," and the trial court issued the 304(a) finding.

The appellate court held that the trial court was correct regarding Rule 304(b)(1), and noted that it had an independent duty to consider its jurisdiction. Under Illinois Supreme Court Rule 304(b)(1), "[a] judgment or order entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party" is immediately appealable. Such a judgment must be appealed within 30 days, or within 30 days after the entry of the order disposing of the last pending motion directed against that judgment. Further, "when an order is already immediately appealable under Rule 304(b)(1), the rendition of 'a superfluous Rule 304(a) finding … does not extend the time for appeal.'" (citing *In re Estate of Russell*, 372 Ill. App. 3d 591, 595 (2nd Dist. 2007)).

The court cited *In re Estate of Thorp*, 282 Ill. App. 3d 612, 616 (4th Dist. 1996) holding that "a court order construing a will and directing the transfer of property pursuant to that will must be promptly appealed under Rule 304(b)(1), or not at all, precisely because the court's construction of a will is 'one of the specific issues in an estate administration which requires certainty' as it is 'binding on all the interested parties.'" The court found the bench trial that occurred in this case to determine Shirley's intent expressed in the second codicil to her will to be "practically the quintessence of an estate proceeding," and therefore the trial court's order was a final judgment transferring an interest in trust property to plaintiff's pursuant to Shirley's will. Therefore, the 304(a) ruling later made by the trial court was superfluous, the appeal by defendants was untimely, and the appellate court lacked jurisdiction to hear it. The appeal was dismissed.

4. <u>Schroeder v. Sullivan</u>, 2018 IL App (1st) 163210 (March 9, 2018)

Trustee compensation provision providing method for determining corporate trustee compensation did not foreclose ability of individual trustee to obtain compensation.

Joseph Sullivan created, and later restated twice, the Joseph J. Sullivan Trust Dated November 26, 1997." The trust designated defendant Joseph Sullivan, Jr. and plaintiff Amy Schroeder as successor cotrustees but allowed one of them to act alone if the other cotrustee either "fails or ceases to act." The trust further provided that the term "trustee" meant "the trustee or trustees from time to time qualified and acting and whenever two co-trustees are acting, their decision or action must be taken together." In the case of a dispute between the cotrustees, an accountant, Samuel Diamond, would "break the tie" if he were "then willing and able to manage [the settlor's] affairs."

Regarding trustee compensation, the trust provided as follows:

> The trustee shall be reimbursed for all reasonable expenses incurred in the management and protection of the trust, and any corporate trustee shall receive compensation for its services in accordance with its schedule of fees in effect from time to time. A trustee's regular compensation shall be charged against income during my lifetime and thereafter half against income and half against principal, except that the trustee shall have full discretion at any time or times to charge a larger portion or all against income.

The trust also contained the following provision regarding a child of the settlor acting as trustee:

> Whenever a child of mine is acting as trustee hereunder, he or she shall jointly have all the powers given the trustee, except that he or she shall not participate in the exercise of … any discretion to determine the propriety or amount of payments or distributions of income or principal from property to himself or herself, … and his or her co-trustee shall act in the limited capacity of exercising that … discretion….

Finally, the trust contained an *in terrorem* clause, stating that if any person contested or attacked the "validity" of the trust or the "validity of any disposition" under the trust by filing a suit, that person's share of the trust would be revoked.

Joseph died on February 3, 2010, leaving his six children as beneficiaries of the trust. On December 28, 2012, Joseph Jr. withdrew $175,000 from the trust without informing Amy, his cotrustee. On January 3, 2013, Amy sent an email to Joseph Jr. stating that the withdrawal was "unacceptable" and demanding the return of the funds.

Amy and her other siblings filed a complaint against Joseph Jr. seeking a declaratory judgment that Joseph improperly withdrew $175,000 in compensation from the Trust and an additional $40,000 reimbursement for legal fees in defending against both the complaint and an earlier lawsuit, arguing that Joseph Jr.'s withdrawal of the funds constituted a breach of the terms of the trust.

Joseph Jr. filed a five-count counterclaim, alleging Amy's nonfeasance and malfeasance, seeking forfeiture of Amy';s interest in the trust pursuant to the *in terrorem* clause, seeking the appointment of a receiver, and seeking compensation based on *quantum meruit*.

Plaintiffs filed a motion for partial summary judgment on both counts of their complaint and on count III of Joseph's counterclaim (concerning the *in terrorem* clause). Joseph Jr. filed a response to plaintiffs' motion combined with a cross-motion for summary judgment in his favor on plaintiffs' complaint and counts III and V (concerning *quantum meruit*) of his counterclaim. Joseph Jr.'s cross-motion on the quantum meruit issue asserted that he was entitled to the $175,000 fee because of his work in selling the settlor's "Clark & Barlow" hardware business and a building on Grand Avenue in Chicago.

The court noted that Joseph Jr. "did not file either a fee petition nor any document setting forth a detailed listing of the specific tasks he undertook and the time spent." The attorney who drafted the trust testified that the paragraph of the trust related to trustee compensation – providing that "any corporate trustee shall receive compensation for its services in accordance with its schedule of fees in effect from time to time" – entitled a noncorporate trustee to "reasonable compensation."

The circuit court granted Amy's motion on two grounds. First, the court found that, although the language of the Trust allowed for all trustees to be reimbursed for expenses, only corporate trustees were permitted to receive compensation, so "by implication," the Trust prohibited defendant's claimed "fee" of $175,000. The trial court had said on the record that the the court "did not think the amount was unreasonable," but "[t]hat's not really the issue." Second, the court noted that the Trust required that all trustees agree on disbursements of Trust assets, and "there was clearly no agreement by Amy that this particular fee could be taken."

The court further found that the in terrorem clause did not apply not only because "the plaintiffs prevailed [in this case], but also because they [were] not directly or indirectly contesting or attacking the validity of the trust or any amendment thereto." Finally, the court found that, "because the Trust prohibited Joseph from receiving compensation, he could not seek relief under *quantum meruit*."

The appellate court treated the case as one of trust construction, which is review *de novo*. The paragraph of the trust regarding compensation states that a "trustee" will be reimbursed for all reasonable expenses, and that a "corporate trustee" will receive compensation for its services based upon its schedule of fees. However, the following sentence—stating that a "trustee's regular compensation" will be charged first against Trust income and thereafter against income and principal equally—does not limit the term "trustee" with the term "corporate."

The court reversed the trial court's summary judgment in favor of Amy that the trust document did not allow compensation to an individual trustee, and entered summary judgment in favor of Joseph, holding that individual trustees in this case may receive compensation. The court reasoned that "[t]he sentences at issue do not explicitly prohibit individual, noncorporate trustees from compensation, and the general rule embodied in section 7 of the Act applies, providing in relevant part that a trustee, both corporate and noncorporate, 'shall be … entitled to reasonable compensation for services rendered.'" In other words, the language requiring a corporate trustee's compensation to be "in accordance with its schedule of fees in effect from time to time" did not prevent an individual trustee from receiving compensation.

However, the court pointed to the provision of the trust that prevented a child acting as trustee from participating in the decision to make any "payments" to himself, and remanded the case for a determination as to what the proper compensation would be for Joseph Jr. The court stated that the record was insufficient to fix Joseph's fee, and Joseph had admitted that he did not itemize his time spent working on the trust. Because the court reversed summary judgment in determining that the trust language does allow compensation to an individual trustee, and remanded the case for a determination as to the proper amount of the fee, the court ruled that the *quantum meruit* argument was moot.

Finally, the appellate court agreed with the trial court that neither lawsuit filed by the plaintiff's "challenged the validity of any Trust provision," and therefore ruled that the trial court was correct in refusing to enforce the *in terrorem* clause.

EXECUTORS, ADMINISTRATORS, AND TRUSTEES

1. ***In re* Estate of Sandra Lee, 2017 IL App (3d) 150651 (August 14, 2017)**

Failure to account by trustee, who was guardian of beneficiaries, was breach of duty warranting removal.

Sandra Lee died in January, 2005, leaving three minor children (age 17, 16, and 10 upon Sandra's death). Sandra's will named Jennifer Mansberger as executor, bequeathed the residue to a testamentary trust for her three children, and named Kathleen Line as trustee of the trust and guardian of the children. Kathleen, as trustee, could apply principal and income as she determined in her sole discretion was "necessary for the support, health, welfare, and education" of the children. Each child could withdraw a one-third share of the trust upon reaching age 25.

Jennifer filed a petition to admit the will and be appointed executor, and an inventory showing Sandra's personal estate to be about $233,000.00. After Sandra passed away, two of the three children moved in with Kathleen. The oldest child was in the Department of Corrections, but also moved in with Kathleen and her family after being released.

In April, 2010, five years after the children had moved in with Kathleen and her family, Kathleen filed a petition demanding that Jennifer provide an accounting of the estate and release the remaining estate assets to Kathleen as trustee of the trust. Jennifer filed an accounting of the estate within a month. The accounting indicated that the estate started with a balance of approximately $269,000 in cash or other assets and that certain itemized disbursements were made over a five-year period for the benefit of the children, including distributions of $90,000 and $100,000 to Kathleen as trustee of the trust, in April and December, 2009, respectively.

In August 2014, one of the children filed a petition for an accounting of the estate by Jennifer and an accounting of the trust by Kathleen. The other two children later joined in the petition. Neither Jennifer nor Kathleen objected to the petition; therefore, by agreement, they were both ordered to file accountings. Jennifer's accounting indicated that the estate had assets of about $81,000. Kathleen, however, failed to file an accounting of the trust.

The trial court issued a rule to show cause against Kathleen for failing to file the accounting. At the hearing on the rule to show cause, the "trial court spoke of Kathleen purging herself of any possible contempt" by presenting evidence as to why she should not be held in contempt, but Kathleen's attorney did not present any evidence, nor did the children's attorney. The court found Kathleen in contempt of court for failing to file the accounting in a timely manner.

Thereafter, in April, 2015, Kathleen filed her accounting. The accounting listed a few specific expenses, but otherwise relied on a USDA study to estimate amounts that had been spent on the children. The accounting indicated that three the children had lived with Kathleen for 3.5 years, 8.51 years, and 9.5 years. In addition, one of the children's girlfriend and son lived with Kathleen for 3.5 years. The accounting also stated that during the time period when the children lived with Kathleen, the trust received $190,000 from the estate and about $158,000 from social security for the children, but had spent about $505,000 on the children. According to Kathleen and her family paid that difference, which Kathleen represented to be about $315,000 (apparently not accounting for the social security payments?). No receipts, checks, or similar backup information was attached to the accounting.

After the accounting was filed, the children filed a petition to remove Kathleen as trustee. Kathleen argued that she was entitled to reimbursement from the estate or trust for her family's own money that was spent to support the children. The children also filed objections to Kathleen's accounting and asked for judgment against Kathleen for the $190,000 that Kathleen, as trustee, had received from the estate. Kathleen asserted that she had no duty under the law or the terms of the trust to provide an accounting.

