TABLE OF CONTENTS

LEGISLATIVE CHANGES

CASE LAW

ATTORNEYS

CLAIMS

GIFTS

DOMESTIC RELATIONS

POWERS OF ATTORNEY

TRUSTS AND TRUSTEES

LEGISLATIVE CHANGES

1. Public Act 99-609

Land Trust Beneficiary Rights Act

This legislation is entitled the Land Trust Beneficiary Rights Act, and is intended to protect the rights of beneficiaries of land trusts when the trustee changes. The legislation arose in the context of banks and title companies entering and exiting the land trust business. The Act is in three sections. The first section names the Act. The second section states that if the identity of the trustee of a land trust has been changed by virtue of sale, assignment, appointment, or otherwise, but the beneficial owner or owners of the land trust remain unchanged, the rights of the beneficial owner or owners shall in no way be impaired by the change of trustees.

The third section provides that a change of trustee pursuant to a sale, acquisition, or appointment governed by the Corporate Fiduciary Act is not a bar or defense to any court action filed by or in the name of either the previous trustee or the new trustee, irrespective of whether the court action was originally filed in a representative capacity on behalf of the beneficial owner or owners.

The new law is effective as of January 1, 2017.

2. Public Act 99-0743

Transfers of Real Property to Trusts Requires a Conveyance

This legislation amended the Illinois Trusts and Trustees Act by adding a new section 6.5, requiring that all transfers of real property to a trust must include a conveyance of legal title. The entirety of the new section reads as follows:

> 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) 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.

Thus, for garden-variety transfers to revocable living trusts where the transferor is also a trustee, the deed must be recorded to be effective. The provision is undoubtedly in reaction to the initial Appellate Court opinion, later revised, in Estate of Mendelson v. Mendelson, 48 N.E. 3d 891 (Second District, 2016). Citing section 17(a) of the Restatement (Second) of Trusts, and a Kentucky case, Ladd v. Ladd, 323 S.W.3d 772 (Ky.Ct.App.2010), the Second District had initially determined that a declaration by a grantor that property belongs to a trust can be sufficient to establish ownership even if no deed was prepared or delivered. The initial opinion was revised to eliminate this part of the court's opinion.

The new section is effective as of January 1, 2017.

3. Public Act 99-775

Revised Uniform Fiduciary Access to Digital Assets Act

The Act sets forth comprehensive ground rules for the disclosure of electronic information to a fiduciary acing pursuant to a trust, a power of attorney, letters of office in probate, or letters of office in a guardianship proceeding. The new law was made effective on August 12, 2016, and applies whether a will, power of attorney or trust is executed before, on or after the effective date, and whether or not a probate or guardianship proceeding was commenced before, on or after the effective date. The Act also applies to a custodian, who is defined as a person that carries, maintains, processes, receives, or stores a digital asset of a user, if the user resides in Illinois, or resided in Illinois at the time of death. The Act does not apply to the digital assets of an employer used by an employee in the ordinary course of the employer's business.

Under Section 4 of the Act, a user may control the disclosure of the user's electronic information provided that the user has not agreed otherwise by an act that is affirmative and distinct from the terms-of-service agreement. A user may use an online tool to direct the custodian of the electronic information to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

If a user has not used an online tool to give direction as provided in the preceding paragraph, or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

As noted above a user's direction under Section 4 of the Act overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service. This prevents the "boilerplate" of the terms-of-service agreement from overriding the user's directions.

Section 5 of the Act makes it clear that the At does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user, nor does it give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under Section 4 of the Act.

Sections 7 and 8 of the Act deal with the disclosure of electronic information in the case of decedent's estates. Section 7 sets forth requirements for disclosure of the content of electronic communications of a deceased user, and Section 8 sets forth requirements for disclosure of electronic records, other than content.

If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) a certified copy of the death certificate of the user;

(3) a certified copy of the letter of appointment of the representative or a court order;

(4) unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications; and

(5) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user; or

(C) a finding by the court that:

(i) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A);

(ii) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. Section 2701 et seq., as amended, 47 U.S.C. Section 222, as amended, or other applicable law;

(iii) unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

(iv) disclosure of the content of electronic communications of the user is permitted under this Act and reasonably necessary for administration of the estate.

Under Section 8 of the Act, unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the representative gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) a certified copy of the death certificate of the user;

(3) a certified copy of the letter of appointment of the representative or a court order; and

(4) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user;

(C) an affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or

(D) a finding by the court that:

(i) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A); or

(ii) disclosure of the user's digital assets is permitted under this Act and reasonably necessary for administration of the estate.

Sections 9 and 10 of the Act deal with the disclosure of electronic information to agents under durable or non durable powers of attorney. The statute again separates disclosure of the content of electronic communications of a deceased user from disclosure of electronic records, other than content. The requirements for disclosure to agents under powers of attorney are similar, but not identical, to the requirements under Sections 7 and 8 for decedent's estates. Section 9, dealing with disclosure of the content of electronic communications, provides that to the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) an original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;

(3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(B) evidence linking the account to the principal.

Section 10, dealing with disclosure of electronic records other than content, provides that unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) an original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;

(3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) if requested by the custodian

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(B) evidence linking the account to the principal.

Section 11 of the Act deals with disclosure of digital assets held in trust where the trustee is the original user (*e.g.*, grantor/trustees of revocable living trusts). Unless otherwise ordered by a court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

Sections 12 and 13 of the Act then deal with disclosure of electronic information to trustees who are not original users (*e.g.*, successor trustees). The Act again preserves the distinction between disclosure of content from disclosure of records other than content. Section 12 of the Act provides that unless otherwise ordered by a court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) a certified copy of the trust instrument that includes consent to disclosure of the content of electronic communications to the trustee;

(3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(4) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(B) evidence linking the account to the trust.

Section 13 provides that unless otherwise ordered by a court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) a certified copy of the trust instrument;

(3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(4) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(B) evidence linking the account to the trust.

Finally, Section 14 of the Act covers disclosure of electronic digital information to guardians. The Act provides that after an opportunity for a hearing under Article XIa of the Probate Act of 1975, the court may direct the disclosure of the digital assets of a person with a disability to his or her guardian. Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a guardian the catalogue of electronic communications sent or received by a person with a disability and any digital assets, other than the content of electronic communications, in which the person with a disability has a right or interest if the guardian gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) a certified copy of the court order that gives the guardian authority over the digital assets of the person with a disability; and

(3) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the person with a disability; or

(B) evidence linking the account to the person with a disability.

A guardian with general authority to manage the assets of a person with a disability may request a custodian of the digital assets of the person with a disability to suspend or terminate an account of the person with a disability for good cause. A request made under this Section must be accompanied by a certified copy of the court order giving the guardian authority over the protected person's property.

The Act makes it clear that a fiduciary's authority with respect to the digital assets of a user is subject to the terms-of-service agreement, except as otherwise provided in Section 4, relating to when the terms-of-service agreement may not override user's right to designate disclosure or non-disclosure of these assets. The authority of a fiduciary is subject to applicable law, including copyright law, and is limited by the scope of the fiduciary's duties under Illinois law. The fiduciary may not use its authority to impersonate the user, but when acting within the scope of its fiduciary duties is considered an authorized user for purposes of complying with various criminal statues dealing with computer fraud and the unauthorized-computer-access laws.

(c) A fiduciary with authority over the property of a decedent, person with a disability, principal, or settlor has the right to access any digital asset in which the decedent, person with a disability, principal, or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, person with a disability, principal, or settlor for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including Subdivision 30 of Article 17 of the Criminal Code of 2012, and may challenge the validity of an online tool in court when requesting an order directing compliance with this Act.

A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

(1) if the user is deceased, a certified copy of the death certificate of the user;

(2) a certified copy of the letter of appointment of the representative or a small-estate affidavit or court order, court order, power of attorney, or trust giving the fiduciary authority over the account; and

(3) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user; or

(C) a finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A).

Under Section 17 of the Act the custodian is given 60 days after receipt of the information required under Sections 7 through 15, to comply with a request under the Act from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance. However, an order directing compliance must contain a finding that compliance is not in violation of the federal criminal statutes regarding confidentiality of electronic information (18 U.S.C. Section 2702, as amended).

4. Public Act 99-821

Additional Duties for Personal Guardian

The Act imposes additional duties on the personal guardian of an adult disabled person. The Act amends Section 11a-17 of the Probate Act to require the personal guardian to make reasonable efforts to notify an adult disabled person's adult children of the ward's hospital admission or admission to a hospice program, the death of the ward, and arrangements for the disposition of the ward's remains. The efforts of the guardian must be consistent with the requirements of section 11a-17(e), which, in general, requires the guardian to make decisions consistent with the ward's wishes or, lacking evidence of that, the ward's best interests. The Act also permits a child to petition for visitation. The new law does not apply to a duly appointed public guardian or to the Office of the State Guardian. The new subsection (g) reads in its entirety as follows:

> (g)(1) Unless there is a court order to the contrary, the guardian, consistent with the standards set forth in subsection (e) of this Section, shall use reasonable efforts to notify the ward's known adult children, who have requested notification and provided contact information, of the ward's admission to a hospital or hospice program, the ward's death, and the arrangements for the disposition of the ward's remains.
>
> (2) If a guardian unreasonably prevents an adult child of the ward from visiting the ward, the court, upon a verified petition by an adult child, may order the guardian to permit visitation between the ward and the adult child if the court finds that the visitation is in the ward's best interests. In making its determination, the court shall

consider the standards set forth in subsection (e) of this Section. This subsection (g) does not apply to duly appointed public guardians or the Office of State Guardian.

CASE LAW

ATTORNEYS

Malpractice action dismissed for failure to show proximate cause when attorneys voluntarily dismissed estate's appeal

1. Logan v. U.S. Bank, 2016 IL App (First District, 2016) 152549

Logan concerned a malpractice claim brought against attorneys who had prosecuted a wrongful death claim on behalf of an estate. At the trial court level the estate won a verdict of $3,000,000 in damages, which was reduced by 50% for contributory negligence of the decedent. The decedent was crushed by an accident at a time when, as toxicology results indicated, his body contained 18-20 times the amount of morphine that would be necessary to lessen moderate pain. The defendants in the wrongful death case appealed the verdict, and the estate appealed the 50% reduction for contributory negligence. During the appeal, the attorneys for the estate voluntarily dismissed the estate's appeal of the contributory negligence claim without informing the next of kin. The judgment of the trial court was affirmed, but the next of kin sued the attorneys for attorney malpractice for appellate malpractice in dismissing the claim. The trial court granted the attorneys' motion for summary judgment on the malpractice action and the next of kin appealed.

The First District affirmed, on the basis that the appellants could not show proximate cause for the alleged damage they suffered. The next of kin argued that had the attorneys not dismissed the estate's part of the appeal, the appellate court would have found error in the trial court's decision to allow testimony on the toxicology report of the decedent, thereby reversing the trial court's ruling on contributory negligence, thus restoring $1.5 million to the damage award. The First District pointed out that there was nothing improper in the admission of the blood evidence, and that the determination of contributory negligence was a jury determination of fact, not a determination of law, which the Appellate Court would not have reversed.

"Intent to benefit" non-client not expanded to "intent to influence" non-client; settlement of will contest fatal to claim of tortious interference with an expectancy

2. Phelps v. Land of Lincoln Legal Assistance Found., Inc., 55 N.E. 3d 1268 (5th District, 2016), appeal denied, 60 N.E.3d 882 (Ill. 2016)

In Phelps the decedent had executed a will about 1 ½ years before his death. The will was admitted to probate in Missouri. The decedent's heirs initiated a will contest which they later settled. Following the settlement of the will contest, the heirs sued a legal assistance foundation, and an attorney, for legal malpractice and tortious interference with an expectancy. The complaint alleged that the attorney, who worked for a legal assistance foundation, prepared the will for person in his early 80s without having ever met him or interviewed him, instead relying on information supplied by those who benefitted under the will. The complaint alleged that had the attorney actually met the client, the attorney would have known that the person was incapable of making a will.

The defendants filed a hybrid motion to dismiss the counts in the malpractice suit. Hybrid motions are not permitted and drew extensive chastisement from the Appellate Court. The trial court nonetheless granted the motions to dismiss, and the appeal followed.

The defendants moved to dismiss the malpractice claim pursuant to Section 2-615 of the Civil Practice Act, for failing to state a claim on which relief could be granted. In other words, the malpractice count was legally insufficient. The defendants argued that under the seminal case Pelham v. Griesheimer, 92 Ill.2d 13, 544, 440 N.E.2d 96 (1982), the attorney, and the legal clinic, owed no duty to the decedent's heirs. They were not clients of the defendants, nor were they intended third party beneficiaries of the decedent's will. The plaintiffs sought to distinguish Pelham by arguing that in the opinion the Supreme Court referred in two places to people who were intended to be benefitted or influenced by the attorney's action. Since the heirs were allegedly "influenced" by the creation of the will, albeit in a negative way, they argued that their malpractice suit should be allowed to proceed. The Fifth District affirmed the trial court's dismissal of the action, finding no reason to expand the narrow exception for non-client plaintiff's articulated in Pelham:

> ¶ 20 The first time the *Pelham* court used the term "or influence," it began by stating that "[a]nalogizing the scope of the duty to the concept of a third-party direct beneficiary serves the purpose of limiting the scope of the duty owed by an attorney to nonclients." *Id.* at 21, 64 Ill.Dec. 544, 440 N.E.2d 96. The court then went on to say that "[t]he key consideration is the attorney's acting at the direction of or on behalf of the client to benefit *or influence* a third party." (Emphasis added.) *Id.* In making this statement the court cited to the conclusion section of a law review article. *Id.* (citing Walter Probert & Robert A. Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract,* 55 Notre Dame L. Rev. 708, 728 (1980)). Moreover, the court followed the statement with the following quote from the Maryland Court of Appeals:
>
> > " 'Whether the action is based upon a contract (express or implied), to which the traditional rules relating to third party beneficiaries may apply, or more on a theory of negligence—the violation of a duty not founded exclusively upon contract—there still must be shown (*i.e.,* alleged and shown) that the plaintiff, if not the direct employer/client of the defendant attorney, is a person or part of a class of persons specifically intended to be the beneficiary of the attorney's undertaking.' " *Id.* (quoting *Clagett v. Dacy,* 47 Md.App. 23, 420 A.2d 1285, 1289 (Md.Ct.Spec.App.1980)).
>
> ¶ 21 The court then stated, without citation, "We conclude that, for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit *or influence* the third party." (Emphasis added.) *Id.* The court finished this part of its discussion by stating, "Under such proof, recovery may be allowed, provided that the other elements of a negligence cause of action can be proved." *Id.* In making this statement, the court cited to another law review article. *Id.* (citing Joseph T. Kleespies, Comment, *Liability of Lawyers to Third Parties for Professional Negligence in Oregon,* 60 Or. L. Rev. 375 (1981)).

> ¶ 22 This court has reviewed both law review articles to which the court refers when inserting the words "or influence" into its statement of what it terms as "the intent to directly benefit test." Neither article contains any discussion of the term "or influence" when discussing the test, and neither applies the term in the negative manner advanced by the plaintiffs. The Notre Dame article simply adds the words in its conclusion section with no discussion or citation. The Oregon article does not use the words at all. In addition, this court finds no case cited by the *Pelham* court and no subsequent case or authority that suggests that the term "or influence" is intended to in any way impact the court's statement of the test, in the numerous other places in the opinion described above, that the plaintiffs must be direct beneficiaries of the attorney-client relationship in order to have a cause of action for legal malpractice. While it is unclear to this court why the term "or influence" was added to the court's statement of the test in *Pelham,* the absolute statements regarding the exclusivity of the "intent to directly benefit test" as set forth throughout the remainder of the *Pelham* opinion, as well as the subsequent cases discussed below, convince this court that it is not intended to serve as a second prong to be applied independently of the "intent to directly benefit test."

The two cases referred to by the Fifth District as supporting its opinion were McLane v. Russell, 131 Ill.2d 509, 546 N.E.2d 499 (1989) (beneficiaries under will could pursue malpractice for failure to sever joint tenancy asset); and In re Estate of Powell, 12 N.E.3d 14 (2014) (attorney prosecuting wrongful death action owes duties to next of kin). Powell was discussed at the 2015 Institute.

The Fifth District also affirmed the trial court's dismissal, under Section 2-619 of the Civil Practice Act, of the tortious interference count. Here the heirs' settlement of the will contest was fatal to their cause of action. The heirs had an adequate remedy available to them in the Missouri probate proceedings. Their failure to fully prosecute that remedy was an affirmative matter that defeated their tortious interference claim:

> ¶ 32 We now address the plaintiffs' cause of action against the defendants for tortious interference with inheritance expectancy. The defendants argue that this claim is properly dismissed because the plaintiffs had a remedy available to them in the probate proceeding and chose not to avail themselves of that remedy. Because this argument is in the nature of affirmative matter that the defendants assert defeats the plaintiffs' claim for relief, it is properly addressed as a motion to dismiss pursuant to section 2–619 of the Code (735 ILCS 5/2–619 (West 2014)). Our review of the applicable law reveals that the defendants' assertion is correct.
>
> ¶ 33 The facts of this case are nearly identical to those set forth in *Robinson v. First State Bank of Monticello,* 97 Ill.2d 174, 73 Ill.Dec. 428, 454 N.E.2d 288 (1983). In *Robinson,* a decedent's heirs brought an action for tortious interference with inheritance expectancy against an attorney who they alleged induced the decedent to execute a will and codicil that had the effect of disinheriting the plaintiffs. *Id.* at 183–84, 73 Ill.Dec. 428, 454 N.E.2d 288. Prior to bringing the action for tortious interference with inheritance expectancy, the will had been admitted to probate and the plaintiffs had

engaged an attorney to determine whether they should file a will contest. *Id.* at 184, 73 Ill.Dec. 428, 454 N.E.2d 288. The plaintiffs did not file the will contest, instead settling their dispute regarding the validity of the will and allowing the statutorily prescribed period in which to contest the will to expire. *Id.* The Illinois Supreme Court held that under these circumstances, it would not recognize a tort for intentional interference with inheritance expectancy. *Id.*

¶ 34 Here, the plaintiffs actually filed an action contesting the will, but chose to settle that action short of reaching the merits of their contentions regarding the will's invalidity. As a result, the will was admitted to probate, thereby establishing the validity of the will. See *In re Estate of Luccio,* 2012 IL App (1st) 121153, ¶ 24, 367 Ill.Dec. 777, 982 N.E.2d 927 (citing *Robinson,* 97 Ill.2d at 184, 73 Ill.Dec. 428, 454 N.E.2d 288). We find that the declaration of the supreme court in *Robinson* controls our disposition of this issue on appeal.

The Fifth District distinguished the Supreme Court's holding in In re Estate of Ellis, 236 Ill.2d 45, 48, 337 Ill.Dec. 678, 923 N.E.2d 237 (2009), discussed at the 2010 Institute. In Ellis the plaintiff was a charitable organization that was named as a beneficiary of the decedent's will executed in 1964. In 1999, the decedent executed a new will that left her entire estate to her pastor. After the decedent died, her 1999 will was admitted to probate but the charitable legatee under the 1964 will did not learn of the decedent's death, or the existence of the subsequent will, until 3 years after the decedent's death, and long after the period for contesting the will had run. The court allowed the charity to pursue its tortious interference claim because having no notice of the decedent's death, or the subsequent will, it had no effective opportunity to bring an action contesting the will. In addition, the tortious claim sought to recover lifetime transfers, a remedy that a will contest would not provide.

CLAIMS

Claimant who is also executor must file claim within statutory period

3. In re Estate of Levit, 2016 IL App (4th) 150721-U (Fourth District, 2016)

Note: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Levit dealt with an appeal by a person ("Meredith") over the amount the court awarded for fees, and its denial of his claim for services rendered to the decedent during life under a power of attorney. Meredith had been removed as executor of the estate because of his inefficient administration and lack of timely progress. The Fourth District affirmed the trial court's rulings in both instances.

In regard to fees, the Fourth District noted that the estate was a small one, the tasks were relatively simple, and the executor simply took too much time in relation to what was required:

¶ 39 In determining the amount of reasonable compensation, "[t]he most important factor is the amount of time spent on the estate." *In re Estate of Weeks,* 409 Ill.App.3d 1101, 1110, 950 N.E.2d 280, 287 (2011). The trial court found the "inordinate amount of time and money" Meredith spent relative to the estate's size was "baffling." In making its award, the court noted Meredith spent 36 months and almost $20,000 to prepare a

940–square foot home for sale. The court found "[a] reasonable and prudent person could have repaired, cleaned out, cleaned up, and put this house on the market by June 1, 2009." Further, $2,322.90 of additional yard work was not reasonable. As an example of waste, the court pointed out Meredith spent $7,615.65 to paint, prepare, and clean the house.

¶ 40 Decedent died in February 2009, and the administration of his estate, the litigation at the trial level, and the appeals to this court have extended into 2016. The trial court was in the best position to consider the evidence and the credibility of the parties involved. While the court did not believe Meredith intentionally depleted estate resources for personal gain, the evidence indicates Meredith's actions resulted in waste, inefficiency, and mismanagement. Given the small size of the estate and the large amount of time expended, the court found Meredith should be awarded only 10% of his original claim. We find the court's award of $1,277 .47 was not manifestly or palpably erroneous.

The trial court had denied the request for fees under the power of attorney on the basis that the claim was filed well beyond the statutory claims period. The executor argued that under the Probate Act a claim could be filed with the executor or with the court, and the fact that he was in possession of the a document memorializing the claim was in effect a filing of the claim with himself. The trial court found that the only evidence of the claim was a document created well after the claims period ended and therefore there was no filing either with the court or with the representative as required by the Probate Act. The Fourth District affirmed.

GIFTS

Father's action in placing child's name on contract purchase does not constitute gift as a matter of law; subsequent conveyance held necessary for completed gift

4. Jackson v. DBR Jackson Partnership, 2016 IL App (3d) 150229 (Third District, 2016)

Note: As of March 19, 2017 this opinion had not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.

Dean, a very successful farmer, had four children, Barry, Russell, Cheryl and Janet. In 1977 Dean negotiated an agreement to purchase 320 acres of farmland for $1,334,000 to be paid with interest in annual installments until 1997, when the balance would due and on payment a deed would issue. The purchase agreement listed Dean and each of his four adult children as the contract purchasers. In 1977 Dean signed the agreement, and had each of the four children sign it. After the contract was executed, Dean farmed the 320 acres along with his sons Barry and Russell. The grain from the 320 acres was commingled with grain from other farms owned by Dean and his family, so that it was impossible to tell what cash proceeds were generated by any specific acreage. The proceeds from the sale of the grain was deposited to a bank account entitled "DBR Farm Account' which was owned by Dean, Barry and Russell. Each year enough cash from the bank account was distributed to allow Dean, Barry and Russell to each pay 1/3 of the amount due under the contract for deed. Neither of the daughters, Cheryl or Janet, ever received a distribution from the bank account, and neither ever paid anything toward the contract purchase price.

In 1992 the contract for deed was modified, decreasing the annual payment and extending the final payment date to 2009. Again Dean signed the agreement, as did each of the children. At the time of the modification, both Barry and Russell thought that their sisters would be taken off the contract because they had made no payment toward the purchase price. Barry thought that his sisters would receive some equivalent value "somewhere along the way." After the modification, Dean, Barry and Russell continued as before, farming the property and making payments from grain sales, although Dean began to turn more of the day-to-day operations over to Russell.

In 1995 Barry became involved in divorce proceedings, and Dean decided to decrease his role in the farming operations. This resulted in Barry's income share of the DBR bank account being reduced, although he still paid his one third share of the contract purchase for the 320 acres. By the late 1990s Dean was no longer involved in the operation, and by 2004 his mental condition was slipping. Within a year Dean no longer recognized people and would forget how to get home. By this time, Russell was in complete control of the DBR partnership operations. In 2007 Barry executed a deed conveying his "undivided interest" in the 320 acre parcel to Dean and his wife Irma, as tenants in common. In 2009, the contract seller executed a deed for the 320 acres to Russell as the only grantee. The contract seller testified that she listed Russell as the only grantee pursuant to Dean's instructions. Russell did not inform his sister Cheryl of the deed.

After Dean died in 2011, Barry learned that the 320 acre parcel had been conveyed to Russell. In 2012 Barry advised Cheryl of the existence of the deed. Barry then sued the DBR partnership, Russell, Russell's wife Debra and his mother Irma for an accounting for all of the partnership operations and for a portion of the partnership assets. In 2013 Cheryl intervened with a cross claim against Russell regarding the 320 acre parcel, claiming an equitable interest in the property or, in the alternative, seeking a constructive trust over a one-fifth interest in the property. Russell and Cheryl each filed motions for summary judgment; the trial court denied Russell's summary judgment motion and granted Cheryl's.

The Third District reversed the trial court's order granting summary judgment to Cheryl. The Appellate Court believed that the dispositive issue was whether Dean's action placing Cheryl's name as a grantee on the purchase agreement constitute a completed gift as a matter of law. In finding that the gift was not complete, the court stated:

> ¶ 15 A "gift" is "a voluntary, gratuitous transfer of property by one person to another where the donor manifests an intent to make such a gift and absolutely and irrevocably delivers the property to the donee." Hall v. Eaton, 258 Ill.App.3d 893, 895, 197 Ill.Dec. 611, 631 N.E.2d 833 (1994). See also Moniuszko v. Moniuszko, 238 Ill.App.3d 523, 529, 179 Ill.Dec. 636, 606 N.E.2d 468 (1992); Hugh v. Amalgamated Trust & Savings Bank, 235 Ill.App.3d 268, 275, 176 Ill.Dec. 726, 602 N.E.2d 33 (1992). A gift is not shown unless the donor has relinquished all present and future dominion and power over the subject matter of the gift. Id. The alleged donee has the burden of proving the existence of donative intent by the donor, which must be established by clear and convincing evidence. Moniuszko, 238 Ill.App.3d at 529, 179 Ill.Dec. 636, 606 N.E.2d 468. A rebuttable presumption of donative intent arises where the donor is a parent and the donee is his or her child. Moore v. Moore, 9 Ill.2d at 558, 138 N.E.2d 562. This

presumption, once established, can only be overcome by clear and convincing evidence. Id.6789

¶ 16 However, additional considerations arise when the subject matter of the purported gift is an interest in real property. The general rule is that a gift of land is invalid and ineffectual until title has passed to and vested in the donee. Pocius v. Fleck, 13 Ill.2d 420, 427, 150 N.E.2d 106 (1958); Pesovic v. Pesovic, 10 Ill.App.3d 708, 712, 295 N.E.2d 261 (1973).[2] "Where the alleged gift is of a legal estate capable of legal conveyance, and no conveyance is made, the gift is revocable." Pocius, 13 Ill.2d at 429, 150 N.E.2d 106. Moreover, "[i]f anything remains to be done to complete the gift, what so remains to be done cannot be enforced, and when the gift is incomplete, it may be revoked." Id.

[3] Exceptions to this general rule arise in limited circumstances, such as where the donee exercises possession of the property that is hostile to the interests of the donor or the donee makes permanent and valuable improvements to the property. Pesovic, 10 Ill.App.3d at 712, 295 N.E.2d 261. In addition, special circumstances supporting the existence of an equitable interest in land based upon a gift have been found to exist where the donee received the interest in settlement of a dispute. Hill v. Bowen, 8 Ill.2d 527, 529, 134 N.E.2d 769 (1956). None of these circumstances arise in the instant matter.

¶ 17 Here, the trial court relied on the presumption of gift articulated in Moore. In Moore, the plaintiff's mother paid the entire purchase price for a parcel of land but instructed the seller to execute a deed to herself and two of her three adult children as joint tenants with right of survivorship. Moore, 9 Ill.2d at 557, 138 N.E.2d 562. The deed was executed, delivered, and recorded. After many years of living on and maintaining the property, the mother died. The son whose name had not been included on the deed brought suit against his siblings, claiming that the presumption of a gift from a parent to her children arose only where the parent remained legally obligated to support the children. Id. at 558, 138 N.E.2d 562. Our supreme court, citing a long line of prior precedent, held that the presumption of a gift from parent to child did not depend upon any legal obligation to support the child. Id.

¶ 18 On appeal, Russell recognizes that Moore stands for the general proposition that a transfer from a parent to a child is presumed to intend a gift. He maintains, however, that Moore is distinguishable from the matter *sub judice* in that there was a deed of conveyance in Moore that was not present here. He further maintains that the trial court erred in holding that Moore was dispositive as to whether Dean had made a completed gift to Cheryl such that he could not revoke the gift by some future action. We agree. Moore does not address the specific issue in this case, i.e., whether Dean's instruction to add Cheryl as a contract purchaser on the 1977 purchase agreement constituted a completed gift of an interest in the property that was the subject of the agreement. To answer that question, it is necessary to look to Pocius and its progeny.

¶ 19 In Pocius, an elderly woman who held title to a particular parcel of property executed a written power of attorney directing her agent to convey the parcel to the plaintiff as a gesture of gratitude for the plaintiff's help during the woman's extended

illness. The woman also signed a blank warranty deed form and gave it to the agent. The agent, sensing no urgency in executing the deed of conveyance left on vacation. When he returned, he was informed that the woman had died during his absence. The deed of conveyance was never executed. Pocius, 13 Ill.2d at 424, 150 N.E.2d 106. The plaintiff brought suit against the woman's estate seeking a declaration that decedent had executed an effective gift of the property to the plaintiff. Id. The trial court agreed, holding that the executed power of attorney constituted a completed gift of the subject real estate. Our supreme court reversed, holding that the plaintiff's reliance upon the executed power of attorney and blank deed was insufficient to establish a completed gift. Id. at 430, 150 N.E.2d 106. The court focused upon the revocable nature of the purported gift, noting that the documents remained in the control of the agent of the donor, not the donee, and were thus "undelivered and incomplete." Id. Thus, the court held that to the extent that the power of attorney and instructions to the agent to execute a deed on behalf of the plaintiff may have evidenced a donative intent, the gift was not complete and was subject to revocation at the time the purported donor died. Id.

¶ 20 We find the holding in Pocius that a gift of an interest in land must be evidenced by the delivery of a deed of conveyance in order to be complete to be more instructive on the issue at hand than the general proposition articulated in Moore that a gift from a parent to a child is presumed regardless of the legal duty of the parent toward the child. In the instant matter, as in Pocius, something remained to be done to complete the gift, i.e., the final deed of conveyance, and what remained to be done rendered the purported gift incomplete and subject to revocation by the purported donor. Pocius, 13 Ill.2d at 429, 150 N.E.2d 106. We hold therefore that the circuit court erred as a matter of law in finding that Dean executed a completed and irrevocable gift to Cheryl of a one-fifth interest in the Dixon 320 when he caused her name to be listed as a future grantee pursuant to the purchase agreement executed in 1977. The undisputed facts establish that additional steps needed to be performed subsequent to the execution of the original agreement and the addendum; specifically the execution and delivery of the deed. The undisputed facts establish that Dean remained in control of steps necessary to complete the gift to Cheryl, and it is uncontroverted that he exercised that control in such a manner as to revoke the purported gift to Cheryl when he instructed Faber to execute the deed to Russell as the sole grantee.[3]

[3] While we are loath to engage in speculation, we point out that had the deed naming Dean and his four children as grantees been executed contemporaneously with the purchase agreement and placed in escrow, the outcome would likely have been different. See Fantino v. Lenders Title & Guaranty Co. 303 Ill.App.3d 204, 208, 236 Ill.Dec. 629, 707 N.E.2d 756 (1999) (escrowee is agent of both buyer and seller).

¶ 21 Our analysis would not be complete without addressing Cheryl's purported interest as a contract purchaser. The trial court, while holding that her interest in the real estate was pursuant to a gift by Dean, also referenced Cheryl's equitable interest in the property as a contract purchaser. See Shay v. Penrose, 25 Ill.2d 447, 451, 185 N.E.2d 218 (1962). However, as we have previously noted, the uncontroverted facts do not support

> Cheryl's position as a *bona fide* purchaser, since she did not make any payments toward the purchase of the property. See Daniels v. Anderson, 252 Ill.App.3d 289, 302, 191 Ill.Dec. 773, 624 N.E.2d 1151 (1993). Moreover, our courts have consistently held that a contract to sell an interest in realty does not result in a transfer of title but is merely an executory agreement that will result in transfer of title once performance of the contract is complete. While a purchaser may have a right to enforce the contract, he or she has no interest in the property (legal or equitable) under a contract to sell an interest in land. 8930 South Harlem, Ltd. v. Moore, 77 Ill.2d 212, 219, 32 Ill.Dec. 888, 396 N.E.2d 1 (1979); In re Estate of Martinek, 140 Ill.App.3d 621, 627, 94 Ill.Dec. 939, 488 N.E.2d 1332 (1986); Carollo v. Irwin, 2011 IL App (1st) 102765, ¶¶ 19–20, 355 Ill.Dec. 49, 959 N.E.2d 77. Here, whatever interest Cheryl might have had under the purchase agreement was of no relevance to her claim to a legal or equitable interest in the Dixon 320.
>
> ¶ 22 We hold, therefore, that the trial court erred as a matter of law in finding that Cheryl had an equitable interest in the Dixon 320 property by operation of a purported gift to her from Dean when the purchase agreement was executed in 1977. Because the purchase agreement conveyed no legal or equitable interest to her, any actions by her or Russell subsequent to the execution of the original purchase agreement had no relevance. Thus, the trial court erred in granting Cheryl's cross-motion for summary judgment and denying Russell's motion for summary judgment.

The Third District reversed the trial court, and remanded the cause to the circuit court for entry of an order granting Russell's motion for summary judgment.

DOMESTIC RELATIONS

Challenge to property settlement order 10 years later: subsequent pre-marital agreement held not a bar to fraudulent concealment claim

5. In re Marriage of Van Ert, 54 N.E. 3d 928 (Third District, 2016)

Van Ert considered whether a party exercised diligence in bringing a §2-1401 petition to vacate a final judgment. Under Section 2-1401 of the Civil Practice Act, a §2-1401 petition challenging an order after it has become final must allege facts supporting (1) the existence of a meritorious defense, (2) due diligence in presenting the defense or claim to the circuit court in the original action, and (3) due diligence in filing the §2-1401 petition for relief. The petition normally must be brought more than 30 days, but less than two years, after the entry of a final judgment in the original action; however, there is an exception to the two-year limitation where there is a clear showing of that the person seeking relief is under legal disability or duress, or the grounds for relief are fraudulently concealed. In this case Janet brought a petition challenging the dissolution of her first marriage approximately 10 years after the order was entered. The trial court ruled that she had not exercised diligence in bringing the petition; the Appellate Court reversed and remanded the case for further proceedings.

Janet and Larry had been married 30 years when Larry brought a petition for dissolution of the marriage. At the time of filing he owned 46.5% of the stock of a closely-held company. Two days before he filed for divorce, Larry had received an "intention of interest" from a third party to acquire the

company for $15-$16 million. Larry did not disclose this offer to Janet and suggested that they both would be represented in the divorce by the same lawyer, although apparently the lawyer only represented Larry. Larry never filed the mandatory financial disclosure affidavit in the proceeding; less than a month after filing, the parties were divorced. The Marital Settlement Agreement awarded Larry all of his stock in the company, and awarded to Janet a property in Hawaii. The MSA further stated that each of the parties had been "fully informed of the wealth, property, estate and income of the other", that Janet had been informed of and received copies of Larry's financial information, and that the parties had made a full and complete disclosure to their respective financial conditions. Larry's counsel stated to the court that Janet would wind up with property valued at about $2.8 million and that Larry would wind up with property valued at about $1.2 million, which apparently did not include the value of Larry's interest in the company. The record did not show that a valuation of Larry's company was ever disclosed to Janet during the dissolution proceedings.

Less than two hours after the dissolution order was entered, Larry agreed to sell the company for $16 million.

A little more than a year and a half later Larry and Janet decide to remarry in Hawaii. Five days before leaving for the marriage ceremony, Larry presented Janet with a premarital agreement by which each party would keep all of the property they owned separately as their non-marital property if the marriage did not last. Larry disclosed assets of about $7.8 million and net worth of about $6.9 million. Janet signed the agreement.

In 2011 Larry again petitioned for divorce. Through discovery Janet learned of the earlier sale and in 2015 petitioned to vacate the 2005 order on the grounds of fraudulent concealment. Larry filed an amended motion to dismiss the §2-1401 petition the grounds that (1) their remarriage rendered the 2005 judgment of dissolution unenforceable; (2) because Janet accepted benefits from the 2005 judgment she was barred from attacking it; and (3) Janet did not exercise vigilance in bringing her petition.