At the hearing on the contempt sanction, the trial court ordered Kathleen to pay the children's attorney fees. The court also granted the children's motion for distribution directly from the estate, bypassing the trust, allowing a partial distribution and ordering Jennifer to retain the remaining funds in the estate.

At the hearing on the petition for removal of Kathleen as trustee, Kathleen acknowledged that she had not kept records for most of the money she had spent for the children. Kathleen and her husband had built a new house because their current house did not have enough bedrooms for the children. Kathleen further testified that she and her family sold many of their own personal belongings to support the children, especially during the first five years before the trust received any money from the estate. Kathleen denied that she kept any of the children's money for own benefit. The trial court removed Kathleen as trustee, finding that the evidence "was "overwhelming and basically uncontroverted that the Trustee [Kathleen] violated her fiduciary duty by essentially treating the trust money as if it were her own," and that Kathleen "failed to maintain sufficient records of the trust income and expenditures and commingled the funds of the trust with her personal funds."

The appellate court first, on its own, analyzed its appellate jurisdiction, and found that it had jurisdiction to hear the appeal of the contempt penalty, the distribution order, and the removal of Kathleen as trustee pursuant to Rule 304(b)(1).

The appellate court then held that Kathleen had forfeited any argument about having no duty to file an accounting because she failed to object to the children's request for an accounting and allowed the order requiring an accounting to be entered by agreement. The court went on, however, to conclude that they would have ruled for the children on the issue under the clear language of 760 ILCS 5/11(a), which requires a trustee to provide a yearly accounting to any person who is entitled to receive trust income.

Kathleen also argued that the court erred in ordering distribution directly from the estate to the children, asserting that doing so was contrary to the terms of Sandra's will and that she was entitled to reimbursement for her own family's money that was spent for the children. The children, on the other hand, argued that the distribution carried out the purpose of the trust. The appellate court upheld the trial court's decision to bypass the trust, holding that doing so best effectuated the intent of Sandra. The trust was to distribute one-third of its assets to each child upon attaining age 25, and the two children to whom partial distributions were ordered had attained that age. The court was mindful of the ongoing concerns with Kathleen acting as trustee (and that she had been removed by the time of the appellate case).

Kathleen appealed the trial court finding her in contempt for failing to timely file an accounting pursuant to the court's original order to do so, and sanctioning her to pay the children's attorney fees. The appellate court began, "[a]ll courts have the inherent power to punish a party for contemptuous conduct." "That power is essential to the maintenance and administration of the court's judicial authority." Contempt is a question of fact, and the trial court's decision will not be disturbed unless it is against the manifest weight of the evidence. The court distinguished criminal contempt from civil contempt, and direct contempt (in court) from indirect contempt (not in the presence of the court). A person charged with indirect criminal contempt is generally entitled to all of the constitutional protections and procedure protections afforded to other criminal defendants, while a person charged with indirect civil contempt is only entitled to minimal due process, including the right to notice and an opportunity to be heard.

Kathleen argued that the proper procedure was not followed and that no rule to show cause was prepared, signed by a judge, or served on Kathleen. The appellate court agreed that the procedure followed in the trial court with respect to finding Kathleen in contempt did not complay with the procedures required under the law. While the court concluded that the case involved indirect contempt, it could not determine whether the contempt was criminal or civil, as the facts contained indications of both (to coerce future conduct and to punish). The reversal of the contempt finding by the trial court, however, was without prejudice, so the children could proceed with the proper filings. Attorney fees, however, "must be strictly limited to those incurred as a result of the filing and prosecution of the contempt petition."

Finally, with respect to the removal of Kathleen as trustee, Kathleen made no argument in her initial brief or her reply brief on that issue. Thus, even though Kathleen challenged the trial court's order removing her as trustee, the issue was forfeited on appeal.

2. *In re* Estate of Anne Sperry, 2017 IL App (3d) 150703 (October 23, 2017)

Purchasing a burial plot does not give an individual the right to control the placement of a gravestone.

This fight over the placement of a headstone over the decedent's grave pitted the decedent's brother, Matthew, as independent administrator of Anne's estate, against Anne's ex-husband, Jack. Anne's grave was located in a cemetery plot that Jack had purchased.

Anne died in an automobile accident in 2013, and had been divorced from Jack in 2009. Jack and Anne had two children together and Anne had a child born of another father. It was unclear whether Anne's estate would be solvent, and after Anne's death, Jack purchased two adjoining cemetery plots, intended for him and his ex-wife to be buried next to each other. Anne's father paid for the funeral and for the burial expenses, and was reimbursed by Anne's estate. Matthew and Anne's oldest child (the one from another father) selected a headstone, which was approved by Anne's father and other siblings. Jack claimed that the burial plot was his property since he paid for it, and would not allow a headstone to be installed. He intended to have a "companion" double headstone installed for both him and Anne.

The trial court ruled that the burial plot was "a gift by [Jack] to [Anne's] estate," and therefore, "[t]he estate may place the headstone on the lot where [Anne] is buried and put on it whatever they wish to put on it." The court found that Matthew, as legal representative, had the authority to do so.

While the trial court ruled on the basis of the burial plot being a gift from Jack, the appellate court affirmed the trial court's decision by holding that Jack was equitably estopped from contesting the placement of the headstone. Equitable estoppel "may arise from silence as well as words." (citing *Geddes V. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 314 (2001). Jack testified that when he agreed with Anne's relatives that he would buy the burial plot, he intended to retain control over Anne's gravesite. However, he did not inform Matthew, Anne's father, or any other member of Anne's family of such intention at that time, but a year after Anne was buried.

While the court found it unclear under the Disposition of Remains Act whether it would be Matthew as administrator or Anne's father who had the right to direct the disposition of Anne's remains, it was one of them and they were in agreement. Under Illinois law, whoever has the right to control the disposition of a decedent's remains also has the right to design and place a headstone. When Jack failed to express his intention to retain control over the gravesite before Anne was buried, Matthew and Anne's father reasonably relied upon Jack's silence and assumed that Jack would not attempt to interfere with their legal right to design and place a headstone on Anne's grave. Ruling in favor of Jack would have forced Anne's family to disinter Anne and bury her elsewhere.

3. *In re* Estate of Pryor, 2017 IL App (3d) 170023 (December 1, 2017)

A special administrator cannot be appointed under § 5/8-1(e) of the Probate Act unless the action is a will contest.

Ethel prior died on September 3, 2012; on March 5, 2013, the circuit court appointed Michael Pryor as "legal representative" of the decedent's estate.

Petitioner Kathy Ralph filed a petition for declaratory judgment on February 11, 2015, which alleged that the decedent executed an original living trust, dated June 3, 2005; an amendment to the original living trust, dated February 13, 2009; the decedent's last will and testament, dated February 13, 2009; a second amendment to the original living trust, dated July 11, 2012; and a third amendment to the original living trust, dated August 13, 2012. The petition estimated the value of the estate assets to be $844,288, and alleged that petitioner had standing to request a declaration from the court regarding which of the four trust documents should be used to distribute the trust assets.

On October 22, 2015, a copy of the last will and testament of Ethel Marie Pryor, dated February 13, 2009, was filed with the trial court. The will left the residue of Ethel Pryor's property to "The Ethel Marie Pryor Family Trust, dated February 13, 2009." The record contained a document titled, "Amendment to the Ethel Marie Pryor Revocable Living Trust Agreement," dated February 13, 2009, but does not contain a copy of the document referenced in the will as "The Ethel Marie Pryor Family Trust, dated February 13, 2009."

On December 9, 2015, petitioner filed a motion to appoint a special administrator of the estate pursuant to section 8–1(e) of the Probate Act. The plaintiff alleged:

> In this case, the actual Will is not being contested; rather, the Petitioner/Plaintiff seeks to have the court validate the Trust document that will become the instrument used to distribute the Estate of the decedent. There is an Original Trust, and three Amendments to the Trust. It is not established which is the proper instrument to distribute the estate, and there is no document that has been admitted to probate, either the Will or any of the Trusts, the original or the three amendments to the Original Trust.

The estate and the respondent (Pryor) individually filed separate responses, asking the court to deny the motion to appoint a special administrator pursuant to section 8–1(e) of the Probate Act, because this provision pertains to will contests under the Probate Act and petitioner's motion to appoint a special representative to act in the pending declaratory action conceded the decedent's will was not being contested by petitioner. Petitioner then amended her petition to refer to "special representative" instead of "special administrator." The trial court denied the motion to appoint a special representative, which was the sole issue addressed by the appellate court.

The appellate court affirmed the trial court's denial to appoint a special representative, based on its construction of § 5/8-1(e) of the Probate Act. That provisions reads as follows:

> (e) It is the duty of the representative to defend a proceeding to contest the validity of the will. The court may order the representative to defend the proceeding or prosecute an appeal from the judgment. If the representative fails or refuses to do so when ordered by the court, or if there is no representative then acting, the court, upon its motion or on application of any interested person, may appoint a special administrator to defend or appeal in his stead.

The court held that the plain language of the statute "gives the court the authority to appoint a special administrator *to defend a proceeding to contest the validity of a will*." (emphasis added).

In the trial court, petitioner acknowledged she was not contesting the validity of the will. Rather, "[p]etitioner would like the special representative to address all matters pending in the trial court including the jury trial." Therefore, the court held, § 5/8-1(e) of the Probate Act had "no applicability to the facts of the instant case."

A dissenting opinion pointed to Pryor's conflict of interest as administrator. "At least one of the amendments to the declaration of trust would give Michael Pryor and his brother two-thirds of the entirety of Ethel's estate and eliminate distribution of any portion of the estate to other heirs." Although this case did not involve a contest to the validity of the will, as described in § 5/8-1(e) of the Probate Act, § 5/23-2 of the Probate Act "allows for the removal of the representative of the estate on the petition of any interested person or on the court's own motion in a number of circumstances." The dissent wrote, "it is clear the trial court understood the basis upon which the petitioner sought relief, since no mention of the will contest portion of the Probate Act was cited as a basis to deny relief to the petitioner." The trial court cited *In re Estate of Hawley*, 183 Ill. App. 3d 107, 109 (5th Dist. 1989) and *Conant v. Lansden*, 341 Ill. App. 488 (4th Dist. 1950), which to the dissent indicated that that trial court determined that since Michael Pryor was specifically named as trustee by the trust documents, any conflict of interest was expressly contemplated, created and sanctioned by the documents and thus may be permitted to exist. The dissenting opinion would have removed Pryor under § 23-2 and appointed a special representative due to Pryor's conflict of interest in determining which trust document would ultimately control the disposition of Ethel's estate.

4. <u>Mook v. Johnson</u>, 2018 IL App (3d) 170229 (March 27, 2018)

Trial court erred in reducing punitive damages award to estate from defendants who committee fraud in the surrender of a life insurance policy.

Plaintiff, as independent executor of the estate of Jeremy Travelstead, sued defendants Robin Johnson and Jamy Johnson, alleging that they committed fraud by fraudulently concealing surrender of a life insurance policy. Defendants had forged the signature of at least 1 of the 7 co-owners of policy on the surrender form, and then cashed the checks and unevenly distributed the funds. The two defendants surrendered a policy that would have had a death benefit of $3,500,000 for $612,542.81, and distributed $317,440.93 to themselves, leaving $295,101.88 for the other five beneficiaries. Defendant Robin Johnson was a daughter of the decedent, and Jamy was her husband, who was also an insurance agent who had sold the policy to the Travelsteads, earning a commission of $112,000.

When Robin called the insurance company about surrendering the policy, the insurance company informed her that all seven policy owners need to sign the surrender form, and that the early surrender charges would be $126,000. On March 20, 2007, Robin submitted a surrender form to the insurance company on which she had forged at least one signatures. In her defense, Robin testified that she gave the form to her mother, June, and received it back with Mook's signature on it. She also said that she "obtained permission from Jeremy to sign his name on the surrender form after telling him that his grandmother wanted to surrender the policy."

Mook testified that she first became aware that the policy had been surrendered when another sister told her so in May, 2008. Mook then confronted Robin, at which time Robin gave her a cashier's check for $45,000 and another check for $45,000 signed by their mother. Jeremy testified that he gave Robin permission to sign his name on the surrender form because he was under the impression that the money was going to his grandmother (June). However, the signature on the back of the surrender check was not his and he did not give anyone permission to sign his check.

After jury trial, the jury returned a verdict for both plaintiffs and against both defendants, awarding compensatory damages of $110,469.12 and punitive damages of $508,982.88. The defendants filed a post-judgment motion seeking judgment in their favor or a new trial, and for remittitur of the punitive damages award. They argued that "the award for punitive damages … was so excessive that it indicated that the jury was moved by passion and prejudice and the verdict exceeds the necessary limits of flexible limits of fair and reasonable compensation. Further the judgment for punitive damages was so large that it shocks the judicial conscience and should be reduced."

The trial court denied defendants' motion for judgment notwithstanding the verdict or for a new trial, but granted the motion for remittitur of punitive damages and reduced the punitive damages award from $508,982.88 to $20,000. The appellate court summed up the trial courts ruling by writing, "[i]n sum, the court pointed to what it considered circumstantial evidence that June Lackey forged Mook's signature and that Robin was simply "honoring her mother's wishes" by surrendering the policy and distributing the funds as she did."

The appellate court held that the trial court *abused its discretion* by remitting the punitive damage awards. "Punitive damages, unlike compensatory damages, serve to punish the wrongdoer and to deter that party and others from committing similar acts of wrongdoing in the future." "A jury's punitive damages award should not modified unless it is so excessive that it must have been a result of passion, partiality, or corruption."

The appellate court found that, in reducing the punitive damages award, "the trial court essentially reweighed the evidence and then, based on its assessment of the facts, including some irrelevant facts not of record, determined that the punitive damages awarded were excessive." However, based on evidence, the jury clearly could have found Defendants' conduct reprehensible enough and need for deterrence sufficient to warrant the punitive damages it awarded. The court wrote about Robin and Jamy:

> Robin attempted to surrender the policy on her own despite knowing that all policy owners were required to sign the surrender form. After her attempt to surrender was denied, she obtained Jeremy's permission to sign his signature on the surrender form under what the jury could have found to be false pretenses, i.e., by telling Jeremy that his grandmother wanted to surrender the policy. Next, Robin submitted the surrender form knowing that Mook's signature had been forged. Finally, after negotiating the policy proceeds check with Mook's and Jeremy's forged signatures, defendants distributed more than half of the proceeds to themselves and their son and paid off the mortgage on their house, despite the fact that there were five other owners on the policy. Defendants distributed nothing to Mook until she confronted Robin, after which Robin gave her a check for $45,000.

In addition, while the jury determined plaintiffs' compensatory damages based on the actual surrender value of the policy, the jury had evidence before it that had the policy been in effect at the time of June's death, each owner would have received approximately $434,000. Based on the facts of this case, the appellate court found the punitive damages award by the jury to be appropriate.

GUARDIANSHIP

1. ***In re* Estate of Beetler, 2017 IL App (3d) 160248 (August 29, 2017)**

Agency under power of attorney survives appointment of guardian unless explicitly contained in court order.

The ward's husband and named agent under her power of attorney for health care petitioned the circuit court for permission to make arrangements to reline the ward's dentures. The power of attorney authorized the husband to make any and all decisions for the ward concerning her "personal care, medical treatment, hospitalization and health care."

After a contested guardianship proceeding, another individual – a caseworker for Alternatives for Older Adults – was appointed by the court as plenary guardian for the ward. The court's announced findings and written order appointing the guardian "were silent and did not explicitly address the prior agency created by the ward pursuant to the Illinois Power of Attorney Act." The court directed that "Letters of Guardianship shall issue in accordance with the provisions of this Order." The court clerk issue letters of guardianship, which contained a statement that the plenary guardian shall have the powers to "arrange for and consent to any and all medical and/or dental tests and/or examinations which are reasonably required for the ward" and to "consent to medical and/or dental treatment on behalf of the ward, including surgery, as is reasonably required for the ward, except where contrary to law."

The circuit court denied the husband's request to reline the ward's dentures, finding that the plenary guardianship implicitly terminated the agent's authority to make any health care decisions for his wife.

The Appellate Court reversed, holding that without a written court order *explicitly* directing a plenary guardian to exercise the powers of the principal pursuant to the Power of Attorney Act, the appointment of a plenary guardian does not automatically revoke an existing power of attorney for health care.

The court reasoned that no person had filed a petition with the circuit court pursuant to § 2-10 of the Power of Attorney act seeking to set aside or requesting a judicial determination that the husband's agency should be terminated. Further the court found support in both the Power of Attorney Act and the Probate Act for holding that the agency survives the appointment of a plenary guardian. Section 2-10(b) of the Power of Attorney Act provides as follows:

> (b) If the court finds that the agent is not acting for the benefit of the principal in accordance with the terms of the agency or that the agent's action or inaction has caused or threatens substantial harm to the principal's person or property in a manner not authorized or intended by the principal, the court *may* order a guardian of the principal's person or estate to exercise any powers of the principal under the agency, including the power to revoke the agency, or may enter such other orders without appointment of a guardian as the court deems necessary to provide for the best interests of the principal.

755 ILCS 45/2-10(b) (emphasis added).

Section 11a-17(c) of the Probate Act provides:

> (c) Absent court order pursuant to the Illinois Power of Attorney Act directing a guardian to exercise powers of the principal under an agency that survives disability, *the guardian has no power, duty, or liability with respect to any personal or health care matters covered by the agency.* This subsection (c) applies to all agencies, whenever and wherever executed.
>
> 755 ILCS 5/11a-17(c) (emphasis in opinion).

Thus, because the order appointing the guardian did not terminate the husband's status as agent, and no petition had been filed to revoke the agency, the appointment of the plenary guardian did not automatically extinguish the preexisting and unchallenged power of attorney. The appellate court found that the letters of guardianship (not signed by a judge) contained language beyond the terms contained in the court order.

2. *In re* Estate of Kusmanoff, 2017 IL App (5th) 160129 (August 29, 2017)

Trial court abused its discretion in appointing daughter as plenary guardian of the person and estate of her mother; move to Texas by ward does not divest the Illinois guardianship court of jurisdiction.

The court in *Kusmanoff* considered three appeals concerning the guardianship of the person and estate of MaryLou Kusmanoff. MaryLou and her son, Michael Burgett, appealed the adjudication of MaryLou as a disabled person and the appointment her daughter, Carol Easterley, as guardian over her person and estate. MaryLou also appealed the circuit court's order, which denied her motion to take judicial notice of a Texas judgment finding that a guardianship of her person and estate was not required and to terminate the circuit court's adjudication of her disability.

In April 2015, the circuit court entered an ex parte order adjudging MaryLou to be a disabled person, and appointing her daughter Carol as temporary guardian over her person and estate. Carol alleged that MaryLou was a disabled adult incapable of managing her person or estate of approximately $750,000, and had been the victim of fraud and abuse. About one month after the initial order for temporary guardianship was entered, MaryLou moved with Michael from Illinois to Texas and transferred the majority of her assets to Michael's personal account in Texas.

Carol continued to be temporary guardian for a period of over seven months prior to a hearing on the petition for plenary guardianship, which began on December 2, 2015. MaryLou filed a motion to quash Carol's Illinois Supreme Court Rule 237 notice to compel her attendance at trial. MaryLou argued that she intended to reside in Texas, was a resident under Texas law, and expressed a fear that the circuit court would require her to live in Illinois. MaryLou filed a motion to dismiss on the basis that Texas had acquired jurisdiction over her guardianship proceeding. MaryLou's motions were denied. The circuit court entered an order enjoining the parties from proceeding in a guardianship action in Texas, and appointed Carol as plenary guardian of MaryLou's person and estate in March of 2016.

MaryLou had filed a motion to vacate the April, 2015 order granting the temporary guardianship, arguing that the circuit court erred in adjudging her to be disable without any expert evidence and without a physician's report as required by § 11a-9 of the Probate Act. MaryLou attached a physician's report to her motion, which was in a separate sealed envelope and never opened by the circuit court. On June 1, 2015, the circuit court vacated the adjudication of disability but denied to vacate the guardianship, and extended the temporary guardianship. The court also ordered MaryLou to submit to an evaluation by a physician selected by Carol. Thereafter, on July 6, 2015, MaryLou filed another physician's report, from a board-certified geriatric physician in Texas (not the physician selected by Carol), which was also in a sealed envelope and not read by the circuit court. In both physician's reports submitted by MaryLou (opened by the appellate court), the doctors had found that MaryLou did not need a guardian.

The appellate court reviewed *de novo* the issue of whether the circuit court had subject matter jurisdiction. The appellate court found that at the time Carol filed the original petition, Illinois was MaryLou's "home state" pursuant to section 201(a)(2) of the Guardianship Jurisdiction Act, and thus Illinois (not Texas) has jurisdiction to appoint a guardian over MaryLou's person and estate. 755 ILCS 8/201(a)(2). Further, once the circuit court appointed a guardian or issued a protective order, it has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the order expires by its own terms.

The appellate court pointed out several irregularities in the proceedings. For instance, the Probate Act provides that a temporary guardianship not be extended beyond 120 days, and requires that upon the filing of a petition for guardianship, the court shall set a date and place for a hearing on the petition within 30 days. 755 ILCS 5/11a-4(b)(2), 5/11a-10(a). Both provisions were violated in this case. The appellate court was concerned about the impact of the significant delay in the guardianship proceedings of over a year (MaryLou's funds were frozen except for a $1000 per month allowance, and she was ordered that she could not leave the residence of a nursing home or choose her own caregiver). The appellate court was further troubled by the fact that for the majority of the time the petition for guardianship was pending and temporary guardianship extended, there was no physician's report filed by Carol as required by § 11a-9 of the Probate Act. 755 ILCS 5/11a-9.