The trial court granted Larry's motion to dismiss. The court believed that Janet sufficiently alleged that she had a valid claim, and also that her lack of diligence in the first dissolution was excusable. However, the trial court believed that when Janet signed the pre-marital agreement in 2007, knowing that Larry's assets were much greater than what was represented to the court less than two years earlier, she became aware of the "operative facts" that would give rise to her claims of fraud and unconscionability. Therefore she did not show diligence in bringing the §2-1401 petition.

The Third District reversed, finding that Janet's simple knowledge of Larry's increase in assets did not put her on notice of his fraudulent concealment. In short, Larry's assets could have increased between the date of the first divorce and the date of second marriage, and such increase would not necessarily apprise Janet that this increase was marital property accumulated during the 30-year marriage and if so, that the marital property had not been previously disclosed. Janet's petition properly alleged facts which, if proved, could entitle her to relief. The cause was remanded for further proceedings.

Hewitt endorsed; unmarried co-habitants cannot enforce property rights rooted in marriage-like relationships

6. Blumenthal v. Brewer, 2016 IL 118 (2016)

The Illinois Supreme Court reversed the First District opinion, which had declared Hewitt v. Hewitt, 77 Ill. 2d 49 (1979) as outmoded and ill-considered. Hewitt holds that Illinois public policy precludes unmarried cohabitants from bringing claims against one another to enforce mutual property rights where the rights asserted are rooted in a marriage-like relationship between the parties.

Blumenthal and Brewer are two women who had maintained a long-term, domestic relationship and had raised a family. They never married. When the relationship soured, Blumenthal petitioned the court for the partition of the residence that she and Brewer co-owned. Brewer counterclaimed in the partition action. Four counts of the counterclaim dealt with the disposition of the parties' home, including theories of unjust enrichment, *quantum meruit*, and equitable division. The fifth count sought alternative relief regarding Blumenthal's medical practice, either the imposition of a constructive trust over the annual net earnings of the practice or the sale of Blumenthal's share of the practice, or restitution of funds that Blumenthal had used from the couple's joint account to purchase the practice.

In the trial court Blumenthal raised Hewitt to successfully defeat the counterclaim. Brewer appealed on the basis that developments in the law since Hewitt was decided made the decision obsolete. The First District agreed, reversing the trial court's decision and remanding the case. Blumenthal appealed the First District decision to the Supreme Court. Meanwhile, the partition action proceeded at the trial level. Brewer moved to stay the partition action, but was denied. Brewer did not appeal the denial of her motion to stay. The trial court then adjudicated the parties' right with respect to the home, awarding a larger share to Brewer and giving Brewer the right to buy Blumenthal's share of the home, which she did. Brewer did not appeal the outcome of the partition action.

The Supreme Court first considered the four counts of Brewer's counterclaim dealing with the home. As to these counts, the Court found that the First District lacked jurisdiction to hear the case, because Brewer had not appealed a final order. Although the trial court had included the special finding language of Supreme Court Rule 304 in its order dismissing the four house-related counts, the dismissal of the counterclaim did not terminate the litigation between the parties on the merits of the case, because the same issues raised in the counterclaim were ongoing in the partition action. After noting that the special finding language contemplated by Supreme Court Rule 304 has no effect on an order that is not final, the Court stated:

> ¶ 26 Counts I, II, IV, and V arose from the same set of operative facts and sought precisely the same thing as the underlying cause of action asserted by Blumenthal: division of the value of the parties' Chicago home. Rather than being distinct and separate from Blumenthal's action, these counts merely advanced different analytical approaches for determining how the home or its proceeds should be allocated between the parties. They were, in effect, different iterations of the very same claim. When they were dismissed, the ultimate question—how the value of the residence should be split—remained unresolved. The dismissal served only to narrow the criteria applicable to that decision.

> ¶ 27 Although we have found no cases directly on point, our appellate court has recognized that where one claim based on the same operative facts is stated differently in multiple counts, the dismissal of fewer than all counts is not a final judgment as to any of the party's claims as required by Rule 304(a). See Davis v. Loftus, 334 Ill.App.3d 761, 766, 268 Ill.Dec. 522, 778 N.E.2d 1144 (2002). Similarly, we have held that where an order disposes only of certain issues relating to the same basic claim, such a ruling is not subject to review under Rule 304(a). To the contrary, permitting separate appeals of such orders promotes precisely the type of piecemeal appeals Rule 304(a) was designed to discourage. See In re Marriage of Leopando, 96 Ill.2d 114, 119–20, 70 Ill.Dec. 263, 449 N.E.2d 137 (1983). Based on this reasoning, the portion of the circuit court's order dismissing counts I, II, IV, and V of Brewer's counterclaim was not appealable under Rule 304(a).

The Supreme Court also found a second problem with the First District's opinion: the Appellate Court's rejection of Hewitt was tantamount to an overruling of a Supreme Court decision, which it had no authority to do.

Having found that the First District had no jurisdiction to hear the case, and had no authority to repudiate the legal precedent that controlled the case, the Court then observed that even if Brewer's counterclaim could be resuscitated, there would be no point to remanding the matter, because the partition action had been decided. In effect, the final adjudication of the partition action was either *res judicata* (if one somehow considered a resuscitation of the counterclaim a different action from the partition suit), or the law of the case (if one considered a resuscitation of the counterclaim a continuation of the same case).

The Court then moved to the count dealing with Blumenthal's medical practice. The Court noted that the imposition of a constructive trust on Blumenthal's medical practice was unattainable because Brewer was not a licensed medical doctor, so transferring title and possession of Brewer's interest in the practice was prohibited by the Medical Corporation Act and Medical Practice Act. The Medical Corporation Act prohibits anyone who is not licensed to practice medicine from having any part in the ownership, management or control of a medical corporation. The Medical Practice Act prohibits fee-splitting arrangements between a doctor and one who is unlicensed.

The rejection of the constructive trust left the common law remedy of restitution. The Court analyzed Hewitt, characterizing the essential rationale of the decision as rooted in the statutory prohibition against common law marriage:

> ¶ 58 In our view, the legislature intended marriage to be the only legally protected family relationship under Illinois law, and permitting unmarried partners to enforce mutual property rights might "encourage formation of such relationships and weaken marriage as the foundation of our family-based society." Id. at 58, 31 Ill.Dec. 827, 394 N.E.2d 1204. This court was concerned that permitting such claims might raise questions about support, inheritance rights, and custody of nonmarital children.[1] Id. We noted that the situation between the unmarried couple was "not the kind of arm's length bargain envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind." Id. at 61, 31 Ill.Dec. 827, 394 N.E.2d 1204. Because the question concerned changing the law governing the rights of parties in the delicate area

of marriage-like relationships, which involves evaluations of sociological data and alternatives, this court decided that the underlying issue was best suited to the superior investigative and fact-finding facilities of the legislative branch in the exercise of its traditional authority to declare public policy in the domestic relations field. Id. Accordingly, this court held that Victoria's claims were "unenforceable for the reason that they contravene the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants." Id. at 66, 31 Ill.Dec. 827, 394 N.E.2d 1204. We reasoned that an opposite outcome of judicially recognizing mutual property rights between knowingly unmarried cohabitants—where the claim is based upon or intimately related to the cohabitation of the parties—would effectively reinstate common-law marriage and violate the public policy of this state since 1905, when the legislature abolished common-law marriage. Id. at 65–66, 31 Ill.Dec. 827, 394 N.E.2d 1204.

[1] The Hewitt court also questioned and considered the history of whether granting legal rights to cohabiting adults would encourage "what have heretofore been commonly referred to as 'illicit' or 'meretricious' relationships" which could weaken the institution of marriage. Hewitt, 77 Ill.2d at 58, 31 Ill.Dec. 827, 394 N.E.2d 1204. Today, this court does not share the same concern or characterization of domestic partners who cohabit, nor do we condone such comparisons. Nonetheless, as explained herein, a thorough reading of Hewitt makes clear that the core reasoning and ultimate holding of the case did not rely nor was dependent on the morality of cohabiting adults.

¶ 59 Notably, based on our understanding of the public policy in Illinois and the legislative prohibition of common-law marriage, we emphatically rejected the holding in Marvin on which the appellate court relied. Id. In doing so, we found that provisions of the Marriage and Dissolution Act—retaining fault as grounds for dissolution of marriage and allowing an unmarried person to acquire the rights of a legal spouse only if he or she goes through a marriage ceremony and cohabits with another in the good-faith belief that he is validly married—indicated the public policy and the judgment of the legislature disfavoring private contractual alternatives to marriage or the grant of property rights to unmarried cohabitants. Id. at 64, 31 Ill.Dec. 827, 394 N.E.2d 1204. In rejecting Victoria's public policy arguments, this court recognized that cohabitation by the unmarried parties may not prevent them from forming valid contracts about independent matters, for which sexual relations do not form part of the consideration and do not closely resemble those arising from conventional marriages. Id. at 59, 31 Ill.Dec. 827, 394 N.E.2d 1204. However, that was not the type of claim Victoria brought; thus, her claim failed.

¶ 60 The facts of the present case are almost indistinguishable from Hewitt, except, in this case, the parties were in a same-sex relationship. During the course of their long-term, domestic relationship, Brewer alleges that she and Blumenthal had a relationship that was "identical in every essential way to that of a married couple." Although the parties were not legally married, they acted like a married couple and held themselves out as such. For example, the former domestic partners exchanged rings as a symbol of

their commitment to each other, executed wills and trusts, each naming the other as the sole beneficiary of her assets, and appointed each other as fiduciary for financial and medical decision making. Blumenthal and Brewer also began to commingle their personal and financial assets, which allowed them to purchase investment property as well as the Chicago home where they raised their three children. Much like in Hewitt, Brewer alleges that she contributed to Blumenthal's purchase of an ownership interest in the medical group GSN, helping Blumenthal earn the majority of income for the parties and "thereby guaranteeing the family's financial security." Because Blumenthal was able to earn a high income, Brewer was able to devote more time to raising the couple's children and to attend to other domestic duties. Once Blumenthal's and Brewer's relationship ended, Brewer, like Victoria Hewitt, brought suit seeking various common-law remedies to equalize their assets and receive an interest in Blumenthal's business.31

¶ 61 As explained supra, our decision in Hewitt did no more than follow the statutory provision abolishing common-law marriage, which embodied the public policy of Illinois that individuals acting privately by themselves, without the involvement of the State, cannot create marriage-like benefits. Hewitt clearly declared the law on the very issue in this case. Yet, the appellate court in this case declined to follow our ruling, despite the facts being almost identical to Hewitt. This was improper. Under the doctrine of *stare decisis*, when this court "has declared the law on any point, it alone can overrule and modify its previous opinion, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases." (Emphasis in original.) (Internal quotation marks omitted.) Price v. Philip Morris, Inc., 2015 IL 117687, ¶ 38, 397 Ill.Dec. 726, 43 N.E.3d 53. The appellate court had no authority to depart from our decision. It could question Hewitt and recommend that we revisit our holding in the case, but it could not overrule it.

Having analyzed Hewitt, the Supreme Court then declined to deviate from it. The Court cited Spafford v. Coats, 118 Ill. App. 3d 566 (Second District, 1983), for the proposition that a nonmarital, cohabiting relationship did not preclude equitable relief if the claims were substantially independent of the nonmarital relationship between the parties and not based on rights arising from the cohabitation. In Spafford a woman sued the man she was living with for a constructive trust, alleging that she purchased vehicles with her own funds and titled them in the man's name because insurance premiums would be less. The Court distinguished Brewer's restitution claim from the situation in Spafford:

¶ 73 While we acknowledge that restitution may be a remedy available to a party who has cohabited with another (see Hewitt, 77 Ill.2d at 55–56, 31 Ill.Dec. 827, 394 N.E.2d 1204), that is not the circumstance concerning Brewer's restitution claim in count III of her counterclaim. We find that Brewer failed to make a showing that count III of her counterclaim has an independent economic basis apart from the parties' relationship. The joint account used by Blumenthal and Brewer to purchase an ownership interest in GSN was dependent on their desire to live in a marriage-like relationship and make purchases out of this account to better their family situation. Therefore, the purchase of Blumenthal's ownership interest in GSN from the joint account is intimately related to the parties' relationship. Our decision in Hewitt bars such relief if the claim is not

> independent from the parties' living in a marriage-like relationship for the reason it contravenes the public policy, implicit in the statutory scheme of the Marriage and Dissolution Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants. Id. at 66, 31 Ill.Dec. 827, 394 N.E.2d 1204.

The Court also rejected Brewer's arguments that the continued application of Hewitt violated the Illinois and federal constitutional guarantees of due process and equal protection. First, the Court noted that Hewitt only disallows unmarried cohabitants who live in a marriage-like relationship from accessing, under the guise of an implied contract, the rights and protections specified in the Marriage and Dissolution Act. Further, it found that Illinois has a legitimate interest in the creation, regulation and dissolution of the marriage relationship, and that Illinois was not acting irrationally or discriminatorily in refusing to grant benefits and protections under the Marriage and Dissolution Act to those who do not participate in the institution of marriage. The Court vacated the Appellate Court decision with respect to the 4 house-related claims, reversed with respect to the claim regarding the medical practice, and affirmed in full the trial court's order dismissing Brewer's counterclaim.

Justice Theis, joined by Justice Burke, dissented from the majority's decision with respect to the restitution claim. The dissent would have overruled Hewitt because, it its view, the decision was clouded by ". . . an inappropriate and moralistic view of domestic partners who cohabit and founded upon legal principles that have changed significantly." The dissent also believed that the majority opinion misunderstood the nature of the constitutional claims raised by Brewer.

POWERS OF ATTORNEY

Existence of fiduciary relationship between donor and donee held not to invalidate transfers; presumption of undue influence rebutted

7. In re Guardianship of Spinnie, 65 N.E. 3d 541 (Fifth District, 2016)

Spinnie considered the application of presumptions when gifts were made to family members, including a person who at the time of the gift was named as agent under a power of attorney. In 2007, when she was 85 years old, Agnes appointed one of her children, Patricia, as her agent under durable powers of attorney for property and health care. At about the same time, Agnes received a settlement exceeding $400,000 as compensation for a work-related injury. After receiving the settlement, Agnes gifts portions of the settlement proceeds to her two daughters, including Patricia, and to some of her grandchildren and great grandchildren, and others. Agnes also had a son, Richard. The court did not identify Richard as a done so presumably Agnes did not give anything to him.

In 2013 Richard petitioned the court for the appointment of a guardian for Agnes, and also asked the court to terminate Patricia's agency under the two powers of attorney. Agnes indicated to the guardian *ad litem* that she did not think a guardianship was necessary, nor did she want her son to be her guardian. The trial court appointed Richard as temporary guardian of Agnes' person and estate and terminated the two agencies. A subsequent physician's report indicated that Agnes needed a guardian, and the court then appointed Richard as plenary guardian of Agnes' person and estate. Richard, as guardian, filed an inventory showing that Agnes' assets consisted of her mobile home, worth about $21,000, and $1,600 in her checking account. The guardian brought citations against certain family members, including Patricia, for funds that Agnes had transferred within the previous five years, the

applicable limitations period. Richard settled with several of the defendants, but not Patricia or Patricia's niece, Shelley. Therefore, the case went to trial.

The evidence showed that Agnes had been very generous with the settlement proceeds, and had made a series of transfers to various family members, friends of family members and others. She also paid off her mobile home, took a cruise and enjoyed the funds. The evidence also showed that Agnes had often made statements that she would do what she wanted with her money.

The trial court noted that the evidence showed that Agnes had written many checks to cash, but it also noted that Richard had failed to show that any of these checks were actually given to Patricia or Shelley. In effect, the court found that Agnes had given these checks to other family members who "also took advantage of her." The court did find that Agnes had transferred $31,733.19 to Patricia. Because she occupied a fiduciary relationship with respect to her mother, the transfers to Patricia were presumed fraudulent. Patricia could overcome the presumption with clear and convincing evidence, but the trial court did not believe that she had done so. Therefore, the court ordered her to repay $31,733.19. The niece, Shelley, also received gifts, but as she did not operate under a presumption of fraud, the court found the evidence insufficient to support a judgment against her.

Richard's motion to reconsider was denied, as was a subsequent motion to require the trial court to itemize the components of the $31,733.19 in transfers that were made. Patricia then appealed the judgment.

The Fifth District reversed, finding that the trial court's judgment was against the manifest weight of the evidence. The Appellate Court noted that the presumption of fraud is not conclusive; it can be rebutted. Importantly, the presumption does not itself constitute evidence. In other words, establishing the presumption does not constitute evidence of fraud; it only raises a presumption. If the presumption is rebutted (i.e., if the agent shows the exercise of good faith and no betrayal of confidence) then the presumption falls. At that point the burden of proof is still with the petitioner, who must establish the presence of fraud or other bad faith conduct. Here the Appellate Court believed that the evidence showed that Agnes gifts were freely given; the presumption failed. Moreover, once the presumption failed, Richard did not produce sufficient evidence to support the trial court's judgment. The First District stated:

> ¶ 20 The presumption of fraud is not conclusive, however, and may be rebutted by clear and convincing evidence that the agent exercised good faith and did not betray the confidence placed in her. *Jones v. Washington,* 412 Ill. 436, 441, 107 N.E.2d 672 (1952); *Clark,* 398 Ill. at 601, 76 N.E.2d 446; *Spring Valley Nursing Center, L.P.,* 2012 IL App (3d) 110915, ¶ 13, 365 Ill.Dec. 131, 977 N.E.2d 1230; *In re Estate of DeJarnette,* 286 Ill.App.3d 1082, 1088, 222 Ill.Dec. 490, 677 N.E.2d 1024 (1997); *Glass v. Burkett,* 64 Ill.App.3d 676, 681, 21 Ill.Dec. 494, 381 N.E.2d 821 (1978). If the agent rebuts the presumption of fraud, the transaction in question will be upheld. See 755 ILCS 45/2–7(a) (West 2014) (agent who acts with due care for the benefit of the principal will not be held liable merely because the act also benefits the agent); *Clark,* 398 Ill. at 602, 76 N.E.2d 446 ("[i]f a conveyance was not procured through improper means attended with circumstances of oppression or overreaching, but was entered into by the grantor with full knowledge of its nature and effect and because of his or her deliberate, voluntary and intelligent desire, the existence of a fiduciary relation does not invalidate

the transaction"); *Spring Valley Nursing Center, L.P.,* 2012 IL App (3d) 110915, ¶ 13, 365 Ill.Dec. 131, 977 N.E.2d 1230.