"Perhaps most troubling was the circuit court's failure to procure an evidentiary statement by MaryLou regarding her preferences of caregiver and residence and the circuit court's utter disregard for the preferences that were communicated by MaryLou to the various witnesses in the case and through her attorney." Section 11a-12(d) of the Probate Act requires that the circuit court give due consideration to the preference of the disabled person as to a guardian. 755 ILCS 5/11a-12(d). MaryLou requested to be excused from being present at the hearing, which the court denied, even though § 11a-11(a) of the Probate Act , which provides for the potential ward to be excused upon the mere showing that she refused to be present. The circuit court could have ordered on its own motion that the testimony of a witness who is located in another state be procured by deposition or other means, including by telephone or other audiovisual or electronic means. 755 ILCS 8/106. Instead, the circuit court guessed that she would want to stay in Texas but quoted the Rolling Stones saying, "You can't always get what you want."

The appellate court considered the possibility of ordering a new trial based on the cumulative impact of the procedural irregularities, combined with its conviction that the circuit court did not review or consider the medical evidence in determining whether MaryLou was disabled.

However, because the appellate court did not wish to prolong the proceedings any further, leaving MaryLou's rights in limbo, it elected to review the record to determine the propriety of the circuit court's order in light of the applicable legal standards and its standard of review.

The appellate court found that there was no clear and convincing evidence in the record from which the circuit court could conclude that MaryLou's mild to moderate cognitive deficits, manifesting as short-term forgetfulness and periods of confusion, prevented MaryLou from communicating to others regarding her desires with respect to her living arrangements and the direction of her care. Consequently, the appellate court reversed, without remanding, the circuit court's finding that MaryLou required a guardian of her person.

The appellate court affirmed the circuit court's finding that MaryLou required a guardian of her estate, but it found that there was no clear and convincing evidence in the record as to whether MaryLou lacked merely some, or lacked all, capacity to manage her estate. The circuit court was required to determine whether a limited guardianship would be appropriate based on the level of MaryLou's disability. It found that the circuit court's conclusion that a plenary guardian was required was against the manifest weight of the evidence. It vacated the circuit court's finding that a plenary guardianship was required and remanded for the limited purpose of an evidentiary hearing with respect to the exact parameters of the guardianship of MaryLou's estate that are necessary to effectuate the requirements of §§ 11a-3(b) and (c) of the Probate Act.

In addition, the appellate court instructed the circuit court that, should MaryLou so choose, she be permitted to be absent from the hearing pursuant to § 11a-11(a) of the Probate Act, and that her testimony be procured through electronic or other means as set forth in § 106 of the Guardianship Jurisdiction Act. 755 ILCS 8/106.

Further, the appellate court found that, no matter the cause or source of MaryLou's feelings, the record expressed her strong and unequivocal desire that Carol not serve as guardian of her estate. Section 11a-12(d) of the Probate Act provides in part:

> (d) The selection of the guardian shall be in the discretion of the court, which shall give due consideration to the preference of the person with a disability as to a guardian, as well as the qualifications of the proposed guardian, in making its appointment. However, the paramount concern in the selection of the guardian is the best interest and well-being of the person with a disability.

The appellate court held that under the circumstances, the circuit court abused its discretion in not appointing a third party to act as limited guardian of MaryLou's estate. It vacated that portion of the circuit court's order appointing Carol as guardian and remanded for proceedings in which the circuit appoints a corporation pursuant to § 11a-5(c) of the Probate Act as guardian of her estate.

Finally, the appellate court found no prejudicial error with regard to the circuit court's failure to take judicial notice of the Texas judgment in the competing guardianship proceedings. It pointed the circuit court to § 11a-20 of the Probate Act and the standards set forth therein for considering MaryLou's new petition to terminate. The appellate court noted that, in light of its opinion, MaryLou's petition should only be adjudicated as it pertains to the limitations of the guardianship of her estate, as the appellate court had held that Carol did not prove that MaryLou required a guardianship of her person.

3. *In re* Leon Rocker, 2017 IL App (4th) 170133 (December 19, 2017)

Court denied petition to terminate guardianship where ward, suffering from bi-polar disorder, yet "decisional," continued the practice of sending money to internet solicitors.

Petitioner-Appellant, Leon C. Rocker, appealed the trial court's denial of his petition to terminate the guardianship of his estate. Respondent argued (1) the trial court's order denying the petition to terminate guardianship was against the manifest weight of the evidence and (2) the trial court abused its discretion by admitting hearsay. The appellate court affirmed trial court's judgment.

In 2011, a plenary guardian was appointed for guardianship of the person and estate of Rocker. The guardianship was established because family members discovered Rocker suffered from bipolar disorder, causing him to send more than $100,000 to individuals soliciting money over the Internet. In 2013, the guardianship of Rocker's person was terminated in an agreed stipulation by Rocker and his guardian, and in 2015, First Financial Bank, was appointed successor guardian of Rocker's estate.

In 2016, Rocker filed a "Petition to Discharge Guardian and Terminate Guardianship." Rocker alleged that he was no longer a disabled adult and no longer required a guardian. Rocker further alleged that he had the capacity to perform the tasks necessary for the management of his person and estate. To his petition, Rocker attached a physician's report, in which two medical professionals, Dr. Roberts and Dr. Whisenand, indicated that Rocker no longer suffered from a disability preventing him from managing his estate.

In 2016, the trial court held a hearing on Rocker's petition to terminate guardianship. At the hearing, the court heard testimony from Dr. Roberts, Dr. Whisenand, Rocker, and a trust officer from First Financial Bank.

Dr. Roberts testified that he had initially advocated for the guardianship of Rocker's person and estate because Rocker's mental condition (bipolar disorder) caused him to be unable to manage his person or estate. However, in the past two or three years, Rocker's condition had improved, and Dr. Roberts no longer believed guardianship was appropriate, despite the fact that Rocker made poor financial decisions. Dr. Roberts testified that he was aware that Rocker sent money to Internet solicitors, many of whom appeared to be involved in scams. However, Dr. Roberts opined Rocker's decision to send money to others was no longer the product of a mental illness; rather, he believed Rocker was decisional and was making his decision of his own volition.

Dr. Whisenand, who agreed with Dr. Robert's medical assessment, testified that Rocker's bipolar disorder was a condition he will have throughout his lifetime, but bipolar disorder may be effectively managed and go into remission. Based upon his examination of Rocker, he believed Rocker was capable of making decisions free from the effects of bipolar disorder, even if those decisions were poor financial decisions.

The trust officer for First Financial Bank testified that Rocker's estate was currently valued at approximately $420,000. She testified that in 2016 Rocker had wired more than $9,600 to individuals in several countries and Rocker had indicated to her that he planned to continue sending money to individuals in need. The trust officer believed that Rocker was incapable of managing his finances and therefore believed that guardianship of his estate was still necessary.

The court appointed a GAL for Rocker, who opined, “[i]f left to his own devices, Mr. Rocker will immediately return to the [I]nternet and send whatever money is requested of him from people sitting at Internet cafes in Nigeria and Jamaica on the belief that this will eventually make him rich.” The GAL noted that Rocker had no intention of ceasing the practice of sending money to people oversees.

Rocker himself had testified that he had no intention of ceasing the practice. Rocker testified that he is a self-employed gardener and has between 35-50 clients. He kept the money he made from his gardening business, which was not managed by his guardian. Rocker testified that he sent money to people in need for religious and altruistic purposes, and in some instanced, for money in return. Rocker was previously the victim of a scam, in which he lost $106,750. The loss of this sum of money was the event which led his family to petition the trial court for guardianship.

In 2017 the trial court held a second hearing on Rocker’s petition to terminate guardianship. The trust officer was recalled to testify. She testified that she accompanied Rocker to a Verizon store for him to obtain a new cellular phone. The appointment took longer than expected, and Rocker needed to leave so he could get to a gardening job. The officer stated that she would finish the appointment and bring Rocker’s new phone to him afterward. While she was waiting at the Verizon store, Rocker received several phone calls, and she wrote down the numbers. Over the objection on hearsay grounds, the officer testified that she had spoken to a person named Williams, who had offered her a “promotion” for her to send money in return to receive more money. Again over a hearsay objection, four emails were entered into evidence purporting to give Rocker a cash award of 2.5 million dollars. Following her conversation with Williams, she received up to 25 phone calls a day from people soliciting money. The officer also reviewed Rocker’s Verizon statement, which notated several international phone calls. She searched the phone numbers listed on the statement by using a website called “Spy-Dialer,” a site that allows one to input a phone number and the site will generate a report, which will show the owner of the number and the location to which the number is associated. The officer prepared a document, which listed the numbers, the location to which the phone number was associated, and relevant notes (i.e., whether the number was disconnected). The document was entered into evidence over a hearsay objection. The officer reiterated her concern about Rocker’s ability to manage his estate and indicated her belief he remained financially vulnerable. She expressed concern about Rocker’s ability to say no to people who contact him soliciting money.

The trial court denied Rocker’s petition to terminate guardianship. The trial court indicated that this was not a case where the ward merely used his money in eccentric or bizarre ways. Rather, this was a case where Rocker was not logical or rational with respect to the use of his funds and was incapable of resisting the Internet and phone solicitations. The court indicated there was no basis for Rocker’s belief his funds were being used for charitable purposes or for any benefit to him, as he claimed. The court concluded Rocker was still in need of guardianship of his estate so as to prevent it from suffering and waste.

Rocker asserted the trial court abused its discretion by allowing the bank officer to testify about the basis of her opinion that Rocker remained susceptible to scammers, specifically about (1) the conversation she had with Williams, (2) the four e-mails she received and (3) the document prepared by the bank officer, outlining the locations from which certain phone calls to her cellular phone had originated. Rocker argued each of these bases constituted inadmissible hearsay.

The appellate court defined hearsay as an out-of-court statement offered to prove the truth of the matter asserted, which is generally inadmissible. The appellate court found that the purpose for admitting the e-mails and testimony was to show why the bank officer believed Rocker remained susceptible to scams. The conversation with Williams and the e-mails were offered not to prove the truth of the statements contained therein; rather they were offered to show the statements were incredible, thereby supporting the banks officer's opinion of Rocker's continued susceptibility. The appellate court held that the trial court did not abuse its discretion by admitting the e-mails or allowing the bank officer to testify about her conversations with Williams because this evidence, by definition, was not hearsay.

With respect to the bank officer's source of information from caller-identification feature of her cellular phone and the computer-generated output of the Spy-Dialer website, the appellate court found that this information was not hearsay, citing *People v. Caffey*, 205 Ill. 2d 52, 95 (2001) ("The information displayed on a caller ID device is not hearsay because there is no out-of-court asserter."). Similarly, the computer-generated output from Spy-Dialer was not hearsay; there was likewise no human making an out-of-court assertion.

However, the appellate court found that a hearsay question was created by the fact the bank officer physically recorded the information into a document, as the recordation was an out-of-court statement written by a declarant. The appellate court found that the computer-generated information was not hearsay, and Rocker had not persuaded it that the recordation of this information was hearsay. The appellate court concluded that the trial court did not abuse its discretion by admitting the document.