¶ 21 A rebuttable presumption does not shift the burden of proof, and is not evidence in itself, but arises as a rule of law or legal conclusion, which establishes a *prima facie* case of undue influence, in the absence of evidence to the contrary. *Franciscan Sisters Health Care Corp. v. Dean,* 95 Ill.2d 452, 461–62, 69 Ill.Dec. 960, 448 N.E.2d 872 (1983). "Stated differently, the presence of a presumption in a case only has the effect of shifting to the party against whom it operates the burden of going forward and introducing evidence to meet the presumption." (Internal quotation marks omitted.) *Id.* at 462, 69 Ill.Dec. 960, 448 N.E.2d 872. "If evidence is introduced which is contrary to the presumption, the presumption will cease to operate." (Internal quotation marks omitted.) *Id.*

¶ 22 The amount of evidence necessary to meet the presumption is not determined by any fixed rule and depends on the circumstances of each case. *Id.* at 463, 69 Ill.Dec. 960, 448 N.E.2d 872; *In re Estate of Pawlinski,* 407 Ill.App.3d 957, 966, 347 Ill.Dec. 525, 942 N.E.2d 728 (2011). "Some of the significant factors to be considered in determining if the presumption of fraud has been rebutted include whether the fiduciary made a frank disclosure to the principal of the information he had, whether the fiduciary paid adequate consideration, and whether the principal had competent and independent advice." *Spring Valley Nursing Center, L.P.,* 2012 IL App (3d) 110915, ¶ 13, 365 Ill.Dec. 131, 977 N.E.2d 1230. The respondent must show by clear and convincing evidence that she exercised good faith and did not betray the confidence placed in her. See *Lemp v. Hauptmann,* 170 Ill.App.3d 753, 757, 121 Ill.Dec. 397, 525 N.E.2d 203 (1988) (presumption of fraud is overcome by clear and convincing evidence that the transaction was fair and equitable and was not a result of undue influence). "The term 'clear and convincing' is a relative term." *In re Estate of Pawlinski,* 407 Ill.App.3d at 966, 347 Ill.Dec. 525, 942 N.E.2d 728. "[T]he amount of evidence . . . to meet the presumption varie[s] with the strength of the facts supporting the presumption." *Id.* at 965, 347 Ill.Dec. 525, 942 N.E.2d 728. "A party may simply have to respond with *some evidence* or may have to respond with *substantial evidence*." (Emphasis in original.) *Id.* at 966, 347 Ill.Dec. 525, 942 N.E.2d 728.

¶ 23 "Where there is a fiduciary relationship, a gift is not presumed, regardless of the relationship of the parties involved." *Deason,* 251 Ill.App.3d at 638, 190 Ill.Dec. 959, 622 N.E.2d 1276; *Lemp,* 170 Ill.App.3d at 758, 121 Ill.Dec. 397, 525 N.E.2d 203 (fiduciary relationship between parent and child defeats presumption of a gift). "A trial court's determination as to whether a presumption of fraud has been overcome, made after an evidentiary hearing, is entitled to deference and will not be reversed on appeal unless it is against the manifest weight of the evidence." *Spring Valley Nursing Center, L.P.,* 2012 IL App (3d) 110915, ¶ 14, 365 Ill.Dec. 131, 977 N.E.2d 1230.

¶ 24 The respondent argues that the circuit court erred in applying a presumption of fraud or undue influence in this case because the gifts from Agnes to the respondent were not executed pursuant to the power of attorney. We reject the respondent's contention.

¶ 25 The execution of the 2007 power of attorney for property document authorized the respondent to manage and control Agnes's property and financial matters and established a fiduciary relationship between the respondent and Agnes as a matter of

law. *In re Estate of Miller,* 334 Ill.App.3d 692, 697, 268 Ill.Dec. 276, 778 N.E.2d 262 (2002); *Lemp,* 170 Ill.App.3d at 757, 121 Ill.Dec. 397, 525 N.E.2d 203. As a result of the property power of attorney, any subsequent conveyance of Agnes's property that either materially benefitted the respondent or was for the respondent's own use was presumed to be fraudulent. See *Jones,* 412 Ill. at 441, 107 N.E.2d 672; *Spring Valley Nursing Center, L.P.,* 2012 IL App (3d) 110915, ¶ 12, 365 Ill.Dec. 131, 977 N.E.2d 1230; *cf. McDonald v. McDonald,* 408 Ill. 388, 394, 97 N.E.2d 336 (1951) (because fiduciary relationship arose from business partnership, it did not extend to conveyance outside scope of partnership); *In re Estate of Stahling,* 2013 IL App (4th) 120271, ¶ 26, 370 Ill.Dec. 267, 987 N.E.2d 1033 (because fiduciary relationship arose from healthcare power of attorney, no presumption of undue influence in transactions involving property or financial matters).

¶ 26 Because Agnes's transfers of property to the respondent were within the scope of the property power of attorney, the transfers gave rise to a presumption of fraud, even though almost all of the transfers were signed by Agnes personally and not by the respondent as agent under the power of attorney. See *Spring Valley Nursing Center, L.P.,* 2012 IL App (3d) 110915, ¶ 13, 365 Ill.Dec. 131, 977 N.E.2d 1230 (no question under the law that transfer of life estate from principal to agent gave rise to a presumption of fraud, even though deed was signed by principal personally); *In re Estate of Elias,* 408 Ill.App.3d at 320, 349 Ill.Dec. 519, 946 N.E.2d 1015 (subsequent to execution of power of attorney, transfer of property from principal to agent pursuant to transfer-on-death form gave rise to presumption of fraud even though principal, not agent under power of attorney, signed transfer-on-death form); *Pottinger,* 238 Ill.App.3d at 920, 179 Ill.Dec. 116, 605 N.E.2d 1130 (subsequent to execution of power of attorney, transfer of property from principal to agents gave rise to presumption of fraud or undue influence even though some of the transactions benefitting agents were executed by principal herself, not by agent through power of attorney); *White,* 215 Ill.App.3d at 59, 158 Ill.Dec. 478, 574 N.E.2d 272 (subsequent to execution of power of attorney, transfer of property from principal to agent gave rise to presumption of fraud even though none of the property in question was transferred pursuant to power of attorney). The fact that the power of attorney was not necessary for the transactions does not diminish the fact that a fiduciary relationship existed. See *In re Estate of Miller,* 334 Ill.App.3d at 700, 268 Ill.Dec. 276, 778 N.E.2d 262 ("fact that the power of attorney was not necessary for the checking account transactions . . . does not diminish the fact that a fiduciary relationship existed"). The respondent's duty was not limited only to transactions invoking her power of attorney. See *In re Estate of Elias,* 408 Ill.App.3d at 320, 349 Ill.Dec. 519, 946 N.E.2d 1015 (transactions benefitting the defendant after grant of power of attorney are presumed fraudulent).

¶ 27 Accordingly, as a result of the presumption, the respondent was required to show by clear and convincing evidence that she exercised good faith and did not betray the confidence placed in her. See *Lemp,* 170 Ill.App.3d at 757, 121 Ill.Dec. 397, 525 N.E.2d 203 (presumption of fraud is overcome by clear and convincing evidence that the transaction was fair and equitable and was not a result of undue influence). We note that the strength of the facts supporting the presumption of fraud was tenuous. See *In re Estate of Pawlinski,* 407 Ill.App.3d at 965, 347 Ill.Dec. 525, 942 N.E.2d 728 (amount of evidence to meet presumption varies with strength of facts supporting the presumption). The evidence revealed that Agnes's gifts to the respondent were

consistent with the gifts she bestowed on her other relatives, the gifts were given while Agnes was competent and expressing a desire to gift, and Agnes consistently signed checks to the respondent in her own capacity, with the respondent signing only one check written to cash for $300. Thus, as noted, the respondent did not utilize her power of attorney to acquire the great majority of the gifts given by Agnes. *Cf. id.* at 966–68, 347 Ill.Dec. 525, 942 N.E.2d 728 (presumption of undue influence was strong because the evidence went far beyond the mere signing of the power of attorney).

¶ 28 Undue influence is defined as " 'any improper . . . urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely.' " *Franciscan Sisters,* 95 Ill.2d at 460, 69 Ill.Dec. 960, 448 N.E.2d 872 (quoting *Powell v. Bechtel,* 340 Ill. 330, 338, 172 N.E. 765 (1930)). The petitioner offered no evidence whatsoever of actual undue influence or fraud, relying completely on the presumption that arose from the execution of the power of attorney. However, the presumption of fraud was overcome by clear and convincing evidence that the transactions were fair and equitable and were not a result of undue influence. See *Lemp,* 170 Ill.App.3d at 757, 121 Ill.Dec. 397, 525 N.E.2d 203.

¶ 29 Although we also recognize that the circuit court's judgment amount is unsubstantiated by its order, in that it seems to have improperly included, *inter alia,* funds transferred prior to the execution of the power of attorney (*In re Estate of Miller,* 334 Ill.App.3d at 701, 268 Ill.Dec. 276, 778 N.E.2d 262 (no presumption of fraud regarding transfers prior to obtaining power of attorney)), we need not address the respondent's remaining arguments. The evidence before the circuit court revealed that the conveyances were not procured through improper means attended with circumstances of oppression or overreaching but were entered into by Agnes with full knowledge of their nature and effect and as a result of her deliberate and voluntary desire. Accordingly, the existence of the fiduciary relationship between Agnes and the respondent did not invalidate the transactions at issue. See *Clark,* 398 Ill. at 602, 76 N.E.2d 446; *Spring Valley Nursing Center, L.P.,* 2012 IL App (3d) 110915, ¶ 13, 365 Ill.Dec. 131, 977 N.E.2d 1230. The circuit court improperly entered judgment against the respondent.

Person named as successor agent owes no fiduciary duty until actually acting but owes duties to refrain from participating in a fraudulent concealment by prior agent

8. <u>In re Estate of Shelton</u>, 60 N.E. 3d 121 (Third District, 2016).

Thomas and Doris had two children, Rodney and Ruth Ann. In 2005 Thomas and Doris executed statutory powers of attorney, by which each named the other as attorney in fact for property matters. Rodney was named as the successor agent under both powers.

In 2011 Thomas conveyed two farms to Rodney. One farm was solely owned by Thomas. The other farm was jointly owned by Thomas and Doris. The deed for the jointly owned farm was signed by Thomas, individually for himself and as agent for Doris under the statutory power of attorney. The statutory power contained express language allowing the agent to make gifts.

Ruth Ann wound up as executor for both parents' estates after they died, Doris in 2012 and Thomas afterward. Ruth Ann brought actions under both estates. In Doris' estate, Ruth Ann sued Rodney for breach of fiduciary duty. She claimed that at the time of the conveyance of the jointly held farm, Rodney and Thomas colluded to deprive Doris of her interest in the property. Thomas was Doris' agent

under the power of attorney, and thus owed Doris a duty. Rodney was a successor agent under the power of attorney. Ruth Ann argued that under Section 10-3(b) of the Power of Attorney Act (755 ILCS 45/2-10.3(b)), a successor agent could be liable for participating in, or concealing, the fraudulent activity of a prior agent. The section reads:

> (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.

Rodney moved to dismiss the complaint under Section 2-615 of the Civil Practice Act for failing to state a cause of action.

In Thomas's estate, Ruth Ann moved for a citation to recover the farm that Thomas conveyed to Rodney. Ruth Ann argued that Rodney was in a fiduciary relationship with Thomas on account of the power of attorney. She raised two arguments: first, that a *successor* agent owes a fiduciary duty to the principal; and second, that because Doris was incapacitated at the time of the conveyance, Rodney was Thomas' primary agent under the power of attorney. Thus, Ruth Ann argued, because of the existence of the fiduciary relationship, any conveyance by Thomas to Rodney raised a presumption of undue influence, which Rodney must rebut. Rodney moved to dismiss under Section 2-615 and 2-619 of the Civil Practice Act.

Both powers of attorney contained the following language regarding successor agents

> For purposes of this paragraph 8, a person shall be considered to be incompetent 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.

In support of her argument that Rodney was acting as Thomas' primary agent at the time of the conveyance of the farm properties, Ruth Ann submitted a physician's report dated approximately 2 years after Doris' death. The physician's report cited various medical records and opined that as of the time of the conveyances Doris lacked capacity.

The trial court granted Rodney's 2-615 motion to dismiss with regard to Doris' estate, denied the 2-615 motion with regard to Thomas' estate, but granted Rodney's 2-619 motion with regard to Thomas' estate. Ruth Ann appealed both cases, which the Third District consolidated.

With respect to the appeal in Thomas' estate, the Appellate Court rejected Ruth Ann's argument that a successor agent owes fiduciary duties prior to actually acting as agent. The Court also found that under the wording of the power of attorney, Ruth Ann could not use a physician's report to establish, on an after-the-fact basis, that Rodney had assumed the role of agent under Thomas' power of attorney. The Court stated:

> ¶ 23 In determining whether Rodney was Thomas's fiduciary at the time of the conveyance at issue, we must first answer a threshold legal question. Specifically, we must decide whether a *successor* agent under a POA has a fiduciary duty to the principal *before he becomes the acting agent* (or the "attorney in-fact") merely by virtue of being

named a successor agent in the POA. This is an issue of first impression. Illinois courts have held repeatedly that an appointed agent under a POA (*i.e.,* an agent designated as the principal's attorney-in-fact) has a fiduciary duty to the principal as a matter of law from the time the POA is executed, regardless of whether or when he exercises his powers under the POA. See, *e.g., Estate of Elias,* 408 Ill.App.3d at 320, 349 Ill.Dec. 519, 946 N.E.2d 1015; see generally *In re Estate of Miller,* 334 Ill.App.3d 692, 697, 700, 268 Ill.Dec. 276, 778 N.E.2d 262 (2002). However, no published Illinois decision holds that a party named a *successor* agent under a POA has such a duty before he becomes the principal's attorney-in-fact. That is not surprising, because a fiduciary relation is created by the "appointment," "granting," or "designation" of a power of attorney (see, *e.g., Estate of DeJarnette,* 286 Ill.App.3d at 1088, 222 Ill.Dec. 490, 677 N.E.2d 1024; *Estate of Elias,* 408 Ill.App.3d at 319, 349 Ill.Dec. 519, 946 N.E.2d 1015; *Spring Valley Nursing Center,* 2012 IL App (3d) 110915, ¶ 12, 365 Ill.Dec. 131, 977 N.E.2d 1230), and a successor agent under a POA is appointed, granted, or designated a power of attorney only contingently, *i.e.,* only if the person designated attorney-in-fact under the instrument is unwilling or unable to act on the principal's behalf. In this case, Thomas's POA provided: "*If any agent named by me shall die, become incompetent, resign or refuse to accept the office of agent,* I name the following (each to act alone and successively, in the order named) as successor(s) to such agent: my son Rodney I. Shelton—my daughter Ruth Ann Alford." (Emphasis added.) Thus, Rodney's designation as Thomas's agent under the POA, and the attendant powers to act on Thomas's behalf, would be triggered if, and only if, the designated attorney-in-fact (Doris) died, became incompetent, or refused to accept the agency. Until any of those events occurred, Rodney had no power of attorney under the document, and therefore no common-law fiduciary duty to exercise such power according to Thomas's interests. In sum, it is the power to act as a principal's attorney-in-fact that creates a fiduciary duty as a matter of law. Until that power is actually conferred, there can be no corresponding fiduciary duty to use that power for the principal's benefit.

¶ 24 Having found that Thomas's designation of Rodney as a successor agent under the POA did not create a common-law fiduciary relationship, we proceed to the second question noted above: namely, whether the estate established that Doris was incompetent at the time of the conveyance in 2011 (and, therefore, that Rodney became Thomas's agent-in-fact at that time under the POA) through Dr. Jurak's physician's report, even though that report was prepared and signed approximately two years later. The trial court answered this question in the negative. The court concluded that a physician's certification of incompetency had to be rendered prior to the conveyance at issue in order to establish Doris's incompetency under Thomas's POA, and that a physician's certification prepared two years after the fact could not establish Doris's incompetency "retroactively." We agree.

¶ 25 As noted, Thomas's POA names Rodney as a successor agent only if the designated attorney-in-fact (Doris) "shall . . . become incompetent." The next sentence states that "[f]or purposes of this paragraph . . . , a person shall be considered to be incompetent 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 added.) Although the POA does not expressly state when the physician's certification must take place, when the paragraph is read as a whole, the clear implication is that the certification must occur before the successor power of attorney becomes the attorney-in-fact. Unless the originally designated attorney-in-fact is disabled or a minor, she does not "become incompetent" for purposes of the POA unless she is *adjudicated* incompetent or *certified* incompetent by a licensed physician. Moreover, the POA expressly states that the original agent will be considered incompetent "if *and while*" such certification and adjudication takes pace. (Emphasis added.) The most straightforward reading of these provisions is that the physician's certification, like an adjudication of incompetency, 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. Nothing in Thomas's POA suggests that a physician's certification prepared years after the fact may retroactively nullify the designated agent-in-fact's authority to act under the POA. Because written POAs must be strictly construed in Illinois (*In re Estate of Romanowski,* 329 Ill.App.3d 769, 265 Ill.Dec. 7, 771 N.E.2d 966 (2002); *Amcore Bank, N.A. v. Hahnaman–Albrecht, Inc.,* 326 Ill.App.3d 126, 259 Ill.Dec. 694, 759 N.E.2d 174 (2001)), we will not read such intent into the instrument by implication where the text does not clearly support that interpretation.