The appellate court found that there was substantial evidence presented – including Rocker's own admission – showing he intended to continue sending his money to Internet and phone solicitations many of which appear to be scams. It noted that Rocker had given away thousands of dollars even since the guardianship was established. Prior to the guardianship, Rocker had given away in excess of $100,000, and very likely much more. The appellate court found that it was clear that Rocker had a permanent mental illness – he continued to have bipolar disorder. While stable, he continued to receive treatment and medications. The court also found that both Dr. Roberts and Dr. Whisenand noted his mental condition could make him susceptible to financial manipulation, and Whisenand had only limited awareness of Rocker's financial choices. The appellate court found that although Rocker's behavior and choices may be "decisional," they went far beyond poor financial decision making. The appellate court concluded that the petitioner had not established by clear and convincing evidence that he was no longer disabled or that he was fully able to make financial decisions free from the effects of his disorder and manage his estate so as to prevent waste. The court also concluded that it was not clearly evident from the record that Rocker was capable of managing his own estate such that his interest would be best served by terminating the guardianship; instead, the evidence tended to show his interests would be best served by continuing the guardianship to prevent further large-scale waste of his estate, especially in light of his own admission he intended to continued sending money to Internet solicitors.

POWERS OF ATTORNEY

1. Epstein for Estate of Polchanin v. Bochko, 2017 IL App (1st) 160641 (May 11, 2017)

Credit union not liable for funds converted using power of attorney

Defendants Bochko and Shchudlo were employed as caregivers for 95-year old Anna Polchanin, and in April, 2008 obtained power of attorney for property and health care for Anna. The next month, on May 31, 2008, Shchudlo took Anna to Selfreliance Ukrainian American Federal Credit Union to open a joint bank account, where Shchudlo already had an account. Neither Anna nor Shchudlo presented the power of attorney when the joint account was opened because Anna was present and signed her own name to the account agreement. The joint account was opened with $50,000 of Anna's money from an account at a different bank.

"Between May and June 2008," more than $300,000 was transferred from Anna's other accounts to the joint account. Between July and October, 2008, Bochko and Shchudlo wired more than $250,000 from the joint account to bank accounts in the Ukraine.

A licensed psychiatrist evaluated Anna on October 30, 2008 and concluded that Anna was disabled by dementia and opined that her dementia had been present for several years, and testified that Anna was suffering from dementia when she went to Selfreliance on May 31, 2008. Based on this physician's report, the circuit court declared Anna a disabled person and appointed the public guardian as plenary guardian of Anna's estate and person. Around that time or thereafter (as the opinion points out in a footnote), Bochko was convicted of elder abuse and financial exploitation and was incarcerated, and Shchudlo fled the country.

The public guardian filed a petition for a citation to recover assets on February 19, 2010, including from Selfreliance. Anna died on May 7, 2011, and the court appointed the Cook County public administrator as the supervised administrator of her estate.

The public guardian's petition contained two counts against Selfreliance. The first alleged that Selfreliance breached a duty of care owed to Anna. The allegation stated that "Banks, Savings and Loans, and Credit Unions generally owe their customers a duty of ordinary care to maintain and guard a customer's accounts, and protect the account holder from fraud, abuse and waste." The second count against the credit union sought rescission of the May 31, 2008 account agreement, because Anna was incapable of entering into contracts at that time, and sought an order that Selfreliance reconvey all of the funds from the fraudulent wire transfers.

The credit union filed for summary judgment, contending that (1) it did not owe a duty of ordinary care to maintain and guard a customer's accounts and protect the account holder from fraud, abuse, and waste; and (2) there was no evidence suggesting that it knew or should have known that Anna was disabled when she came to Selfreliance to open the joint account. The circuit court granted Selfreliance's motion, finding no duty of ordinary care between a depositor and a bank, except with regard to negotiable instruments, and wire transfers are not negotiable instruments. The court also found that there were no material facts to establish that Selfreliance either knew or should have known of Anna's condition at the time she opened the joint account.

The appellate court affirmed the trial court's granting of summary judgment for the credit union. By the time respondent filed for summary judgment, it did not dispute Anna's actual incapacity at the time she opened the joint account, an employee of the credit union testified that when the account was opened, Anna did most of the talking, signed her own name, and walked without assistance. The physician who filed his report testified that he could not offer an opinion regarding how Anna presented herself on the date the joint account was opened. Although petitioner contend that respondent's knowledge of Anna's incapacity was not relevant, the court wrote, "it is clear from the evidence presented that Selfreliance entered into the contract in good faith, without taking advantage of its position and in ignorance of Anna's mental capacity." Further, Selfreliance obtained no benefit from the transaction and was not seeking to recover anything from Anna.

2. *__In re__* __Estate of Thomas F. Shelton__, 2017 IL 121199 (May 18, 2017)

Named successor agent under power of attorney for property does not owe a fiduciary duty to principal and presumption of fraud does not arise.

In 2011, Thomas Shelton quitclaimed farmland to his son Rodney and Rodney's wife. At that time, Rodney was designated as the successor agent under both Thomas's and Doris's powers of attorney. Thomas and Doris had designated each other as agent. One of the two plots of farmland was owned entirely by Thomas. The other was owned jointly by Thomas and Doris. The quitclaim deed pertaining to the second plot was signed by Thomas individually and as "attorney-in-fact" for Doris. As of the date of the deeds, Doris had not been adjudicated incompetent or disabled by a court, nor had a licensed physician certified that Doris was unable to give prompt and intelligent consideration to business matters.

Rodney's sister Ruth Ann Alford was named as executor of the estates of both of her parents, who died in 2012. Ruth Ann filed two actions, as executor of each estate, against Rodney.

In the action on behalf of Thomas's estate, Ruth Ann alleged that Doris had been diagnosed with dementia and was incompetent at the time Thomas executed the deeds; and accordingly that Rodney, not Doris, was Thomas's agent when the deeds were executed. The estates further alleged that any conveyance of property from a principal to an agent under a power of attorney is presumed fraudulent. The estate requested that the deeds be set aside and the property returned to Thomas's estate. Rodney argued that he was not Thomas's agent since Doris was not "incompetent" as defined in the power of attorney, and argued further that a *successor* agent has no fiduciary duties to a principal and no presumption of fraud arises with respect to transfers to a named successor agent.

In response to Rodney's motion to dismiss, the estate filed a supplemental physician's report, dated January 20, 2014, averring that on December 1, 2011, Doris was incompetent, unable to manage her personal affairs, and unable to give prompt and intelligent consideration to her business matters.

In the action on behalf of Doris's estate, Ruth Ann alleged that a successor agent owes statutory duties to the principal under § 2-10.3(b) of the Power of Attorney Act, and that Rodney breached his duty (as successor agent to Thomas for Doris) in not notifying Doris of Thomas's breach or taking action to safeguard her interests. Rodney argued that section 2-10.3(b) did not apply to him because he was only a successor agent and had not obtained the status of agent at the time of the transactions. Section 2-10.3(b) of the Power of Attorney Act provides as follows:

> (b) An agent is not liable for the actions of another agent, including a predecessor agent, unless the agent participates in or conceals a breach

> of fiduciary duty committed by the other agent. An agent who has knowledge of a breach or imminent breach of fiduciary duty by another agent must notify the principal and, if the principal is incapacitated, take whatever actions may be reasonably appropriate in the circumstances to safeguard the principal's best interest.

The circuit court dismissed both actions pursuant to §§ 2-619(a)(9) and 2-615 of the Code of Civil Procedure. The appellate court affirmed dismissal of the action involving Thomas's estate, holding that a certification of incompetence signed two years after the execution of the deeds could not retroactively establish Doris's incompetency. However, the appellate court reversed the dismissal of the action involving Doris's estate, holding that the duties imposed by § 2-10.3(b) apply to an individual designated as successor agent.

The Supreme Court held that both cases were properly dismissed by the circuit court. With respect to dismissal of the action pertaining to Thomas's estate, the Illinois Supreme Court confirmed that a fiduciary duty is not imposed on someone by virtue of being named as a successor agent in a power of attorney. The Power of Attorney Act, the court stated, "recognizes that it is the agent's exercise of power pursuant to the authorizing document which triggers the agent's duty to the principal." (citing 755 ILCS 45/2-7(a)). Until a contingency occurs resulting in the initial agent ceasing to act, the successor agent has no authority to act. Thus, Rodney did not owe a fiduciary duty to Thomas when the deeds were executed. In the action brought by Thomas's estate, the executor did not claim that an agent other than Rodney breached a duty, only that Rodney had breached his own fiduciary duty to Thomas, which the court held did not exist merely due to Rodney being named as successor agent. Similarly, no presumption of fraud arises with respect to a principal and one named a successor agent until that agent begins to act.

The addressed the supplemental physician's report filed by Ruth Ann. Noting that powers of attorney must be strictly construed, the court looked to the language designating a successor agent "*if and while* the person is a minor or an adjudicated incompetent or disabled person or the person is unable to give prompt and intelligent consideration to business matters, as certified by a licensed physician." (emphasis in original). This language, the court explained, means that a physician's report "is meant to serve as a triggering event that nullifies the primary agent's authority at the time of the certification and in the future, until the certification is rescinded." The court held that a physician's certification of incompetency must have been rendered prior to the conveyances at issue in order to establish Doris's incompetency.

With respect to dismissal of the action pertaining to Doris's estate, which was dismissed pursuant to 5/2-615 a facially failing to state a cause of action, but reversed by the appellate court, the Illinois Supreme Court conducted a *de novo* review of the construction of § 45/2-10.3 of the Power of Attorney Act. The estate had alleged that Thomas, as "primary agent," breached his fiduciary duty to Doris, and that Rodney therefore had a duty to notify Doris of that breach and take action to safeguard Doris's best interests.

The court found that the statute refers "exclusively to the liability and duties of an 'agent' with no mention of the qualifying word, 'successor.'" The term "agent" is "specifically defined in section [755 ILCS 45/2-3(b)] as 'the attorney-in-fact or other person designated to act for the principal in the agency.'" As the designated successor agent, Rodney was authorized to act on Doris's behalf only in the event of Thomas's death, incompetence, resignation, or refusal to accept the office. Thus, on the date of the conveyances, Rodney was not an "agent" under the plain and unambiguous language of § 2-10.3. If the legislature had intended to impose statutory liabilities and duties on successor agents, it would have made its intention explicit. However, "once a successor agent has assumed the duties of an agent, he may not participate in or conceal a breach of fiduciary duty committed by another agent, which may include a predecessor agent or co-agent."