¶ 26 Moreover, there are good policy reasons for reading a standard form POA in this manner. Allowing incompetency determinations to be made years after the fact could create uncertainty and lead to situations where an acting power of attorney makes financial decisions for a long period of time before he or she is declared incompetent and replaced with a successor POA. Principals, acting agents, successor agents, and third parties need to know with certainty who has the authority to act on the principal's behalf (and who has fiduciary duties to the principal) at a particular time. If an attorney-in-fact's authority can be nullified retroactively by a doctor's certification years after the fact, the designated successor agents would never be certain when their powers and duties under the POA were triggered. A successor agent under the POA might reasonably believe that the attorney-in-fact is competent, only to discover years later that she had been incompetent for years, and that the successor agent has been inadvertently shirking his duty throughout that entire period. This would create a regime of instability and uncertainty which could upset the settled expectations of principals, attorneys-in-fact, successor agents, and third parties who have transacted business with an attorney-in-fact. Moreover, allowing retroactive certification of an agent's incompetency would likely spawn litigation (complete with conflicting expert testimony) to establish when an attorney-in-fact became incompetent. A bright-line rule requiring a physician's certification of incompetency *before* the attorney-in-fact is replaced by a successor agent would avoid all of these problems.[2]

The First District, in a 2-1 decision, reversed the trial court's dismissal of Ruth Ann's claim in Doris' estate. The First District found that under Section 10-3(b) of the Act, a successor agent could be held

accountable for participating in a breach of fiduciary duty by the acting agent. The Court drew a distinction between its opinion that Rodney did not owe fiduciary duties as a successor agent, but did have limited duties with respect to breaches, or concealment of breaches, of fiduciary obligations:

> ¶ 32 In dismissing the complaint, the trial court held that, because Rodney was only a successor agent who never became an actual agent of Doris's under the POA, no fiduciary duty ever arose as a matter of law. However, although we agree that Rodney did not have a fiduciary duty to Doris under the POA or under the common law, that does not resolve the matter. The complaint in this case was based upon section 2–10.3(b) of the Act. That section provides that successor agents may be liable for breaches of fiduciary duty committed by their predecessor agents if they participate in or conceal such breaches. 755 ILCS 45/2–10.3(b) (West 2010). Successor agents are liable for such conduct under section 2–10.3(b) regardless of whether they have independent fiduciary obligations to the principal. Section 2–10.3(b) does not state that successor agents may be liable for breaches committed by predecessor agents only if they themselves become acting agents.
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> ¶ 33 Moreover, section 2–10.3(b) imposes certain affirmative obligations upon successor agents. Specifically, section 2–10.3(b) provides that a successor 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." *Id.* The statute suggests that successor agents who fail to discharge these obligations are liable for any breach of fiduciary duty committed against a principal by a predecessor agent.[3]
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> ¶ 34 Thus, by its plain terms, section 2–10.3(b) could support a cause of action against a successor agent if the successor agent participated in or concealed a breach of duty by a predecessor agent, or if the successor agent was aware of an imminent breach of fiduciary duty by a predecessor agent but failed to notify the principal or take reasonable steps to safeguard an incompetent principal's interest. In this case, the complaint alleged that: (1) Thomas violated his fiduciary duty as Doris's agent under Doris's POA by transferring all of Doris's interest in the farm to Rodney and Rodney's wife without reserving a life estate in Doris at a time when Doris was incompetent and in need of income from the property; (2) Rodney was aware that Thomas was going to execute a deed accomplishing this wrongful transfer of Doris's property interest; and (3) Rodney "participated in such breach of fiduciary duty" by Thomas in violation of section 2–10.3(b) by failing to notify Doris of such breach and by failing to take action to safeguard Doris's best interests. Thus, the complaint alleged facts sufficient to state a cause of action. We therefore hold that the trial court erred in dismissing the complaint under section 2–615(a).
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> ¶ 35 Rodney argues that, when the Act is read as a whole, it is clear that section 2–10.3(b) does not apply to successor agents. Section 2–10.3(b) states that "[a]n *agent*" may be liable for the actions of another agent under certain specified circumstances; it

does not state that a "successor agent" may be liable for such actions. Similarly, section 2–10.3(b) imposes certain duties on an "agent," not a "successor agent." The Act defines "agent" as "the attorney-in-fact or other person designated to act for the principal in the agency." 755 ILCS 45/2–3 (West 2010).[4] By contrast, section 2–10.3 suggests that a "successor agent" is designated to act only "if an initial or predecessor agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve." 755 ILCS 45/2–10.3(a) (West 2010). Thus, Rodney contends that, by using the term "agent" instead of "successor agent" throughout section 2–10.3(b), the legislature expressed its intent that the duties and potential liability prescribed by that section should apply only to attorneys-in fact, not to successor agents.

¶ 36 We disagree. Section 2–10.3(b) is a subsection within section 2–10.3, which is entitled "Successor agents." The other two subsections within that section both clearly apply to successor agents. See 755 ILCS 45/2–10.3(a), (c) (West 2010). Thus, it stands to reason that section 2–10.3(b) applies to successor agents as well.

¶ 37 Moreover, section 2–10.3(b) imposes certain duties on an agent "who has knowledge of a breach *or imminent breach of fiduciary duty* by another agent." (Emphasis added.) 755 ILCS 45/2–10.3(b) (West 2010). As Rodney acknowledges, only attorneys-in-fact have fiduciary obligations to the principal under a POA, and only attorneys-in-fact are authorized to act for the principal. Accordingly, only an attorney-in-fact could commit an "immanent breach of fiduciary duty." This means that section 2–10.3(b) must intend to impose duties on an agent when certain unlawful acts are performed or about to be performed by an acting attorney-in-fact under a POA. As noted, however, Rodney argues that section 2–10.3(b) imposes duties only on an attorney-in-fact. If that were true, then the statute could apply only in a situation where there are co-agents (*i.e.,* two simultaneously acting attorneys-in-fact) under the POA. However, a careful reading of the Act as a whole establishes that section 2–10.3(b) was not intended to apply to co-agents. First, as noted, section 2–10.3(b) appears in a section of the Act entitled "Successor agents," not "co-agents." More importantly, there is a separate section of the Act entitled "Co-agents" (755 ILCS 45/2–10.5 (West 2010)), and that section contains a subsection that is identical to section 2–10.3(b) (see 755 ILCS 45/2–10.5(c) (West 2010)). If section 2–10.3(b) applied to co-agents, as Rodney maintains, then section 2–10.5(c) would be rendered superfluous. "It is a general rule of construction that where a statute can be reasonably interpreted so as to give effect to all its provisions, a court will not adopt a strained reading which renders one part superfluous." *Bass v. Cook County Hospital,* 2015 IL App (1st) 142665, ¶ 25, 390 Ill.Dec. 860, 29 N.E.3d 1130. For this additional reason, we reject Rodney's interpretation.

¶ 38 In his partial dissent in case No. 3–14–0685, Justice Carter maintains that our decisions in these two consolidated appeals are inconsistent. See *infra,* ¶ 47. We disagree. In the first appeal (No. 3–14–0163), we hold that a successor agent under a POA has no fiduciary duty to the principal under the common law until he becomes the acting agent (or attorney-in-fact). In the second appeal (No. 3–14–0685), Justice

Schmidt and I hold that a successor agent has a limited statutory duty under section 2–10.3(b). That statutory duty is an exception to (*i.e.,* in derogation of) the common law rule that successor agents have no duties to the principal. However, it is a very limited duty. As noted above, the statute imposes a duty on a successor agent to: (1) refrain from participating in or concealing a breach of fiduciary duty committed by another agent; (2) notify the principal of any immanent breach of fiduciary duty by another agent and, if the principal is incapacitated, take whatever actions may be reasonably appropriate under the circumstances to safeguard the principal's best interest. The latter duty is imposed only if the successor agent has knowledge of a breach or imminent breach of fiduciary duty by another agent. Thus, it will apply only in very limited circumstances.

¶ 39 We also disagree with Justice Carter's conclusion that "the references to the 'agent' in section 2–10.3(b) are limited solely to the acting agent or attorney in-in-fact." *Infra* ¶ 47. As explained above, when section 2–10.3(b) is read in conjunction with other relevant provisions of the Act, the only reasonable conclusion is that section 2–10.3(b) was intended to apply to successor agents, not to co-agents or other attorneys-in-fact.

¶ 40 Moreover, contrary to Justice Carter's conclusion (*infra* ¶ 47), our reading of section 2–10.3(b) does not conflict with section 2–7, which provides that an agent has no duty to "assume control of or responsibility for any of the principal's property, care or affairs, regardless of the principal's physical or mental condition." 755 ILCS 45/2–7 (West 2010). Section 2–10.3(b) merely imposes a limited duty under certain narrow and specified circumstances, as discussed above. In any event, even if there were some tension between these two provisions, the specific duties imposed in section 2–10.3(b) would control over the general principle announced in section 2–7. See *Sierra Club v. Kenney,* 88 Ill.2d 110, 126, 57 Ill.Dec. 851, 429 N.E.2d 1214 (1981); *Calibraro v. Board of Trustees of the Buffalo Grove Firefighters' Pension Fund,* 367 Ill.App.3d 259, 262, 305 Ill.Dec. 195, 854 N.E.2d 787 (2006).

COMMENT: As noted in the quoted language, Justice Carter dissented from the Court's ruling with respect to Thomas' estate. Justice Carter believed that it was inconsistent to hold in Thomas' estate that Rodney owed no duties as a successor agent, but that he did under Doris' estate. He would read Section 10.3-(b) to apply only to acting agents. Justice Schmidt dissented from the holding in Thomas' estate on the basis that the physician's report could operate retroactively. His dissent was succinct:

¶ 51 In paragraph 26, *supra,* the majority explains that the sky will fall if we were to read a standard form POA to allow a retroactive declaration of incompetency. I suggest that the majority's view allows a successor agent under a POA, who knows full well that the designated attorney-in-fact is incompetent, to engage in self-dealing before either seeking a physician's declaration of incompetency, or a court order to the same effect. In a case such as this, we have the opinion and medical records of Doris's former treating physician, not simply a hired expert. If the estate can show that Doris was indeed incompetent at the relevant times, I see no reason, not to allow the estate to challenge the transactions that benefitted Rodney. If a retroactive declaration of

> incompetency only affects transactions that benefit the successor agent directly, or even indirectly, then that should alleviate most of the majority's concerns. *Supra* ¶ 26.

The Illinois Supreme Court has granted leave to appeal (65 N.E.3d 841 (Ill. 2016)).

Agent Cannot Amend Trust Under Power of Attorney Without Specific Reference in Agency

9. <u>Auster v. Auster</u>, 2016 IL App (2d) 160059-U, (Second District, 2016).

***Note: the** order was filed under Supreme Court Rule 23(c)(1) and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).*

This case concerned whether an agent acting under a power of attorney had the right to amend a trust in order to appoint a successor trustee. Rosemary had created a revocable living trust, and named herself trustee. She reserved the right to name a successor trustee. The trust provided that if she became incapacitated, her husband would succeed her. If her husband was unable to act, ATG Trust Company was named as the next successor trustee. If there should be a further vacancy, then a majority of her children would name a successor trustee. Rosemary's husband predeceased her, and when she became incapacitated in 2013, she had five children. One of her children, Sam, was acting as her agent under a durable power of attorney. When ATG Trust Company declined to act as trustee, Sam attempted to amend the trust in order to appoint another corporation as the successor trustee. Same argued that he had the authority to do this under the durable power of attorney, which stated:

> My Attorney-in–Fact may exercise, in whole or in part, release or let lapse any power of appointment held by me, whether general or special, or any amendment or revocation power under any trust even if the power may be exercised only with the consent of another person and even if my Attorney-in–Fact is the other person subject to any restrictions on the exercise imposed on my Attorney-in–Fact under this power of attorney.

Section 2-9 of the Illinois Power of Attorney Act (755 ILCS 45/2–9) states:

> In exercising powers granted under the agency, including powers of amendment or revocation and powers to expend or withdraw property passing by trust, contract or beneficiary designation at the principal's death (such as, without limitation, specifically bequeathed property, joint accounts, life insurance, trusts and retirement plans), the agent shall take the principal's estate plan into account insofar as it is known to the agent and shall attempt to preserve the plan, but the agent shall not be liable to any plan beneficiary under this Section unless the agent acts in bad faith. ***An agent may not revoke or amend a trust revocable or amendable by the principal or require the trustee of any trust for the benefit of the principal to pay income or principal to the agent without specific authority and specific reference to the trust in the agency.*** The agent shall have access to and the right to copy (but not to hold) the principal's will, trusts and other personal papers and records to the extent the agent deems relevant for purposes of this Section. [Emphasis added.]

Meanwhile, a majority of Rosemary's children appointed one of the children to be the successor trustee. The child then petitioned the court for a declaration that she was the rightful trustee. The trial court found the successor trustee provisions of Rosemary's Trust unambiguous, ruled that Sam did not have

the authority to amend the trust, and confirmed the appointment of the child as the successor trustee. Sam appealed.

In the appeal Sam argued that he had the authority to amend the trust under the language of the power of attorney. The Second District disagreed, and affirmed the trial court's ruling on this point. The Appellate Court pointed out that Section 2-9 of the statute requires a specific reference to a trust in order to provide the authority to amend or revoke it. Here Rosemary's power of attorney made only a general reference to any trust, with no specific reference to her trust. The Court also rejected Sam's argument that Section 2-4 of the Power of Attorney Act should be read as allowing the general reference to "any trust" in the body of the power as negating the requirements of Section 2-9. The Court reasoned as follows:

> ¶ 13 First, we will address defendant's contention that the Power of Attorney vested him with authority to amend the trust to name Heartland Bank as successor trustee. Defendant cites section 3.18 of the Power of Attorney as his source of authority to amend the trust. This section states, "My Attorney-in–Fact may exercise, in whole or in part, release or let lapse any power of appointment held by me, whether general or special, or any amendment or revocation power under any trust." This indeed appears to be a broad grant of authority to amend the trust. However, the trial court found that section 2–9 of the Act limited defendant's authority. In pertinent part, this section states, "An agent may not revoke or amend a trust revocable or amendable by the principal or require the trustee of any trust for the benefit of the principal to pay income or principal to the agent without specific authority and specific reference to the trust in the agency." 755 ILCS 45/2–9 (West 2010). The Power of Attorney does not mention the trust by name, simply granting defendant authority over "any trust." In other words, the Power of Attorney grants this authority *generally*. This plainly runs afoul of the statute's requirement of a "*specific* reference to the trust." (Emphasis added.) The construction of such documents presents a question of law subject to *de novo* review. *Herlehy v. Marie V. Bistersky Trust Dated May 5, 1989*, 407 Ill. App. 3d 878, 889 (2010) (trust); *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 13 (statute).
>
> ¶ 14 Defendant calls our attention to section 2–4 of the Act, which states, in pertinent part, "The principal may specify in the agency the event or time when the agency will begin and terminate, the mode of revocation or amendment and the rights, powers, duties, limitations, immunities and other terms applicable to the agent and to all persons dealing with the agent, *and the provisions of the agency will control notwithstanding this Act*." (Emphasis added.) 755 ILCS 45/2–4 (West 2010). According to defendant, the final phrase of this section establishes that the Power of Attorney controls over the provisions of section 2–9 requiring a specific reference to the trust. Defendant's contention violates several principles of statutory construction.
>
> ¶ 15 First, it would violate the principle that a statute should not be construed so as to render any portion of it meaningless. *Chestnut Corp. v. Pestine, Brinati, Gamer, Ltd.*, 281 Ill. App. 3d 719, 724 (1996). Quite simply, if, in the absence of a specific reference to a trust as specified in section 2–9, a court were to examine a document and perhaps parol evidence to ascertain if some other grant of authority existed, the purported requirement of a specific reference would have no meaning. Any grant of authority would be sufficient. There is no legitimate way to say that the requirement of a specific

reference may be freely disregarded if such a reference does not appear in a power of attorney that would allow this portion of section 2–9 to have any meaning whatsoever.

¶ 16 Second, defendant's position imputes an absurd intent to the legislature. It is axiomatic that legislative enactments will not be construed in an absurd, unjust, or inconvenient fashion. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 280 (2003). On defendant's interpretation, the legislature enacted an entire Act but did not require anyone to follow its provisions. We cannot presume the legislature intended such an absurdity.

¶ 17 Third, defendant's position ignores the precept that in the event of a conflict between statutory sections, the more specific section controls over the more general section. *State v. Mikusch*, 138 Ill. 2d 242, 254 (1990). In *Village of Chatham v. County of Sangamon*, 351 Ill. App. 3d 889, 896 (2004), the court explained, "A general statute is one that applies to cases generally while a specific statute is particular and relates to only one subject." Here, section 2–4 is clearly the more general of the statutes. It states, in essence, that where some portion of a power of attorney conflicts with the Act, the power of attorney controls. However, the portion of section 2–9 at issue here concerns an attorney-in-fact's authority regarding a trust—a much more specific subject. Thus, to the extent the two statutory provisions conflict, we must give effect to section 2–9.

¶ 18 Accordingly, we hold that section 2–9's requirement that the Power of Attorney must make a "specific reference to the trust" applies here. That said, defendant's protestations to the contrary notwithstanding, that the Power of Attorney granted defendant authority concerning "any trust" is plainly not a "specific reference" to the trust. Defendant spends considerable time arguing that we should interpret the statute broadly to effectuate Rosemary's intent. However, we cannot simply disregard section 2–9 of the Act. Indeed, as section 2–9 is entitled "Preservation of Estate Plans and Trusts," it is apparent that the legislature determined that the best way to preserve estate plans and trusts was to ensure that an attorney-in-fact be allowed to substantively change a trust only where that authority is expressly set forth.

The Court rejected three other arguments Sam advanced in the appeal. One argument was that the language of Section 2-4 requiring a specific reference to a trust should apply only to situations when an agent directs a trustee to pay income or principal to the agent. The Appellate Court refused to read the language in this manner, noting that an attorney-in-fact seeking pecuniary gain is not the sole threat to an estate plan. Another argument was that in appointing the successor trustee the children did not give proper notice to Rosemary, who was effectively removed. The trust required notice to any trustee who would be removed. The Appellate Court first observed that notice of the appointment of the successor trustee was served on Sam at a time when he was acting as Rosemary's agent. The notice indicated that she was incapacitated and therefore the clear implication was that she could no longer act as trustee. Delivery of the notice to Rosemary's agent sufficed as notice to Rosemary.

The Second District went one step further, however, finding that notice was not even necessary:

¶ 24 Moreover, assuming, *arguendo*, that the notice requirement was not satisfied, we agree with the trial court that this did not render plaintiff's appointment invalid. Again, defendant was attorney-in-fact for Rosemary. As early as April of 2013, defendant was

> attempting to find a successor trustee for Rosemary, as evidenced by ATG Trust Company's declination of that role occurring on April 29, 2013. Thus, Rosemary's attorney-in-fact had actual knowledge that Rosemary was no longer capable of serving as trustee. Requiring notice that Rosemary was being removed under such circumstances would elevate form over substance. *Cf. In re Spelt*, 143 Ill. 2d 245, 230–31 (1991) ("When it is evident that a respondent received actual notice of the proceeding against him, then a commitment order, based upon clear and convincing evidence and issued by a circuit court after a hearing on the merits, may be deemed proper in an appropriate case even though the record does not demonstrate that respondent received formal notice as well."). As the trial court succinctly put it: "The trust language does not require the person deemed incapacitated by two physicians to receive notice to make the appointment effective. Nor would this comport with common sense." Providing notice to an incapacitated person, particularly where that person's attorney-in-fact had actual knowledge of the incapacity, would appear to be a useless act and accomplish nothing. Defendant was not prejudiced by a lack of formal notice.

Sam's final argument was that the trial court erred in refusing to consider a reformation of Rosemary's trust to prevent a related or subordinate party from becoming a successor trustee. Sam had offered the testimony of the scrivener that he inadvertently omitted this language.

The Second District affirmed the trial court's refusal to entertain a reformation action, on the grounds that the trust was unambiguous:

> ¶ 28 In *Wheeler–Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 869 (2008), the court explained that "The purpose of an action for reformation is to change a written instrument by inserting some omitted provision or deleting some existing provision so that the document conforms to the original agreement of the parties." Regarding a trust, Illinois courts have held that "the use of extrinsic evidence to nullify the effect of unambiguous language should be allowed 'only in extreme cases.' " *Handelsman v. Handelsman*, 366 Ill. App. 3d 1122, 1133 (2006). For example, in *Reingberg v. Heiby*, 404 Ill. 247, 249–50 (1949), an attorney preparing a trust copied descriptions of lands bequeathed to the settlor's two daughter from an erroneous source, resulting in one receiving 20 acres and the other 4 acres rather than an equal division as contemplated by the settlor.
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> ¶ 29 In this case, the trust is not ambiguous. Section 3.02(b) plainly states what is to occur should a successor trustee need to be appointed during Rosemary's lifetime. Defendant would simply add a condition limiting the choice of whom that successor could be. Defendant identifies no reason why this is one of the "extreme cases" (*Handelsman*, 366 Ill. App. 3d at 1133) where extrinsic evidence should be allowed to override the unambiguous language of the trust. In *Reinberg*, giving effect to the language of the trust would have resulted in a distribution of assets between the settlor's children contrary to the settlor's desires—a substantive matter. Here, we are dealing simply with who should be trustee—a matter more procedural in nature.
>
> ¶ 30 Regardless of whether plaintiff or a corporate trustee serves as successor, the trustee will have fiduciary duties. See *Smith v. First National Bank of Danville*, 254 Ill. App. 3d 251, 261–62 (1993); *Dick v. People's Mid–Illinois Corp.*, 242 Ill. App. 3d 297, 303

(1993). An action for a breach of fiduciary duty would lie against either, providing a means of redress should the trustee act inappropriately. See *In re Estate of Muppavarapu,* 359 Ill. App. 3d 925, 929–30 (2005). Furthermore, assuming plaintiff will not faithfully discharge her duties is mere speculation. In short, we perceive no grave injustice that will occur if the trust is given effect as it is written.

COMMENT: The issue of reformation can be a tricky one. Strictly speaking, it should not turn on whether the document is ambiguous; one could have a perfectly clear document that contains a mistake. This issue really should be whether a mistake has occurred, and whether the mistake is one that permits reformation. Case law is not always clear, nor consistent, on these issues. The issue of reformation based on scrivener's error often arises in the context of the federal estate tax, where parties try to reform a document to escape an adverse tax consequence. Whether a reformation is binding on the IRS depends on the circumstances. In Commissioner v. Estate of Herman J. Bosch, 387 U.S. 456 (1967), the Supreme Court held that the Internal Revenue Service is bound by the state law interpretation rendered by the highest court in the state. However, under the Bosch case lower court rulings have much less force, and trial court rulings to which the government is not a part can be discounted, as they often represent little more than a non-adversarial proceeding where whatever relief that is requested is granted. Discounting these types of decisions is particularly so if the ruling is sought after the tax controversy has arisen.

Moreover, the trouble with many of the "scrivener's error" situations is that the error was because the scrivener really didn't understand the implications of what he or she was doing – for example, a scrivener's affidavit might boil down to something like "I didn't realize that the unlimited power to remove and replace a trustee might confer on a beneficiary a general power of appointment. Had I understood this I never would have included that provision in the trust." Is this really a scrivener's error, or simply a mistake of law on the part of the draftsman? And is there any evidence that the person who signed the document did not intend to sign it? Perhaps decanting offers a better solution to correcting problematic documents, although whether decanting to remove potentially taxable powers involves gift issues is a discussion for another day. Finally, one should never ignore the ability to obtain relief through a construction action, which interprets a trust. Cf. Rev. Rul. 73-142, 1973-1 Cum. Bul. 405, which provided that a state court determination of a beneficiary's rights under a trust, ***even though contrary to state law***, was binding on the IRS; Bosch did not apply.

TRUSTS AND TRUSTEES

Will contest exception to attorney-client privilege applies to revocable trust; attorney's estate planning notes not protected by work product doctrine

10. Eizenga v. Unity Christian School of Fulton, Illinois, 54 N.E. 3d 907 (Third District, 2016).

In Eizenga a successor trustee of a revocable living trust filed an interpleader action, claiming that the deceased settlor's attorney had exercised undue influence over the settlor regarding a substantial gift to charity. The complaint alleged that the settlor was not a religious person and had no connection with Unity Christian School of Fulton, Illinois ("Unity Christian"). The complaint further alleged that the attorney was an "avid booster" of Unity Christian and served as the school's attorney. The settlor of the trust died on July 10, 2013, and the trustee filed the interpleader action on August 13, 2013.

In discovery the attorney was served with a production request. The attorney filed a motion to quash, asserting attorney-client privilege and work product doctrine. The attorney filed with the trial court a privilege log for documents spanning 1996 to2014. According to the Appellate Court nearly all of the documents in the privilege log that were dated after the action was filed were timesheets. The earlier documents included letters to the settlor, notes on estate planning, notes from calls, notes regarding communications about potential beneficiaries of the trust, notes on calculations, and valuations. After a hearing, the trial court issued a written opinion denying the motion to quash and ordering the attorney to comply with the production request. In denying the motion to quash, the trial court cited the "will contest" exception to the attorney-client privilege, and by analogy extended the exception to the contest of a living trust instrument. The trial court also ruled that work product doctrine did not apply because the documents in question did not appear to be related to "theories, mental impressions, or litigation plans prepared . . . in anticipation of pending or threatened litigation." The attorney refused to comply was held in civil contempt with a penalty of $1 per day for continued refusal. The attorney appealed.

The attorney raised several arguments on appeal, but his main argument on privilege was that the will contest exception is a narrow exception that applies only to wills, not to living trust documents. Generally the attorney-client privilege survives the death of the client. There is an exception, however, when after the death of the client there is a contest regarding the validity of the testator's will. The rationale for the exception is that if the controversy is between claimaints who are all claiming under the decedent's will, the decedent would have wanted the otherwise-privileged information to be available as a means toward properly fulfilling testamentary intent.

In affirming the trial Court, the Third District cited §81 of the Restatement (Third) of the Law Governing Lawyers, that the privilege does not apply to communications ". . . relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction." The Third District agreed with the trial court that this case presented no material difference between a will contest for purposes of the testamentary exception to the attorney-client privilege, and that the case fit squarely within the rationale behind the exception.

Regarding work product, the Appellate Court cited Waste Management, Inc. v. International Surplus Lines Insurance Company, 144 Ill. 2d 178 (1991), that the doctrine is designed to protect the right of an attorney to thoroughly prepare a case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts. Because the exception is narrow, any relevant material generated in preparation for trial is freely discoverable, as long as it does not disclose "conceptual data." Under Supreme Court Rule 201(b)(2) material prepared in preparation for trial is discoverable only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.

Here the vast majority of material subject to the subpoena concerned notes and communications prior to the date that the litigation was commenced. Nothing in the privilege log indicated that these documents were created in preparation for any impending or threatened litigation. The Third District affirmed the trial court's order that all of the documents should be produced. Finding the attorney's appeal to have been in good faith in and for the purpose of serving his client and the court, the Third District vacated the civil contempt order.

Adoption of adult not a subterfuge; omission of person's name not clear and convincing evidence of intent to exclude

11. In re Estate of Weidner v. Peifer, 68 N.E. 3d 1011 (Fourth District, 2016)

Section 2-4(e) of the Probate Act of 1975 provides a presumption regarding whether adopted children take as if born to the adopting parents. The statute states in relevant part:

> For purposes of determining the property rights of any person under any instrument executed on or after September 1, 1955, an adopted child is deemed born to the adopting parent unless the contrary intent is demonstrated by the terms of the instrument by clear and convincing evidence.

Greg was born to Ron and Patricia in November, 1967. Ron and Patricia divorced when Ron was a small child. Patricia was granted custody and Greg lived with her. Ron later married Betty, who was a remainder beneficiary of an irrevocable *inter vivos* trust jointly created by Betty's parents for the extra and supplemental needs of their daughter Donna. Betty was also the beneficiary of a testamentary trust created by her mother. Betty was an income beneficiary of the testamentary trust, subject to a life estate in favor of her father. Both trusts terminated on Donna's death, and on termination Betty was to receive a distribution of the trust property if she were then living, but if she were not then living the distribution would pass to her descendants, *per stirpes*.

In 1990 Betty adopted Greg, when he was 22 years old. By December, 2000, both of Betty's parents had died, and the trustee of the testamentary trust began to make income distributions. Betty died in 2005, and thereafter the income payments from the testamentary trust were reallocated among her siblings. Nothing passed to Greg. In 2012 Donna died, terminating both trusts. The inter-vivos trust was distributed, but nothing passed to Greg. Before the testamentary trust was fully distributed, Greg filed a claim to share of both trusts.

The trial court found that under the Probate Act Greg was Betty's descendant and therefore entitled to a share of both trusts. The evidence during the trial court hearing on Greg's petition demonstrated a close and long-lasting relationship between Greg and Betty, one that was very close and more active than might normally be expected of a step parent. The court rejected the argument of the respondents that under Cross v. Cross, 177 Ill. App. 588 (First District, 1988), and Dixon v. Weiekamp-Diller, 979 N.E. 2d 98 (Fourth District, 2012) the adoption should be disregarded under the Probate Act because it was entered into as a subterfuge. Although Betty may have been motivated in part by the desire to provide a means for him to be her descendant for purposes of inheritance, this desire was the product of traditional parental desires. The trial court believed that because the adoption was not entered into solely for purposes of making Greg an heir, it was not a subterfuge.

The respondents appealed, arguing that the documents demonstrated an intent to exclude Greg, and also that the adoption was a subterfuge.

Regarding the documents themselves, the respondents argued that because Betty's parents knew of her relationship with Greg before they executed their documents, the fact that they did not explicitly include him as a beneficiary was evidence of their intent to exclude him. Also, Betty's father had explicitly excluded Greg as a beneficiary under his own estate planning documents. Of course under the statutory presumption the intention to exclude must be demonstrated by clear and convincing

evidence, and not mentioning Greg by name simply could not meet this burden. The actual language of the trusts, directing distribution of trust property to Betty ". . . if then living; and if not then living, to her descendants, *per stirpes*, then living" did not provide clear and convincing evidence to exclude Greg as Betty's descendant.

The Fourth District also affirmed the trial court on the issue of adoption-as-subterfuge:

> ¶ 25 In 1988, the First District addressed the concept of a limited-use subterfuge exception. In Cross, 177 Ill.App.3d at 589, 126 Ill.Dec. 801, 532 N.E.2d at 487–88, the testator died, leaving her estate in trust and granting her son a testamentary power of appointment to distribute the res of the trust to any of her descendants. Any part of the trust estate not effectively appointed by the testator's son was directed to be divided equally amongst the testator's husband's nephews. Id. at 590, 126 Ill.Dec. 801, 532 N.E.2d at 488. One month after the testator's death, her 49-year-old son adopted the 36-year-old defendant as his son and then exercised his testamentary power of appointment in favor of the defendant as the grandson and descendant of the testator. Id. The exercise of the power of appointment was later challenged, and the trial court found the defendant was not a descendant of the testator. Id. On appeal, the court found the trust language demonstrated the testator's desire to have her estate remain in her family unless the family chose to give it to charity. Id. The court further found to allow the testator's son to select by adoption the one to take his mother's estate would disregard the intent of the trust, a use of the adoption process the court could not condone. Id. at 591, 126 Ill.Dec. 801, 532 N.E.2d at 488. Specifically, the court noted: "The adoption of an adult solely for the purpose of making him an heir of an ancestor under the terms of a testamentary instrument known and in existence at the time of the adoption is an act of subterfuge." Id. at 591, 126 Ill.Dec. 801, 532 N.E.2d at 488–89. The defendant attempted to argue extrinsic facts to demonstrate the adoption was motivated by traditional parental desires. Id. at 592, 126 Ill.Dec. 801, 532 N.E.2d at 489. The court found, while it was unnecessary to review such facts, the record demonstrated any such argument to be unpersuasive. Id.
>
> ¶ 26 Almost 24 years later, our court had the opportunity to address and apply the limited-use subterfuge exception. In Dixon, 2012 IL App (4th) 120209, ¶ 8, 365 Ill.Dec. 732, 979 N.E.2d 98, Hughes was the life-estate income beneficiary of three trusts created by family members. Those trusts provided for the res of each to be distributed to Hughes' children at his death; however, if Hughes were to die without children, the res of each trust would go to Hughes' sister's children. Id. ¶¶ 1, 10–14. Eighty-seven-year-old Hughes, who had previously been unmarried, married his 71-year-old former assistant, Barbara. Id. ¶ 2. At the age of 94, Hughes adopted Barbara's four adult daughters, all of who were in their 50's. Id. ¶¶ 28, 30. Following Hughes' death, the trial court found Barbara's daughters were not entitled to take under the trusts as (1) the sole purpose of the adoptions was to take under the trusts and (2) the settlors of the trusts did not intend for the remainder interests to pass to nonfamily members who were adopted long after they became adults and were never raised by the family. Id. ¶ 32. On appeal, we found the trusts demonstrated the testators' intent to have the res of the trust remain in the testators' family, an intent that would be thwarted by allowing

> Barbara's daughters to take under the trusts. Id. ¶ 41. We further declined to enforce the statutory presumption and treat Barbara's daughters as Hughes' biological children as the record revealed their adoptions were for the sole purpose of making them beneficiaries under the trusts. Id. ¶ 39.
>
> ¶ 27 We are now tasked with determining whether the facts of this case warrant applying the limited-use subterfuge exception. In making that determination, we must consider the entire record to determine whether the adoption was an act of subterfuge for the sole purpose of taking under the trusts.
>
> ¶ 28 The record reveals a relationship significantly different than the relationships detailed in Cross and Dixon. Greg and Betty maintained an active, close relationship for over 30 years. Betty was his stepmother. She was an integral part of Greg's childhood, and Greg considered Betty as a mother. Greg lived with Betty and Ron for a period while in high school. Greg became a regular participant in Weidner family holidays and vacations. During his childhood, Betty had expressed a desire to adopt. While Greg later moved away, he ultimately returned and spent much of his time with Betty and Ron.
>
> ¶ 29 Betty adopted Greg when he was 22 years old. At that time, Greg was living 10 miles from Betty and Ron. Greg suspected Betty would have adopted him earlier in life but she wanted to avoid stressing the relationship with Greg's biological mother. According to Greg, Betty sought to adopt for "estate reasons" and because she "really loved [him]." Greg suggested the adult adoption allowed him "to be in her estate" without taking away any of his biological mother's rights.

The Fourth District agreed with the trial court's assessment that Betty's desire to adopt Greg was motivated in part by "traditional parental desires" and found that the record failed to demonstrate that Greg's adoption occurred *solely* for the purpose of taking under the trusts.

Trustee's distribution of trust funds to enable a gift to a non-beneficiary held sufficient to support allegation of breach of trust where discretionary standard is what is necessary or advisable for health and support and maintenance in reasonable comfort

12. Gwinn v. Gwinn, 60 N.E. 2d 890 (Second District, 2016)

Kenneth's first wife, Betty, created a credit-shelter trust of which Kenneth became the sole trustee after Betty's death in 2009. The trust held approximately held investment assets and farm property. Under the terms of the trust, Kenneth was entitled to:

- As much of the income as he would request in writing;
- Such amounts of the principal as he from time to time would request in writing, not to exceed in any calendar year the greater of $5,000 or 5% of the trust at the end of the year; and
- Such sums from principal ". . . as the trustee deems necessary or advisable from time to time for his health, support and maintenance in reasonable comfort."

The credit shelter trust also provided for Kenneth and Betty's four children, all of whom were adults when Betty died:

(d) The trustee may pay so much or all of the trust's income and principal not distributed to my spouse to my children, as the trustee determines to be required or desirable for their health, maintenance in reasonable comfort, education and best interests individually and as a family group. The trustee may make payments in equal or unequal proportions at such time or times as the trustee deems best.

(e) My primary concern with respect to my children is for their care and education until they become self-supporting and, while my general plan is to treat them alike, I recognize that needs will vary from person to person and from time to time. Accordingly, I direct that all distributees [sic] hereunder need not be treated equally or proportionally for each distribution; that the pattern followed in one distribution need not be followed in others; and that the trustee may give such consideration to the other resources of each of the eligible distributees [sic] as the trustee may think appropriate."

About two years after Betty's death, Kenneth married Maria. After his marriage, Kenneth withdrew funds from the trust in order to construct a home in Colorado, which he titled in Maria's name. At the time Kenneth had a home in Illinois.

Three of Kenneth's children filed suit, and in an amended complaint alleged breach of Betty's trust agreement, and breach of fiduciary duty. The complaint alleged that Kenneth breached the trust by making an "extraordinary gift" to Maria by building a home and titling it in her name, that the home was not necessary for Kenneth's health, maintenance and support, because he already owned a home, and that the depletion of the trust harmed the plaintiffs' interests.

Kenneth filed a 2-615 motion to dismiss, essentially arguing that the trust instrument conferred discretion on him to distribute principal to himself, that any distribution to Maria was a transfer by him, not from the trust, and that having a house in Colorado, where Maria lived, as reasonably related to his health, support and maintenance in reasonable comfort. The trial court granted the motion to dismiss, and the children appealed.

Not surprisingly, the Second District reversed and remanded the case. Because the appeal arose from a §2-615 motion, the Court had to assume that the complaint's allegations were true, and then decide whether there was any set of facts alleged which, if proved, would entitle the plaintiff to recover.

In reversing the trial court's order, the Second District focused on the allegation in the complaint that an "extraordinary gift" had been made from the trust to Maria. The Court noted:

¶18 We note that Betty's primary intention in creating both the Marital Trust and the Family Trust was to provide "for the benefit of [her] spouse during his lifetime," i.e., defendant. Moreover, even Betty's expression of her intentions toward her children was qualified: her "primary concern" was "for their care and education until they become self-supporting." (Emphasis added.) Thus, Betty unmistakably gave defendant the authority as trustee to provide for himself as the primary beneficiary of the trust (within limits that we shall discuss) but with no particular obligation to support plaintiffs from the trust while he was alive.