COMMENT: This author believes the Supreme Court reached the correct result here. Importantly, it was *Thomas* who executed the deeds, and Thomas was never alleged to have been incapacitated in any way. This raises the question that often arises in "presumption of fraud" type cases as to whether the mere existence of a fiduciary relationship causes the presumption to apply, or whether the transaction must be alleged to have been accomplished in some way making use the role giving rise to the fiduciary relationship. For example, even if Thomas had named Rodney as agent effective upon signing the power of attorney, but Thomas was never incompetent and the power of attorney was not used to transfer Thomas's interest, why should the presumption arise at all? The court rejected the argument that a presumption of fraud should arise when Rodney was named as a successor agent but had not never acted under the agency, and interpreted the Power of Attorney Act to not impose duties on a successor agent until that agent acts.

The somewhat disturbing portion of this opinion is the court's refusal to allow the supplemental physician's report to establish Doris's incapacity at the time of the conveyances. With respect to the timing of the physician's report, the estate argued "that the appellate court's construction of the power of attorney imposes an unreasonable burden on heirs and estate executors who may have no opportunity to discover that a fraudulent transaction has taken place until after the principal is deceased." As any experienced trusts and estate litigator can tell you, this is a legitimate concern. While the court could rely on the fact that Thomas was acting as Doris's agent and Rodney's duties to Doris did not arise in any event while he was merely named as a successor agent, if the court had found that Doris was incompetent at the time of the conveyances and therefore Rodney's successor agent role *for Thomas* had been "triggered," perhaps the presumption of fraud would have applied to the conveyances? What if the physician's report had been submitted six months after the transaction instead of over two years later? Perhaps there will be distinguishing facts in a subsequent case, but here the court seemed comfortable that it was Thomas, never incompetent, who executed the deeds.

3. <u>Collins v. Noltensmeier</u>, 2018 IL App (4th) 170443 (April 5, 2018)

Agent under power of attorney does not have authority to change a beneficiary designation to herself unless the power of attorney specifically authorizes self-dealing.

In *Noltensmeier*, defendant Patricia Noltensmeier and Billy D. Collins were involved in a long-term romantic relationship when Billy died on January 23, 2011. Plaintiffs Kenny Collins and Linda Richard were Billy's brother and niece. Defendant acted as Billy's caretaker. About one week before he died, Billy executed a will and a property power of attorney. Billy's will referred to Patricia as his "domestic partner" and named her as executor and sole beneficiary of his real property, personal property, and the residue of his estate. Billy's power of attorney named Patricia as his agent.

Plaintiff Kenny Collins filed a will contest, alleging that Billy was of unsound mind, subjected to undue influence from Patricia, and not told the document he was signing was a will. Separately, Kenny and Linda filed a complaint against Patricia related to the power of attorney, alleging that she breached her fiduciary duty owed to Billy and wrongfully converted Billy's IRA funds to herself. Plaintiffs alleged defendant wrongfully and without authorization changed the beneficiary of Billy's IRA, valued at approximately $45,000, from plaintiffs to herself. Defendant had completed the bank's change-of-beneficiary form by using her authority as the agent for Billy.

Paragraph three of the power of appointment indicated the agent had the following powers, in addition to those listed previously: "power to make gifts, exercise powers of appointment, name or change beneficiaries under any beneficiary form or contractual arrangement."

Plaintiff's moved for summary judgment, claiming that Patricia "breached her fiduciary duty because the added language in section three of the power of attorney did not authorize her to make the change of beneficiary to herself." The trial court granted plaintiff's motion for summary judgment, holding:

> The power of self-dealing, i.e., to change the beneficiary to herself, was not included in paragraph [three] and defendant was therefore not entitled to make that change. The original designation of beneficiary form … remains valid and [plaintiffs] are each 50% beneficiaries of that [IRA]….

Defendant argued that the court had overlooked the added language in paragraph three of the power of attorney, which specifically authorized her to change the beneficiary designation of the IRA. At the hearing on the motion to reconsider, the trial court stated that "[t]here is a duty of someone acting under a power of attorney as agent there has to be a fiduciary duty [sic]." The trial court also referred to cases cited from other jurisdictions, and concluded that "the general tenor and principles of those cases are on point that if the recipient of a power of attorney is going to be able to self-deal, in other words, to make gifts and transfers to himself or herself, then there has to be specific authority, in my opinion, granted in the power of attorney." The court then went on:

> The presumption is it's fraudulent and it has to be overcome by clear and convincing evidence. I don't think there is. I have not seen any evidence. I would have to assume there is evidence, and I don't think from what we discussed before a little earlier there is any extrinsic evidence that would come in, and I think the motion for summary judgment is appropriate, and I will confirm my ruling from last August.

The appellate court framed the issue as whether plaintiffs were entitled to judgment as a matter of law based on the language included in the power of attorney, and whether than language granted defendant the authority to change the beneficiary on Billy's IRA to herself.

The appellate court affirmed the trial court's granting of summary judgment to the plaintiffs. The court looked to § 3-4 of the Power of Attorney Act, which provides:

> [T]he agent will not have power under any of the statutory categories (a) through (o) to make gifts of the principal's property, to exercise powers to appoint to others or to change any beneficiary whom the principal has designated to take the principal's interests at death under any will, trust, joint tenancy, beneficiary form or contractual arrangement.

Further, the court wrote, "[a] power of attorney creates a fiduciary relationship as a matter of law." Thus, "[t]he mere existence of a fiduciary relationship prohibits the agent from seeking or obtaining any selfish benefit for herself; if the agent seeks or obtains such benefit, the transaction is presumed to be fraudulent." The court acknowledged, however, that ", the presumption of fraud is rebuttable if it can be shown that the agent exercised good faith and did not betray the confidence placed in her."

A rebuttable presumption "is not evidence in itself, but arises as a rule of law or legal conclusion from the facts proved. These presumptions do not shift the burden of proof. Their only effect is to create the necessity of evidence to meet the prima facie case created thereby, and which, if no proof to the contrary is offered, will prevail." Here, the court wrote, because the transaction is presumed fraudulent, "defendant must demonstrate either (1) the language of the power of attorney itself authorized the act of self-dealing or (2) by some other evidence, Billy intended, without undue influence, to authorize defendant to so act."

The court ruled that the power of attorney *did not* authorize Patricia to change beneficiary designations to herself. Despite the express provision in the power of attorney that an agent had the power to "name or change beneficiaries under any beneficiary form or contractual arrangement," the court held that such authority did not include naming oneself as beneficiary because "the general powers granted to defendant pursuant to paragraph three did not specifically include the power to change the beneficiary on Billy's IRA to herself, a presumed fraudulent act of self-dealing."

The court continued, "[a]bsent the expression of authority in the document itself to designate herself a beneficiary, it is presumed defendant engaged in an act of fraudulent self-dealing." The court then went on rule that no evidence "exists in the record before us" to rebut the presumption of fraud. "[N]othing in the record suggests defendant acted in a manner directed by Billy, that Billy received separate and independent advice on the matter, or that he intended to name defendant, while removing plaintiffs as beneficiaries on his IRA." Because defendant did not carry her burden of rebutting the presumption of fraud, summary judgment in favor of the plaintiffs was affirmed.

PARENTAGE

1. ***In re* Estate of Jagodowski, 2017 IL App (2d) 160723 (August 28, 2017)**

Administrator of estate could not challenge presumed parenthood after limitations period provided in Parentage Act.

Prior to his death, while married, the decedent's wife gave birth to a child, Joanna. The decedent and the mother subsequently divorced, Joanna went to live with her mother in Canada, and the decedent consistently paid child support for Joanna until she turned 18. Decedent died intestate. The administrator of decedent's estate filed a motion to establish heirship, arguing that Joanna was not decedent's biological or adopted daughter and, therefore, his heirs were his mother and his sister. Joanna maintained that the administrator lacked standing to challenge the existence of a parent-child relationship and that, nevertheless, such challenge was time-barred by the Parentage Act.

The circuit court denied the administrator's motion and certified two questions to the appellate court: (1) whether the limitations periods under the Illinois Parentage Act apply in a probate proceeding, and (2) whether the administrator of an estate has standing to maintain a proceeding to adjudicate the nonexistence of a parent-child relationship.

The administrator argued that the Probate Act applies to a motion to determine heirship and that any limitations period under the Parentage Act is inapplicable to such a motion, and that heirship can be conclusively decided only after the death of a decedent.

The appellate court held that the Parentage Act's limitations on declaring the nonexistence of a parent-child relationship apply in a probate proceeding to determine heirship where a party is seeking to declare the nonexistence of the decedent's parent-child relationship with his presumed child. The court addressed three cases cited by the administrator from other states involving situations where parenthood was trying to be established – not de-established – where the courts ruled that the state's probate act applied to determining heirship, not the parentage act. The court addressed two cases cited by Joanna from other states involving situations where the nonexistence of the parent-child relationship was being alleged, where the courts ruled that the parentage act limitations applied over the probate act.

The Illinois Parentage Act, in § 205(b), contains a specific two-year limitations period (and a statute of repose once the child turns 18) for challenging presumed fatherhood; in this case, Christopher was presumed to be Joanna's father because he was married to her mother when she was born. Further, while the Probate Act provides that the court may ascertain and declare heirship, the Probate Act does not speak to the determination of parentage. "[H]eirship is the context for the parentage issue," but "the Probate Act's rules for descent and distribution do not define the parent-child relationship or provide a mechanism for challenging it."

The appellate Court further found that the administrator would only have standing to adjudicate the nonexistence of a parent-child relationship if Christopher, as Joanna's presumed father, would have standing. Section 602(j) of the Parentage Act, entitled "Standing," provides that a complaint to adjudicate parentage may be maintained by "a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor." This clearly includes a decedent's administrator. The court then pointed back to the limitations periods in the Parentage Act to answer the question of standing. Christopher would have "had standing" if he brought an action within two years of obtaining knowledge of the relevant facts, but in no case after Joanna turned 18. 750 ILCS 46/205(b). Notwithstanding § 205(b), section 608(b) of the Parentage Act provides that a "proceeding seeking to declare the non-existence of the parent-child relationship between a child and the child's presumed father may be maintained at any time … if the court determines that the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception."

The appellate court therefore held that "standing" under the Parentage Act will turn on the facts of the particular case. If the circuit court found that the decedent and his wife did not co-habitate and did not engage in sexual intercourse at Joanna's probable time of conception, the administrator would have "standing" to contest paternity.

COMMENT: The court's discussion of the "standing" issue seems to be a recitation of the limitations period applicable to contesting the parent-child relationship when one is presumed, and the exception to that limitation contained in 750 ILCS 46/608(b). Section 602(j) seems to clearly confer "standing," in the traditional sense, on the administrator, even though the administrator's action may otherwise be barred under the Parentage Act.

ATTORNEYS

1. Shutack v. Sidley Austin LLP, 2017 IL App (1st) 160747-U (May 23, 2017)

Legal malpractice claim barred under statute of repose.

In this unpublished opinion, the court upheld the dismissal of a cause of action for legal malpractice pursuant to the statute of repose contained in 735 ILCS 5/13-214.3. The facts as pleaded in the complaint were taken as true for purposes of the appeal of the dismissal.