¶ 19 That does not mean, of course, that defendant could do whatever he wanted with trust property. Section 4(c) gave defendant the prerogative to withdraw whatever he

deemed "necessary *or advisable* from time to time for his health, support and maintenance in reasonable comfort." (Emphasis added.) However, we need not decide whether this language did or did not forbid defendant from using large sums of principal to construct a residence in Colorado for his own use, even if he already had an unencumbered residence in Illinois, because that is not what this case is about. Instead, this case is about an extraordinary gift. Plaintiffs alleged in the second amended complaint that defendant made an "extraordinary gift" to Fritz, his new wife, by using trust principal to design and purchase a custom-built home and title it in her name. We must take this allegation as true for purposes of addressing defendant's motion to dismiss. See Matthews v. Chicago Transit Authority, 2016 IL 117638, ¶ 53, 402 Ill.Dec. 1, 51 N.E.3d 753 (in ruling on a motion to dismiss pursuant to section 2–615, the court "must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise from them"). The only question is whether defendant, as trustee, was authorized under the Trust Agreement to make such a gift of trust principal to Fritz.

¶ 20 We agree with plaintiffs that this is not the exceptional case in which a trustee has essentially absolute control over trust assets. In Rock Island Bank & Trust Co. v. Rhoads, 353 Ill. 131, 187 N.E. 139 (1933), the decedent's will gave his wife as executor and primary beneficiary " 'full authority to use and dispose of so much of [the residue of his estate] as may in her judgment be necessary for her comfort and *satisfaction* in life.' " (Emphasis added.) Id. at 134, 187 N.E. 139. The supreme court held that, given the minimally restrictive term "satisfaction," the wife's decision about the use of assets "was not subject to review by anyone." Id. at 143, 187 N.E. 139. Thus, even bad investments that lost money (such as those that the decedent's executor challenged after the wife died and left a will (id. at 137–38, 187 N.E. 139)) had been within her "unlimited discretion" to dispose of remaining assets (id. at 142, 187 N.E. 139).

¶ 21 Here, the pertinent language is not quite so lax. Section 4(c) does not use the term "satisfaction." It restricts defendant's choices to what he deems, in his discretion, to be "necessary or advisable" to serve his health, support, and maintenance. We find nothing in section 4(c), however, that would allow defendant to make gifts of trust assets. We note that our interpretation is consistent with the Restatement (Third) of Trusts § 50 cmt. d(2) (2003), which explains that provisions for using trust assets for the support and maintenance of a beneficiary do not authorize distributions in order to enlarge the beneficiary's personal estate or to enable the making of extraordinary gifts. See also In re Estate of Polley, 111 Ill.App.3d 873, 875–78, 67 Ill.Dec. 478, 444 N.E.2d 714 (1982) (decedent's will authorized husband to use corpus "for his support in his accustomed manner of living" but not to build up own separate estate).

¶ 22 In interpreting section 4(c) of the Trust Agreement, we are also mindful that article VII, section 1(n), of the Trust Agreement gives defendant, as trustee, the power "[t]o make gifts of trust assets to [Betty's] descendants." We agree with plaintiffs that, under the familiar principle of construction *expressio unius est exclusio alterius*, the express grant of power to make gifts of assets to Betty's descendants is an implied denial of power to make gifts of assets to any person other than Betty's descendants. See

Altenheim German Home v. Bank of America, N.A., 376 Ill.App.3d 26, 36, 314 Ill.Dec. 885, 875 N.E.2d 1172 (2007); Woolard v. Woolard, 547 F.3d 755, 759–60 (7th Cir.2008).

¶ 23 Since the allegations of the second amended complaint must be taken as true and viewed in the light most favorable to plaintiffs, and as those allegations include that defendant titled the Colorado home exclusively in Fritz's name, we must conclude that plaintiffs stated a claim that defendant violated the Trust Agreement by making a gift that he was not authorized to make. For the same reason, plaintiffs stated a claim that he violated his fiduciary obligation.

"Per Stirpes" held to describe a method of distribution, not to identify beneficiaries; land trust does not require different application of principles applicable to trust construction

13. In re Estate of Agin, 57 N.E. 3d 675 (Fourth District, 2016)

Agin considered whether a person's interest in a land trust became an asset of his estate on his death, in which case his spouse would take an interest, or whether the interest passed to his descendants, *per stirpes*, in which case the four children of a prior marriage would take the property. The land trust in question was created by Michael Yergovich, an uncle of the decedent. An amendment to the land trust read provided that in the event of death Michael Yergovich prior to termination of the trust, all of his interest "shall immediately pass and vest, as follows, *per stirpes*." The amendment then listed a 20% interest to each of Yergovich's four then-living siblings, and a 4% interest to each of five named nieces and nephews, including decedent. Yergovich died prior to the termination of the trust.

The decedent's widow was appointed administrator of the estate and she filed an inventory listing the land trust interest as an estate asset. The children objected and the case went to hearing before the trial court. The trial court ruled that the trust unambiguously provided that because Yergovich died prior to termination, a 4% interest vested in the decedent. The trial court found that the decedent's death prior to the termination of the trust had no effect on the vested nature of the decedent's interest, which under the court's ruling passed to his estate, not to his descendants. The decedent's children filed a motion to reconsider, bringing additional factual matters before the trial judge. The additional factual matters included the fact that after Yergovich's death the decedent conveyed his fractional power of direction to two individuals in conjunction with a sale of the property, as well as evidence as to Yergovich's intent with respect to how he wanted the trust to pass on his death. The trial court denied the motion to reconsider and the children appealed.

The Fourth District affirmed the trial court. First, it disagreed that the standard of review was de novo. It pointed out that the appeal came after new evidence was brought before the trial court in a motion to reconsider; therefore, the standard applied by the Appellate Court would be abuse of discretion.

The Fourth District agreed with the trial court that the language of the trust was unambiguous and therefore no extrinsic evidence of Yergovich's intent was needed to construe the instrument. The Appellate Court also agreed with the trial court that the "*per stirpes*" language of the trust did not describe the people who would take; rather, it described how the interests would be shared. In other words, once the interest was found to have vested, the reference to "*per stirpes*" became irrelevant:

¶ 24 "*Per stirpes*" is a term used to specify the method of distribution of property. *Goodwine State Bank v. Mullins,* 253 Ill.App.3d 980, 1006, 192 Ill.Dec. 901, 625 N.E.2d 1056 (1993). "The words *per stirpes* denote a taking by right of representation of that which an ancestor would take if living." *Goodwine State Bank,* 253 Ill.App.3d at 1006, 192 Ill.Dec. 901, 625 N.E.2d 1056. However, contrary to respondents' position, the term designates the method of determining how the estate will be divided among those entitled to take—it has no application in determining who those entitled to share in the estate are. See *Goodwine State Bank,* 253 Ill.App.3d at 1006–07, 192 Ill.Dec. 901, 625 N.E.2d 1056 ("[T]he specification that distribution shall be made *per stirpes* rather than per capita is an instruction of the quantum of the estate which is to be given to each of Harold's surviving descendants. This is not inconsistent with the requirement that only the descendants of Harold who survive him may take under the will; rather, it is an instruction of how the estate shall be distributed to those descendants who do survive Harold."). Respondents cite no cases in which the inclusion of the term "*per stirpes*" was used to determine *who* was entitled to take, as opposed to *how* they were to take.[6]

¶ 25 Respondents argue that "[t]here is nothing in Trust 1110232 which indicates that Mr. Yergovich did not intend to treat a successor beneficiary identified by name (and his/her per stirpal descendants) who outlived him the same as how he intended to treat a successor beneficiary identified by name (and his/her per stirpal descendants) who died before him. Nor is there anything in Trust 1110232 which indicates that the interest of a successor beneficiary who outlived Mr. Yergovich, but died while Trust 1110232 was still in existence and prior to the final distribution and termination of the trust, should not pass 'per stirpes.' " However, this overlooks the critical language of the trust amendment, identified by the probate court: that, in the event of Yergovich's death prior to termination of the trust, "all interest of said Michael Yergovich shall *immediately* pass and vest" (emphasis added) in the way set out in the amendment. Thus, the express language of the trust itself sets out a dividing line between the time prior to Yergovich's death and the time after Yergovich's death—at the moment of death, Yergovich's interest would pass to those named in the amendment, *per stirpes.* This means that if decedent was not alive at the moment of Yergovich's death, his 4% interest would pass to his descendants, *per stirpes.* However, because decedent *was* alive at the moment of Yergovich's death, his 4% interest passed to decedent directly. Accordingly, we cannot find that the probate court erred in finding that the interest in the trust was decedent's property and properly part of his estate.

The children also argued that because the trust was a land trust, different considerations attached to how the trust would be interpreted. The Fourth District rejected this concept

¶ 26 We also find unpersuasive respondent's argument that the probate court "failed to appreciate the significance that Trust 1110232 is a land trust, not a conventional trust." In a conventional trust, the trustee holds the legal title and the beneficiary holds the equitable title. *In re Estate of Mendelson,* 298 Ill.App.3d 1, 3, 232 Ill.Dec. 280, 697 N.E.2d 1210 (1998). However, in an Illinois land trust, the trustee holds both legal and equitable title to any real property held in the trust. *Hoxha,* 365 Ill.App.3d at 87, 301 Ill.Dec. 715, 847 N.E.2d 725. "The interest retained by the beneficiary, including any power to direct the sale of real property, is a personal property interest rather than a real property

interest in the legal or equitable title." *Hoxha,* 365 Ill.App.3d at 87, 301 Ill.Dec. 715, 847 N.E.2d 725. Thus, a settlor of a land trust cannot transfer legal and equitable title in the real estate held in the trust to another but can only convey his beneficial interest in the trust. *Favata v. Favata,* 74 Ill.App.3d 979, 982, 31 Ill.Dec. 241, 394 N.E.2d 443 (1979). In the case at bar, respondents take issue with the probate court's comment in denying their motion for reconsideration that "upon Mr. Yergovich's passing, the decedent had a vested interest in the trust asset." They argue that decedent never had a vested interest "in the trust asset," but only held a beneficial interest in the trust. We cannot find that this misstatement[7] by the probate court has any effect on the court's ultimate conclusion: that 4% of Yergovich's interest in the land trust passed to decedent immediately upon Yergovich's death.

¶ 27 Additionally, respondents point to the fact that decedent assigned his share of the power of direction to McCan and Giacomino, arguing that this meant that his interest "was not vested and irrevocable" and therefore "was subject to the terms of the trust, including the terms defining successor beneficiaries," at the time of his death. Respondents are correct that "when the settlor of a land trust retains the power to direct the acts of a trustee to the exclusion of a beneficiary, the settlor effectively retains the power to defeat the beneficiary's interest during his lifetime, and a beneficiary will not be held to have a present irrevocable interest unless she can show by clear and convincing evidence that the settlor had a donative intent to make an irrevocable *inter vivos* gift of the beneficial interest." *Caleca v. Caleca,* 63 Ill.App.3d 414, 417, 20 Ill.Dec. 515, 380 N.E.2d 493 (1978). However, we note that the instant case is different from those respondent cites in that it was not the settlor defeating a beneficiary's interest during his lifetime but rather was a beneficiary voluntarily assigning his power of direction to another after the settlor's beneficial interest had passed to the beneficiary. Furthermore, as explained earlier, the "terms of the trust" only concerned themselves with the status of the beneficiaries at the time of Yergovich's death. Thus, we do not find this argument supports respondents' position.

¶ 28 Finally, respondents argue that the probate court "repeatedly focused on the passing of Michael Yergovich but ignored the actions taken by [Yergovich's attorney] Mr. Becker to effectuate Mr. Yergovich's intent" and further argue that the probate court "overlooked" decedent's ratification of the trust. However, in construing a trust, "the settlor's intent is to be determined solely by reference to the plain language of the trust itself, and extrinsic evidence may be admitted to aid interpretation only if the document is ambiguous and the settlor's intent cannot be ascertained." *Espevik v. Kaye,* 277 Ill.App.3d 689, 694, 214 Ill.Dec. 360, 660 N.E.2d 1309 (1996). The probate court here found that the trust agreement was not ambiguous, and respondents do not argue that it was ambiguous. Accordingly, the probate court properly focused on the trust agreement itself and not on Becker's actions after Yergovich's death in interpreting the trust. Furthermore, the facts concerning Becker's actions and any purported ratification were presented for the first time in respondents' motion for reconsideration. As noted, "a trial court is well within its discretion to deny such a motion and ignore its contents when it contains material that was available prior to the hearing at issue but never presented. [Citations.]" *River Village I,* 396 Ill.App.3d at 492–93, 335 Ill.Dec. 707, 919 N.E.2d 426. Thus, we find no error in the probate court's actions here.

Land trust continues beyond initial term if its purposes have not been accomplished and settlor manifests intent that the trust continue until they are accomplished

14. In re Estate of Susman, 2016 IL App (2d) 140242-U, appeal denied, 60 N.E.3d 873 (Ill. 2016)

Note: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

This case concerned the terms of a buy-sell agreement for a family business, Susman Linoleum, which was owned by two brothers, Robert and Donald. Donald died and a dispute involving numerous issues erupted within the family, among them whether when the initial term of a land trust expired, the interests of the beneficiaries "vested" even though the land trust continued in existence for many years afterward.

The land trust, which was created by the parents, Matt and Angeline, held title to real estate that was occupied by the family business. The couple had three children, Robert, Donald and Margaret Faber ("Faber"). The land trust interest, like the business itself, was designed to pass to Robert and Donald, but not Faber. Under the land trust, the parents, Matt and Angeline, were the initial beneficiaries and each possessed a power of direction. The trust provided that, in the event of the parents' deaths, their interests in the trust would pass to Donald and Robert. If Donald or Robert died, his right and interest in the trust would pass to his executor or administrator and not to his heirs-at-law. The initial 20-year term of the land trust expired in 1981, when both Matt and Angeline were still living. The land trust provided as follows:

> If the trust property or any part thereof remains in the trust until twenty (20) years from this date, the Trustee shall either sell the same at public sale on reasonable notice, and divide the proceeds of the sale among those who are entitled thereto under this agreement or convey the same to the beneficiaries in accordance with their respective interests.

Apparently the term was never renewed; but in any case the parents continued to pay the annual land trust fees. Matt died in 1996 and Angeline died in 2001. Donald and Robert continued to pay the land trust fees, and then Donald died in 2008. After Donald died his wife, Diane, was appointed executor of his estate. She requested that the land trust trustee distribute a half interest in the land trust property to Donald's estate. A dispute ensued between Donald's estate and Robert over this distribution and also over the terms of a buy-sell agreement for the company stock. Robert alleged that Donald no longer had an interest in the business. The trial court granted Donald's executor summary judgment on her count seeking dissolution of the land trust and a judicial sale. The court found that the land trust was created on May 20, 1961, specified a fixed duration of 20 years, and did not state that a purpose or objective was to maintain property for a particular use or business. The court further found that there were no amendments to the land trust agreement, that the trust expired, and that no purpose was identified within the trust that remained unfulfilled. The trial court ordered termination of the trust and a judicial sale, but it reserved a date for the judicial sale pending trial on the remaining causes of action. Robert and Donald's estate entered into a settlement agreement regarding various issues to resolve the litigation. After the settlement was reached Robert and the company (the "Susman defendants") moved for an order vacating the settlement agreement. The trial court denied the motion, and the Appellate Court, in an earlier decision, affirmed.

At this point the sister, Faber, entered the proceedings, arguing in a declaratory judgment action that the trial court's order terminating the land trust and the ensuing settlement agreement were void because she was never included in the original cases as a necessary party. In her amended complaint, Faber asserted that she was a necessary party to the probate court proceedings, arguing that the land trust terminated after 20 years (in 1981) and that ownership of the real estate reverted to her parents, to be distributed upon their deaths to testamentary trusts to be divided in equal shares for each of her three children: herself, Robert, and Donald. Faber reasoned that, based upon her 1/3 share of the real estate, her interests were materially affected by the relief Donald's executor sought in her complaint (i.e., dissolution of the land trust and a judicial sale of the real estate) and for which the executor was granted summary judgment in the trial court. Faber sought a declaration that she was a necessary party to the executor's complaint and that the court's order (and any subsequent orders) was null and void for failure to include her as a necessary party. Alternatively, she sought a declaration that she was a necessary party and that the court declare that the land trust expired after 20 years (in 1981).

Donald's executor, and the land trustee (North Star), moved to dismiss Faber's complaint on various grounds, including lack of standing. Meanwhile, the Susman defendants sought to vacate the trial court's earlier order regarding the settlement agreement, also on the grounds that Faber was a necessary party. The trial court dismissed Faber's complaint with prejudice, on the basis that under Illinois law she had no interest in the land trust. The rationale of this decision rendered moot the petition to vacate, which the trial court also dismissed. The case continued in the trial court over fee petitions and eventually several parties appealed various aspects of the case, one of which was Faber's appeal of the trial court's ruling that she had no interest in the land trust.

The trial court had based its ruling on two Illinois cases which also dealt with situations where a stated initial term of a land trust occurs, but the beneficiaries continue the existence of the trust. The Appellate Court affirmed the trial court's decision, explaining that a land trust may continue beyond its initial term if the trust's purposes have not been accomplished and if the settlor manifested an intent that the trust should continue until they are accomplished:

> ¶ 37 In their joint briefs, Faber, joined by the Susman defendants, argues that the trial court erred in dismissing her declaratory judgment complaint because she was a necessary party to the Executor's action concerning the land trust. She contends that, "if" any portion of the property in the land trust went to Matt or Angeline, Faber would be a 1/3 beneficiary of that property upon her parents' passing by virtue of the testamentary trust established in Angeline's will. She further complains that she was deprived of the ability to conduct discovery as to the issues that the Executor and North Star raised in their motions to dismiss. According to Faber, she was entitled to the same information as her siblings concerning her parents' "true intentions" as to the disposition of the real estate in the land trust.
>
> ¶ 38 In response, the Executor and North Star, in separate briefs, assert that Faber failed to sufficiently plead a declaratory judgment action, namely, an interest in the real estate. Thus, she failed to allege facts empowering her to seek a declaratory judgment that she was a necessary party to the probate proceedings. The Executor and North Star maintain that Faber was not a necessary party to the litigation involving the land trust because she lacked a present substantial interest in the property, as opposed to a mere expectancy or future contingent interest. They note that Faber was never a trust beneficiary and, at most, had a mere expectancy based on her theory that the land trust

terminated on its own in 1981 and reverted back to her parents. They primarily rely on the two cases cited by the trial court, *Breen* and *Heritage County Bank,* and which we find dispositive.