The plaintiff alleged facts as follows. Sidley had prepared an estate plan for plaintiff's father, John Shutack, which provided plaintiff and his four step-siblings 20% each of John's estate. On two separate occasions, John had communicated with an attorney at Sidley that he wanted to modify his estate plan to provide 50% of his estate to plaintiff. The attorney allegedly dissuaded John from modifying his estate plan, and John did not do so. The plaintiff also alleged a conflict of interest due to the firm's prior representation of one of the step-siblings. Plaintiff alleged that ""[b]ut for defendants' actions, John would have changed his estate plan such that [plaintiff] would have received 50% of the value of the estate." There was no dispute that John died on July 28, 2013 and that the alleged malpractice claim accrued on that date. There was also know allegation that the plaintiff did not know of his claim or was restricted from filing it.

A probate estate was opened for John and the deadline for filing claims against the estate expired on March 11, 2014. Plaintiff filed his malpractice claim on July 8, 2015. Defendant argued that the claim was barred by the statute of repose set forth in 735 ILCS 5/13-214.3, since it was filed after the claims period had expired, while plaintiff argued the claim was timely because it was filed within two years of John's death. Plaintiff argued that section 13-214.3(d) is unconstitutional, in that it (1) violates the equal protection clause of the Illinois Constitution because it treats plaintiffs differently depending on whether or not a probate estate is opened; (2) violates the remedies clause of the Illinois Constitution because it "denied those injured by the poor drafting of trust documents any remedy for legal malpractice;" and (3) violates the special legislation clause of the Illinois Constitution because it applies "to a small class of lawyers solely if they are fortunate enough to have their former client die and his executor open a probate estate."

Section 5/13-214.3(b) provides that a legal malpractice claim must be filed within two years from the time the person bringing the action knew or reasonable should have known of the injury, and § 5/13-214(c) provides that such an action can in no event be filed more than six years after the date of the act or omission. However, section 5/13-214.3(d) provides:

> (d) When the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered, the action may be commenced within 2 years after the date of the person's death unless letters of office are issued or the person's will is admitted to probate within that 2 year period, in which case the action must be commenced within the time for filing claims against the estate or a petition contesting the validity of the will of the deceased person, whichever is later, as provided in the Probate Act of 1975.

The circuit court found that the malpractice action was filed more than one year late, and dismissed it with prejudice without ruling on the plaintiff's constitutional arguments. In the trial court, defendant had argued that plaintiff had not notified the Attorney General of his constitutional challenges as required by Supreme Court Rule 19. The appellate court noted that by failing to do so, the plaintiff had forfeited his constitutional arguments on appeal. But, since the defendant did not pursue the forfeiture argument on appeal but addressed the plaintiff's constitutional challenges on their merits, the appellate court "therefore consider[ed] plaintiff's arguments despite his forfeiture."

Because plaintiff was not part of a suspect class, and the statute of repose does not impinge on a fundamental right, the rational basis test applied for purposes of the equal protection argument. In *Poullette v. Silverstein*, 328 Ill. App. 3d 791 (1st Dist. 2002), the court had rejected a nearly identical equal protection challenged to section 13-214.3(d), finding that the section "provides a claimant with a reasonable time after the decedent's death to pursue a cause of action; it balances the defendant's right to be free of stale claims; and addresses the need for closure with respect to matters related to a decedent's estate as necessitated by the Probate Act." Plaintiff did not supply a persuasive argument or reason to depart from *Poullette*.

Plaintiff argued that § 13-214.3(d) violates the special legislation clause of the Illinois Constitution, which provides, "[t]he General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter of judicial determination." Plaintiff contended that estate planning attorneys are provided a special benefit without any reasonable basis where their deceased clients' wills are admitted to probate or where letters of office are issued. The court responded, "[s]ection 13–214.3(d) is applicable to actions against all attorneys regardless of their area of practice so the convenient characterization of the argument as one that applies only to estate planning attorneys is disingenuous at best." Section 13-214.3(d) applies to all legal negligence actions regardless of the area of practice involved.

Plaintiff argued that § 13-214.3(d) violates the remedies clause of the Illinois Constitution, which provides, "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation." The court summed up plaintiff's argument by writing, "plaintiff appears to suggest that the fact that section 13–214.3(d) of the Code renders his claim time barred leaves him with no remedy means that section 13–214.3(d) of the Code violates the constitution." Then the court said, "[t]hat is simply not the case." Rather, plaintiff has no remedy because he failed to file his complaint on time.

2. <u>Johnson v. Stojan Law Office, P.C.</u>, 2018 IL App (3d) 170003 (January 12, 2018)

Attorney does not owe a duty to successor trustees of a trust.

In *Johnson*, the plaintiff filed a legal malpractice action against the attorney who drafted trust documents and a trust amendment for his mother, Jean Sztajer. The complaint alleged that Stojan breached various duties it owed to him, who had been a successor co-trustee of the trust.

Sztajer hired attorney Stojan to draft a revocable trust. The trust named her three children, including plaintiff, as successor co-trustees. After Sztajer was diagnosed with Alzheimer's disease, she executed a special power of attorney that gave her daughter the power to act as trustee in her place. Stojan helped Sztajer amend the trust to name her daughter as successor trustee and her sons as second successor trustees. A doctor found Sztajer competent to make life decisions two months after the amendment. Sztajer's sons, Bret and Sean Johnson, began questioning distributions from the trust and complained to the Illinois Department of Aging, but no misconduct was found.

After Sztajer died, the Johnson brothers sued Stojan, alleging legal malpractice. The trial court granted summary judgment to Stojan, finding that he did not owe a duty to the brothers. Sean Johnson was dismissed from the case, but Bret appealed, arguing that Stojan owed them a duty as co-trustees and beneficiaries.

The appellate court began by noting that whether a duty exists is a matter of law and an appropriate issue for summary judgment, which is reviewed *de novo*. The appellate court affirmed the summary judgment, holding that Stojan did not owe a duty to the Johnson brothers. According to the court, Sztajer was competent when she amended the trust to name her daughter as successor trustee, so the Johnson brothers never became co-trustees of the trust.

Stojan argued that he never represented plaintiff because plaintiff never became a co-trustee. The plaintiff argued that a non-client may sustain a legal malpractice claim if he proves the attorney-client relationship's purpose and intent was to benefit or influence the non-client as a third party, and that Stojan owed plaintiff a duty as beneficiary of the trust (in addition to as co-trustee). The court ruled that plaintiff never became a co-trustee to whom Stojan would owe a duty directly. The court further ruled that the trust was created to provide financial support for Sztajer, not to benefit the Johnson brothers, meaning that the Johnson brothers were "incidental beneficiaries" who would inherit only if funds remained after Sztajer's death, and Stojan did not owe them a duty. The court wrote, "[t]he possibility that [plaintiff] could benefit from the trust is insufficient to create a duty owed by Stojan." (citing *Reddick v. Suits,* 2011 IL App (2d) 100480 ("fact that a third party may benefit from an attorney's representation of his client does not mean that the attorney thereby owes a duty to the third party."))

The appellate court also held that the trial court properly denied the plaintiff's request to file a second amended complaint. The allegations of the proposed amended complaint only expand claims made in the earlier complaint and do not include facts sufficient to establish that Stojan owed plaintiff a duty. Further, the addition of a new count for financial exploitation of an elderly person would surprise and prejudice the defendant, as it was based on new theory of liability and included a claim for treble damages.

3. <u>Estate of Scott G. Hudson</u>, 2018 IL App (1st) 162469 (February 16, 2018)

Attorneys representing an administrator owe duties to the estate, and successor administrator can bring action for legal malpractice.

Hudson involved a legal malpractice action filed by successor administrator of decedent's estate against the attorneys hired by the predecessor administrator.

Scott Hudson died intestate on February 17, 2005 with two heirs – his wife, Alma, and son from a prior marriage. Decedent's wife was appointed the administrator of his estate and she subsequently retained defendant attorneys as counsel on behalf of herself. Hudson's wife was beneficiary of the estate and the son filed petitions to remove her as the administrator. Alma agreed to resign as administrator in July, 2007, and defendants continued to represent her in her capacity as beneficiary until they withdrew in July, 2008.

The successor administrator and the son filed a lawsuit against the defendant attorneys alleging legal malpractice and breach of fiduciary duty, arguing that the defendant attorneys mismanaged the estate and had a conflict of interest with the estate through their representation of Alma as the original administrator and as beneficiary. The estate alleged that defendant attorneys owed a duty of care to the estate, and the attorneys breached that duty by failing to determine all estate assets and by agreeing to "represent the estate" on behalf of Alma as administrator as well as Alma individually.

The defendant's filed a motion for summary judgment, arguing that the estate could not maintain a cause of action for legal malpractice because defendants were hired by and represented the former administrator of the Estate, and were never the attorney for the successor administrator; thus no attorney-client relationship existed "between defendants and the Estate." The trial court granted defendants' motion and entered judgment in their favor. At the hearing on the estate's motion for reconsideration, the court summarized its primary finding in granting summary judgment as follows:

> I think I said that the lawyer represented the administrator and that it couldn't—you couldn't purely represent the estate without the administrator because the client is the administrator. Because the lawyer has to seek direction and control from somebody. And that person has to be the administrator. I understand your concept. But I don't know how we practically put that into motion without having a client who is the administrator.

The appellate court held that the trial court erred in granting summary judgment for the defendants, holding that the attorneys did owe a duty to "the estate."

The court began, "[a]t the outset, it is pertinent to note that we are not faced with the question of whether an attorney owes a duty to the beneficiaries of an estate where, as here, the only plaintiff remaining in the lawsuit is the Estate." The court cited several cases in concluding that an attorney hired by an estate representative owes a duty to the estate, not just the representative hired by the attorney. *Gagliardo v. Caffrey*, 344 Ill. App. 3d 219, 229 (1st Dist. 2003) (even if an attorney only acted as the attorney for an estate for a limited time, he nonetheless owed a duty to the estate); *In re Estate of Vail*, 309 Ill. App. 3d 435, 441 (4th Dist. 1999) (attorney for executor does not have attorney-client relationship with a will's beneficiaries, thus the attorney may represent the estate against a challenge by a beneficiary because attorney for executor "owes allegiance only to the estate"); *In re Estate of Kirk*, 292 Ill. App. 3d 914, 922, 227 (2nd Dist. 1997) (although attorney had a duty to protect the estate and the interest of the beneficiaries, he did not have an attorney-client relationship with the heirs).

"Given that the relationship between an administrator and a beneficiary is 'fiduciary in character' and the primary duties of the administrator are to collect and pay debts and to distribute any remaining assets to a decedent's heirs, it perplexes this court how any attorney retained to assist in that purpose would not correspondingly owe a duty of care to that estate." Further, the court in *Kirk* held that an *executor* owes a fiduciary duty to the estate. "Thus, if a duty can be owed to an estate by the estate representative, then it seems logical that it would also be possible for an attorney to owe a duty to an estate, regardless of whether it is a legal fiction." The court also cited cases from Florida and California which held that an estate can sue an attorney for malpractice through a successor representative.