¶ 39 In *Breen,* three of four real estate trust beneficiaries sued the fourth beneficiary, seeking partition of the premises. The premises were owned by the parents, who had conveyed the property into a trust. The trust agreement stated: " 'If any property remains in this trust twenty years from this date it shall be sold at public sale by the trustee on reasonable notice, and the proceeds of the sale shall be divided among those who are entitled thereto under this trust agreement.' "Id*.* at 208, 103 N.E.2d 625. About 10 months after the 20 years had passed, the plaintiffs filed their suit. The trial court dismissed the complaint. On appeal, the plaintiffs argued that the trust's term had expired, the trustee's powers had ceased, and that the beneficiaries were entitled to partition.

¶ 40 The supreme court affirmed the dismissal. *Id.* at 212, 103 N.E.2d 625. It noted that the primary question in the case involved construction of the trust agreement, specifically, the question of its duration. *Id.* at 210, 103 N.E.2d 625. Relying on various treatises, the court adopted a rule that, even where a trust provides that it is to terminate on upon the expiration of a certain period, it will not terminate on the expiration of that period if the trust's purposes have not been accomplished and if the settler manifested an intent that the trust should continue until they are accomplished. *Id.* "In such a case, the provision that the trust is to terminate on the expiration of the period is construed as being merely directory." *Id.*

¶ 41 In *Heritage County Bank & Trust Co. v. State Bank of Hammond,* 198 Ill.App.3d 1092, 145 Ill.Dec. 129, 556 N.E.2d 747 (1990), the First District applied the principles stated in *Breen* to another case strikingly similar to the case before us. In *Heritage County Bank,* the decedent father established a trust in 1954 that held a parcel of real estate. The father was the sole beneficiary until his death, at which point his *brother* became beneficiary. The trust also provided that: " 'If any property remains in this trust twenty years from this date it shall be sold at public sale by the trustee on reasonable notice and the proceeds of the sale shall be divided among those who are entitled thereto under this trust agreement.' "After expiration of the 20–year period, neither the father nor the trustee attempted to sell the land and the father continued to pay the trust fees until 1978. He died in 1984 and left his *estate* to his *children.* In 1988, at the brother's request, the trustee conveyed title to the property to him. Later that year, the trustee filed suit to quiet title. The trial court granted the brother summary judgment, finding that the father had manifested an intent to have the trust continue.

¶ 42 The First District upheld summary judgment for the brother. *Id.* at 1094, 145 Ill.Dec. 129, 556 N.E.2d 747. The court stated several general rules, including that, if the trust specifies that it terminates and the proceeds be distributed by a certain date or after a certain amount of time, then the beneficiaries are entitled to the trust *res* at that time. *Id.* at 1095, 145 Ill.Dec. 129, 556 N.E.2d 747. Also, the court noted that, if a trust does not specify a termination point and instead directs that the trust *res* be sold and the proceeds distributed after a certain time, but this distribution does not occur, then the beneficiaries may petition the court for distribution. *Id.* However, following *Breen,* the

Heritage County Bank court held that the father's trust did not terminate; rather, by its terms, after 20 years, the trustee was empowered to sell the property and distributed the proceeds. *Id.* at 1096, 145 Ill.Dec. 129, 556 N.E.2d 747. It also rejected granting equitable relief because the father continued to pay trust fees after the expiration of the 20–year period. *Id.* at 1096–97, 145 Ill.Dec. 129, 556 N.E.2d 747. The court concluded that this reflected an intent that the trust continue until his death, at which point the brother would take. *Id.* at 1097, 145 Ill.Dec. 129, 556 N.E.2d 747. Thus, the court held that the trust continued until 1988, when the brother requested the trustee to convey title to the trust *res. Id.* at 1097, 145 Ill.Dec. 129, 556 N.E.2d 747.

¶ 43 The *Heritage County Bank* court also rejected the trustee's argument that the father acquired a right to the premises when the trustee failed to sell the property within a reasonable time. *Id.* The court noted that the trustee's failure to act in a reasonable time gave the beneficiaries the right to petition the court for action or a new trustee, but it did not terminate the trust. *Id.* The time when interests vest, it further stated, was not dependent on when the trustee performed its duties, but on the trust's terms. *Id.* It emphasized that, under *Breen,* land trust beneficiaries have no legal or equitable right to the real estate. *Id.* at 1098, 145 Ill.Dec. 129, 556 N.E.2d 747.

¶ 44 Finally, the *Heritage County Bank* court rejected the trustee's argument that its failure to sell the premises for 10 years was unreasonable as a matter of law. *Id.* The court noted that, after 10 years, the father acquired a right to compel the trustee to act. *Id.* If the trust specified a termination date, the property interests vest even if a beneficiary dies before distribution. *Id.* However, there is no equitable vesting of legal title when a land trust does not have a specific termination date. *Id. Breen* instructs, the court stated, that the beneficiaries have no legal or equitable right to the real estate; they have only the right to compel the trustee to act. *Id.*

¶ 45 We reject Faber's argument that *Heritage County Bank* is unhelpful because it did not involve a necessary party. The case is directly relevant because it stands for the proposition that the Susman's land trust did *not* terminate in 1981, as Faber theorizes, and the real estate did not revert to her parents' estates. Therefore, her assertion that she is a necessary party, which depends on the claim that the trust *res* reverted to her parents' estates, fails. In light of the land trust's language and the case law, she cannot allege any facts to survive a dismissal of her complaint.

¶ 46 The cases upon which Faber relies, *Lain* and *Lakeview,* do not persuade us to hold otherwise. In *Lain,* an action to recover the proceeds of an insurance policy, the insured had initially listed his wife as the beneficiary, but, 41 years later, purportedly assigned the policy to an individual to whom he was financially indebted and who claimed necessary-party status when the administrator of the widow's estate sought to recover the proceeds of the policy. The court reversed denial of a motion to dismiss for failure to join a necessary party, holding that the insurance policy beneficiary was a necessary party because he had a substantial and present interest in the policy; thus, the trial court abused its discretion when it failed to require the joinder of that necessary party. *Lain,* 79 Ill.App.3d at 269–70, 34 Ill.Dec. 603, 398 N.E.2d 278. Here, in contrast, Faber is not, and has never been, a beneficiary of the land trust. Similarly, *Lakeview* held that a mortgagor who had not been joined because of confusion as to its correct name was a

necessary party to an action to quiet title to the property. *Lakeview Trust,* 134 Ill.App.3d at 813–15, 89 Ill.Dec. 569, 480 N.E.2d 1312. Here, there is no confusion concerning Faber's capacity *vis-a-vis* the land trust-she was never a beneficiary of the trust.

The continued payment of fees by the parents, as well as the absence of any request for termination of the trust, presumably constituted evidence of their intent that the trust continue.

WILLS

Legatees under prior will have standing to bring will contest; Schlenker explained

15. In re Estate of Schumann, 67 N.E.3d 365 (4th District, 2016), appeal denied sub nom. Estate of Schumann v. Herron, No. 121661, 2017 WL 599107 (Ill. Jan. 25, 2017)

Schumann distinguished and explained the holding in In re Estate of Schlenker, discussed in the 2005 Institute. Both cases concerned the standing of a person to bring a will contest. In Schlenker the contestant was an heir who took nothing under the contested will, nor anything under the four preceding wills. The executor argued that because the contestant took nothing under the current will nor any of the four preceding wills, she lacked a pecuniary interest in the estate. Under Section 8-1(a) of the Probate Act, any "interested person" may bring a will contest. The term "interested person" in turn is defined in Section 1-2.11 as follows:

> "Interested person" in relation to any particular action, power or proceeding under this Act means one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative.

The Supreme Court held that since an interested person includes, "without limitation" an heir, the contestant in that case did not need to establish the existence of a financial instrument under a prior document. The Court went on to state, however, that for purposes of its determination, it must presume that all prior wills were in fact void as having been revoked. It was unnecessary to state this, and this dictum became the controversy in the Schumann estate.

"Pete" Schumann died having left a will dated 2007 which left his estate to a trust that, apparently, benefitted his caretaker Mary Ann Herren. Pete apparently had no children, but his late wife, Alice, left two children, Nathan and Hanna Streuver (the "Struevers"), who thought that Pete lacked capacity to make a will in 2007 and was under Herren's undue influence. They contested the admission of Pete's 2007 will, and claimed that Pete left a 2002 will which passed to a different trust, under which they were beneficiaries. When they filed their contest, they produced the trust into which the 2002 will supposedly poured, but they did not produce a copy of the 2002 will.

Herren moved to dismiss the Streuvers' petition on grounds that they lacked standing under Schenker. Specifically, the Struevers were not heirs of Pete, and Herren claimed that Schlenker stood for the proposition that the 2002 will must be considered as revoked by the 2007 will. Therefore, not being heirs, and having no other financial interest, the contestants lacked standing.[1]

[1] The Streuvers also alleged that they were claimants with respect to the estate. The Court did not deal with this issue because it was not necessary to the result.

The trial court initially denied Herren's motion to dismiss, but reversed its decision on a motion to reconsider. The court determined that under the Supreme Court's holding in Schlenker, Pete's 2002 will must be considered revoked and void and could not be used to establish standing. The court also accepted Herren's argument that the 2002 will must be presumed to be revoked because the Struevers produced no evidence establishing its existence or validity. Finally, the trial court also found that the Streuvers were not creditors of the estate and could not establish standing as such.

The Fourth Circuit reversed and remanded the case for further proceedings. In reversing, the Fourth Circuit discussed at some length the Supreme Court's holding in Schlenker, and explained that the Court's reference to considering prior wills as "void" was made in the context of determining the evidentiary burden in a motion to dismiss, and was not to be understood as Herren intended:

> ¶ 34 Herren argues that *Schlenker* stands for the proposition that a legatee under a prior will does not have standing to challenge a current will where the current will contains a clause revoking the prior will. We disagree with Herren's reading of *Schlenker.*
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> ¶ 35 The "fundamental" holding of *Schlenker* was that under the Probate Act, an heir unconditionally has standing to contest a will. *Id.* at 464, 283 Ill.Dec. 707, 808 N.E.2d at 1000. In further support of that holding, the court went on to provide additional discussion unnecessary to its decision. *People v. Flatt,* 82 Ill.2d 250, 261, 45 Ill.Dec. 158, 412 N.E.2d 509, 515 (1980) (the precedential scope of a decision is limited to the facts before the court). That additional discussion included the following proposition: "At this stage of the proceedings, we must therefore regard all of the prior wills as void." *Schlenker,* 209 Ill.2d at 463, 283 Ill.Dec. 707, 808 N.E.2d at 999. For the following reasons, we conclude that the aforementioned statement from *Schlenker* does not affect the Struevers' standing as legatees in this case.
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> ¶ 36 The *Schlenker* court's presumption that the prior wills were void was based on the applicable burden of proof, instead of a broader statement about the power of a probated will to revoke prior wills. As the court explained, "*At this stage of the proceedings,* we must therefore regard all of the prior wills as void." (Emphasis added.) *Id.* The court reached that conclusion because, "[a]t this stage of the proceedings, there is no evidence to support [the prior wills'] validity." *Id.* at 462, 283 Ill.Dec. 707, 808 N.E.2d at 999. Without any evidence of the prior wills' validity, the court concluded that its "presumption must be that none of those wills have any legal effect" because the final will included a clause revoking the prior wills. *Id.* at 463, 283 Ill.Dec. 707, 808 N.E.2d at 999. The critical aspect of the court's reasoning was that it was making a presumption against the respondent, Troy, and in favor of the plaintiff, Imogene. The burden of proof applicable when deciding a section 2–619 motion to dismiss required the court to "accept as true all well-pleaded facts in plaintiff's complaint and all inferences that can reasonably be drawn in plaintiff's favor." *Id.* at 461, 283 Ill.Dec. 707, 808 N.E.2d at 998. In *Schlenker,* one inference that could be drawn in Imogene's favor was that all the prior wills were void and therefore could not affect her standing. We read *Schlenker* less as establishing a new rule that *all prior revoked wills must be considered void* than as reaffirming the well-established rule that *all inferences must be drawn in the plaintiff's favor* when considering a section 2–619 motion to dismiss.
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> ¶ 37 Our reading of *Schlenker* is buoyed by that court's reasoning immediately following its decision to consider the prior wills as void. The court went on to consider the possibility that those prior wills might instead be valid, in direct contradiction of its

previous statement that it was presuming that the prior wills were void. The court considered that the prior wills might grant Imogene an interest in Levi's estate greater than she would take under the final will, which would create a direct financial interest in Imogene's challenging the final will. The court explained that Troy had not met his burden to prove that the prior wills did not grant Imogene such a direct interest. The court concluded that Troy was attempting "to sidestep these deficiencies by shifting the burden of pleading and proof to Imogene." *Id.* at 464, 283 Ill.Dec. 707, 808 N.E.2d at 1000. The court reiterated that it was Troy's burden to plead and prove lack of standing.

¶ 38 The common thread tying together the *Schlenker* court's reasoning is that Troy, as the respondent, had the burden to plead and prove lack of standing. Accordingly, all inferences were required to be drawn in Imogene's favor. *Schlenker* involved a factual scenario in which contrary inferences could be drawn in Imogene's favor—first, that the prior wills were void and, second, that the prior wills gave Imogene a greater interest than the final will. The court therefore considered both those presumptive possibilities in reaching its decision. Because the *Schlenker* court's reasoning was based on the inferences that could be drawn in the plaintiff's favor, we decline to extrapolate any broader legal holding about the efficacy of revocation clauses from its analysis.

¶ 39 We also find compelling the long-standing case law prior to *Schlenker* providing that a legatee under a prior will has standing to contest a subsequent will. See *Malcolm,* 234 Ill.App.3d 962, 176 Ill.Dec. 734, 602 N.E.2d 41; *Watson,* 127 Ill.App.3d at 189, 82 Ill.Dec. 289, 468 N.E.2d at 837 ("It has been held that legatees of a prior will of a decedent, even though not heirs at law, are 'interested' persons within the meaning of the [Probate] Act."); *Kelley,* 81 Ill.App.3d 402, 36 Ill.Dec. 566, 401 N.E.2d 247; *King,* 91 Ill.App.2d 342, 235 N.E.2d 276. We find it hard to fathom that the majority in *Schlenker* set out to create a rule that would make such a drastic change to established precedent without acknowledging as much.

¶ 40 We also find it difficult to conclude that the supreme court intended, as a matter of law, to prohibit a legatee under a prior will from challenging a subsequently executed will containing a revocation clause. Prior legatees have the kind of "real interest in the outcome" of the controversy that is generally sufficient to establish standing. *Powell,* 2012 IL 111714, ¶ 35, 358 Ill.Dec. 333, 965 N.E.2d 404 (describing the general requirements for standing). Legatees are asserting their "own legal rights and interests" rather than the rights of a third party. *Id.* ¶ 36. A rule holding that legatees cannot challenge a will containing a revocation clause would prevent potentially interested parties from challenging suspect wills.

¶ 41 Further, unlike the factual scenarios in *Schlenker* and *Keener,* in this case, no intervening wills stood between the challenged 2007 will and the 2002 will, under which the Struevers claimed to be beneficiaries. That is, if the Struevers successfully challenged the 2007 will, no other obstacle prevented them from immediately seeking to probate the 2002 will. The Struevers therefore have the "direct, pecuniary, existing interest" in their will contest that the petitioner lacked in *Keener,* 167 Ill.App.3d at 271, 118 Ill.Dec. 164, 521 N.E.2d at 234.

¶ 42 In addition, we agree with the point made in Justice Garman's special concurrence that a will's clause revoking all prior wills does not become effective until the will is successfully probated. In *Crooker,* 332 Ill. at 29–30, 163 N.E. at 385, the supreme court held that "no will is legally effective until it has been admitted to probate. No will can be

> shown to revoke a previous will until the subsequent will has been admitted to probate." As we noted earlier, *Schlenker* did not explicitly overrule that holding.
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> ¶ 43 The rule stated in *Crooker* that no part of a will becomes effective until the will is probated makes perfect sense. Certainly, a will's revocation clause could not and should not be effective if the will was the product of undue influence. And we do not know whether the will was the product of undue influence until the will is successfully admitted to probate. Again, we construe the *Schlenker* court's presumption that the prior wills were voided by the revocation clause as a necessary presumption because of the burden of proof and not a holding that prior wills cannot be used to establish standing to challenge a subsequent will containing a revocation clause.
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> ¶ 44 Because the Struevers do not raise the argument, we have no need to determine whether section 1–2.11 of the Probate Act (755 ILCS 5/1–2.11 (West 2014)) provides standing to legatees as a matter of law, regardless of whether a legatee has an actual pecuniary interest in the outcome of the will contest.

The Court then turned to the issue of whether the Streuvers' failure to attach a copy of the 2002 will to their petition should cause the petition to be dismissed. The Appellate Court reasoned that since a motion to dismiss under Section 2-619 of the Civil Practice Act required all pled facts to be considered true, it was up to Herren to establish that the Streuvers were not legatees under the prior will:

> Herren claims that we must presume that the 2002 will is revoked because the Struevers have failed to attach it to their petition to contest. However, Herren's argument is contrary to the appropriate burden of proof. At this stage of the proceedings, the Struevers did not have the burden to plead and prove standing. Instead, Herren had the burden to plead and prove the Struevers' lack of standing. Herren did not meet that burden. As a result, her motion to dismiss the Struevers' petition to contest the 2002 will should have been denied.

COMMENT: In the last sentence, the Fourth District obviously intended to refer to the 2007 will, not the 2002 will. The Fourth Circuit did not make the facts of the case clear with respect to the 2002 will. Specifically, it is not clear from the case whether the Streuvers failed to produce the *original* 2002 will, or failed to produce *any copy* of the 2002 will. It seems logical that they must have produced at least a copy of the will; otherwise it would seem impossible to support a standing argument. In other words, the last quoted paragraph above should stand for the proposition that a party that has some potential evidence to support standing may go forward without necessarily having to prove the validity of the document on which the argument for standing rests. But there should be something produced – otherwise anyone could bring a will contest simply by alleging that there once was a prior will under which the person benefitted. The person defending the will would be left in the impossible position of having to prove a negative – that is, if the Streuvers never did anything more than allege the existence of a prior will, how would Herren ever be able to carry the burden of showing that it did not exist? The Fourth District did note the allegation that Pete and his wife executed "mutual" wills in 2002, but did not discuss whether the contestants alleged contractual (i.e., joint and mutual) wills, which might support standing as contractual beneficiary.