The appellate court concluded that factual issues regarding the alleged breach of duty by the attorneys to the estate precluded summary judgment. For instance, the principal dispute in the case was a bus company that Alma argued belonged to her individually, but which the decedent's son argued belonged to the estate. The defendant's did not dispute that they advocated for Alma's position regarding the ownership of the bus company. Defendants "fail[ed] to reconcile how they were able to advance the interests of Letty as beneficiary, represent the bus company, and still fulfill their duty to the Estate, if they were retained to assist in the administration of the estate." Here, an adversarial situation arose regarding the ownership of the bus company, which should have resulted in defendants' first and only allegiance being to the estate.

4. <u>McCarthy v. Abraham Lincoln Reynolds, III, 2006 Declaration of Living Trust</u>, 2018 IL App (1st) 162478 (March 30, 2018)

Attorney appearing *pro se* is not entitled to attorney fees as part of sanctions.

Plaintiff, Gerald McCarthy, was the beneficiary of a living trust. After the trustee died, defendant Marvin Gray was appointed as the "attorney of that trust." Plaintiff filed a complaint against Gray for breach of fiduciary duty and tortious interference with plaintiff's beneficial interest in the trust.

Plaintiff had previously filed a complaint in 2013 alleging that an amendment to the trust was invalid. Gray was a witness in that trial. The circuit court ruled against McCarthy in that case, and the appellate court affirmed that ruling in a prior opinion.

Thereafter, in 2014 plaintiff filed a five-count complaint against defendants Rozlyn Talyor, individually and as trustee, and Gray. The two counts against Gray alleged that (1) Gray breached his fiduciary duty to plaintiff as a beneficiary of the Trust, and (2) Gray tortiously interfered with plaintiff's share of the trust by making false statements and presenting misleading evidence against him in the 2013 case.

The circuit court dismissed McCarthy's second complaint pursuant to 735 ILCS 5/2-619(a)(4) based on the doctrine of *res judicata*, where the cause of action essentially asked the circuit court to relitigate the issues determined in the 2013 case, namely, the veracity of the Trust amendment. The circuit court also dismissed the breach of fiduciary duty claim against Gray on the basis that the attorney for the trust did not owe a fiduciary duty to the trust's beneficiaries as a matter of law, and McCarthy had not alleged any facts which would establish that Gray owed him a fiduciary duty. Note that the court wrote that McCarthy could have alleged facts "to support that any contract was entered into for his benefit, or the benefit of all the beneficiaries."

Gray filed a motion seeking sanctions under Rule 137, including attorney fees. Gray alleged that plaintiff made false statements in his complaint and that he and plaintiff did not have an attorney-client relationship. Gray requested sanctions in the amount of $11,232.55 as a result of having to defend against "plaintiff's unfounded, fallacious and specious allegations and pleadings." Gray later amended his sanction request to $12,106.03 for further time expended.

The trial court found that McCarthy's cause of action for tortious interference was frivolous and granted sanctions on that basis, but concluded that sanctions were not appropriate for the breach of fiduciary duty claim. The trial court determined that, "although Gray proceeded *pro se*, 'the language of Rule 137 supports the notion that sanctions are available because the supreme court made it clear that a sanction may (but does not necessarily have to) include attorney fees.'" Accordingly, the trial court award sanctions to Gray for his defense against a frivolous claim in the amount of $9707.98, including $102.28 in costs.

The appellate court upheld the dismissal of McCarthy's 2014 complaint. The appellate court also held that the trial court did not abuse its discretion in imposing Rule 137 sanctions. However, the appellate court agreed with the plaintiff's argument that the circuit court abused its discretion in awarding excessive fees against him to an attorney that proceeded *pro se*. While the decision to impose sanctions pursuant to Rule 137 is subject to review for an abuse of discretion, "whether the circuit court has the authority to grant attorney fees as an available remedy is a question of law that we review *de novo*."

The appellate court cited the Illinois Supreme Court case *Hamer v. Lentz*, 132 Ill. 2d 49 (1989), where the court held that an attorney appearing *pro se* in an action brought pursuant to the Freedom of Information Act (FOIA) was not entitled to attorney fees. "The supreme court reasoned that fees were not appropriate under those circumstances because the fee-shifting provision of the FOIA was designed (1) to remove the burden of legal fees as a deterrent from litigants, which was not a barrier for a *pro se* attorney because a lawyer representing himself does not incur legal fees, (2) to reduce unnecessary litigation by encouraging citizens, even lawyers, to seek objective legal advice before filing suit, and (3) to avoid abusive fee generation by unscrupulous attorneys." The court noted that subsequent appellate opinions expanded the rule to other contexts, such as defending against a malpractice action and in divorce proceedings.

The court wrote that, "[t]he parties have not cited, and our research has not uncovered, any case law applying the Hamer rule to a Rule 137 motion." Further, "Rule 137 … is silent on the recovery of attorney fees for all *pro se* litigants, whether an attorney or not."

The appellate court held that an attorney representing himself *pro se* is not entitled to attorney fees as part of a sanction under Rule 137. The court reasoned, based on the line of cases under *Hamer*, "without any support establishing that attorney fees are appropriate under the circumstances before us, we choose to follow the demonstrated law providing that *pro se* attorneys are not entitled to attorney fees, especially because Rule 137 is penal in nature and must be strictly construed." According to the court, "courts consistently have considered the fact that *pro se* attorneys are not burdened by legal fees, such that the fees created a barrier to seeking representation."

The court cited another FOIA case, *Brazas v. Ramsey*, 291 Ill. App. 3d 104, 110 (2nd Dist. 1997), in which that court reasoned that there was "no appreciable difference between a lawyer and a nonlawyer representing himself in a *pro se* complaint" as, "in either case, neither litigant incurs any legal fees in the prosecution of his action." Thus, "courts have highlighted that nonattorney *pro se* litigants are not entitled to fees for the time they spend litigating their own cases; therefore, *pro se* attorneys should not be treated differently."

ILLINOIS PROPOSED BILLS

1. HB 4702: Creates the Uniform Powers of Appointment Act

Synopsis As Introduced

Creates the Uniform Powers of Appointment Act. Defines terms. Adds provisions concerning: governing law, common law and principles of equity; creation of power of appointment; nontransferability; presumption of unlimited authority; rules of classification; power to revoke or amend; requisites for exercise of power of appointment; intent to exercise; donor-imposed formal requirements; permissible appointment; the selective allocation doctrine; the capture doctrine; disposition of unappointed property; appointment to taker in default; the powerholder's authority to revoke or amend exercise; disposition of trust property subject to power; disclaimer; release; power to contract; creditor claims; and other matters. Makes corresponding changes in the Probate Act of 1975. Repeals the Power of Appointment Exercise Act and the Termination of Powers Act.

Status: 4/17/2018 House Placed on Calendar Order of 3rd Reading - Short Debate

2. SB 2309: Amends the Trusts and Trustees Act Regarding Conveyances

Synopsis As Introduced

Amends the Trusts and Trustees Act. Deletes language requiring that a conveyance of real property to a trust include evidence of acceptance by the trustee.

Senate Floor Amendment No. 2

Replaces everything after the enacting clause with the provisions of the introduced bill, and also deletes language providing that if the transferor is a trustee of the trust, an interest in real property does not become trust property unless the instrument of conveyance is recorded in the office of the recorder of the county in which the property is located.

Status: 3/13/2018 Senate Third Reading - Passed; 048-000-000
3/21/2018 House First Reading
3/21/2018 House Referred to Rules Committee
4/9/2018 House Added Alternate Co-Sponsor Rep. Nick Sauer

> Section 5. The Trusts and Trustees Act is amended by changing Section 6.5 as follows:
>
> (760 ILCS 5/6.5)
> Sec. 6.5. Transfer of property to trust.
>
> (a) The transfer of real property to a trust requires a transfer of legal title to the trustee evidenced by a written instrument of conveyance ~~and acceptance by the trustee~~.

(b) (Blank) ~~If the transferor is a trustee of the trust, an interest in real property does not become trust property unless the instrument of conveyance is recorded in the office of the recorder of the county in which the property is located~~.

3. SB 2437: Automatic Revocation of Life Insurance Beneficiary Designations Upon Divorce

Synopsis As Introduced

Amends the Illinois Marriage and Dissolution of Marriage Act. Provides that as to any policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes non-marital property, or constitutes marital property but was not specifically allocated between the parties as provided in the Act, a beneficiary designation made by or on behalf of the decedent prior to the entry of the judgment of dissolution or declaration of invalidity of marriage that provides for the payment or transfer at death of any of the proceeds of the policy to or for the benefit of the decedent's former spouse is void as of the time of the judgment of dissolution or declaration of invalidity of marriage and the policy proceeds shall pass as if the decedent's former spouse predeceased the decedent. Provides that a life insurance company that insures the life of either spouse or holds a policy in which either spouse has an interest will not be held liable for distributing the proceeds or transferring an interest in such a policy if it is disburses the proceeds or transfers the interest prior to the actual receipt of proof of the judgment of dissolution or declaration of invalidity of marriage.

Senate Committee Amendment No. 1

Replaces everything after the enacting clause. Amends the Illinois Marriage and Dissolution of Marriage Act. Provides that if a judgment of dissolution of marriage is entered after an insured has designated the insured's spouse as a beneficiary under a life insurance policy in force at the time of entry, the designation of the insured's former spouse as beneficiary is not effective unless: (1) the judgment designates the insured's former spouse as the beneficiary; (2) the insured redesignates the former spouse as the beneficiary after entry of the judgment; or (3) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either former spouse. Provides that if a designation is not effective, the proceeds of the policy are payable to the named alternative beneficiary or, if there is not a named alternative beneficiary, to the estate of the insured. Provides that an insurer that pays the proceeds of a life insurance policy to the beneficiary under a designation that is not effective is liable for payment of the proceeds to the entitled person or estate only if: (A) before payment of the proceeds to the designated beneficiary, the insurer receives written notice at the home office of the insurer from an interested person that the designation is not effective; and (B) the insurer has not filed an interpleader.

Status: 4/11/2018 Senate Third Reading - Passed; 058-000-000
4/13/2018 House First Reading
4/13/2018 House Referred to Rules Committee

4. SB 3120: Classification of Claims

Synopsis As Introduced

Amends the Probate Act of 1975 in connection with the classification of claims against the estate of the decedent. Provides that a claim for reasonable and necessary medical, hospital, and nursing home expenses for the care of the decedent during the year immediately preceding death is classified equally with claims for money due employees of the decedent for services rendered of not more than $800 for each claimant for services rendered within 4 months prior to the decedent's death. Removes expenses of attending the decedent's last illness from the class. Effective immediately.

Status: 4/11/2018 Senate Placed on Calendar Order of 2nd Reading April 12, 2018

> 4th: <u>Reasonable and necessary medical, hospital, and nursing home expenses for the care of the decedent during the year immediately preceding death; and money</u> ~~Money~~ due employees of the decedent of not more than $800 for each claimant for services rendered within 4 months prior to the decedent's death ~~and expenses attending the last illness~~.