

SURVEY OF ILLINOIS LAW: ELDER LAW

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I. INTRODUCTION

The past few years have given rise to quite a variety of new cases and statutes to consider for the Elder Law practitioner. The new items range from the profound to the relatively insignificant; from the novel to the redundant; from the important, to the amusing, to the intriguing, to the bewildering. Each practitioner will likely find something of interest here, items that will be immediately put to good use in their practice. We hope that all will find the items of general interest and applicability.

However, the time since February 8, 2006, might be best remembered for what did not take place. More than two years after the passage of the Deficit Reduction Act of 2005 (DRA), there are still no visible steps toward implementation of the DRA in Illinois. We can all guess and discuss the reasons for the lack of implementation, but in the meantime we are all left to wonder how to best plan for our clients in the face of unknown rules coming down at an unknown time with unknown consequences. Following a brief,

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but, we hope, handy listing of facts and figures relevant to the Elder Law practitioner in Section II, we discuss the DRA and related items in the material in Section III.

A general summary of new elder law related cases follows in Section IV. Under each topical heading, Illinois state cases are generally listed first, followed by cases from other states or federal courts that may have some impact on the Illinois practitioner.

Highlights of legislative changes related to Elder Law are presented in Section V.

II. QUICK GUIDE: NUMBERS AND STATISTICS

A. 2008 Medicare Figures¹

Part A deductible per benefit period: \$1,024

Part A daily coinsurance, days 61 through 90 (per benefit period): \$256 per day

Part A daily coinsurance, 60 lifetime reserve days: \$512 per day

Part A daily coinsurance, days 21 through 100 in skilled nursing facility (per benefit period): \$128 per day

Part A reduced monthly premium (for voluntary enrollees who have 30–39 quarters of coverage): \$233

Part A reduced monthly premium (for voluntary enrollees who have 29 or fewer quarters of coverage): \$423

Part B standard monthly premium: \$96.40

Part B monthly premium for those filing individual tax returns:

\$96.40 (up to \$82,000 in AGI)

\$122.20 (\$82,001 to \$102,000 in AGI)

\$160.90 (\$102,001 to \$153,000 in AGI)

\$199.70 (\$153,001 to \$205,000 in AGI)

\$238.40 (over \$205,000 in AGI)

1. The information regarding Medicare is summarized from the official Medicare website, www.medicare.gov.

Part B monthly premium for those filing joint tax returns:

\$ 96.40 (up to \$164,000 in AGI)
 \$122.20 (\$164,001 to \$204,000 in AGI)
 \$160.90 (\$204,001 to \$306,000 in AGI)
 \$199.70 (\$306,001 to \$410,000 in AGI)
 \$238.40 (over \$410,000 in AGI)

Part B monthly premium for married filing separate tax returns:

\$ 96.40 (up to \$82,000 in AGI)
 \$199.70 (\$82,001 to \$123,000 in AGI)
 \$238.40 (over \$123,000 in AGI)

Part B yearly deductible: \$135

Part D enrollment period: November 15, 2007 through December 31, 2007

B. Federal Poverty Income Limits²

<u>Persons in Family Unit</u>	<u>Poverty Limit</u>
1	\$10,400
2	\$14,000
3	\$17,600
4	\$21,200
5	\$24,800
6	\$28,400
7	\$32,000
8	\$35,600

For family units with more than 8 persons, add \$3,600 for each additional person.

2. Annual Update of the HHS Poverty Guidelines, 73 Fed. Reg. 3971, 3971-72 (Jan. 23, 2008).

C. 2008 Medicaid Figures.³

Community Spouse Asset Allowance:

2007—\$101,640

2008—\$104,400

Community Spouse Maintenance Needs Allowance:

2007—\$2,541

2008—\$2,610

Current web address for Policy Manual and Workers Action Guide:

<http://www.dhs.state.il.us/page.aspx?item=13473>

Irrevocable Prepaid Burial Expense Limit:

\$5,067, effective September 1, 2006

\$5,219, effective September 1, 2007

D. Maximum Deductions for Qualified LTC Insurance Premiums.⁴

<u>Attained Age before the close of the tax year</u>	<u>Maximum Deduction</u>
40 or less	\$ 310
More than 40 but not more than 50	\$ 580
More than 50 but not more than 60	\$1,150
More than 60 but not more than 70	\$3,080
More than 70	\$3,850

III. THE DEFICIT REDUCTION ACT OF 2005⁵

Signed on February 8, 2006, the Deficit Reduction Act (DRA) promised to save billions of tax dollars on social programs, particularly the long-term care portions of the Medicaid program. The legislation involves significant changes to the asset transfer rules in particular, discussed in greater depth below.

3. The information regarding Medicaid is summarized from the Illinois Medicaid Policy Manual, found online at www.dhs.state.il.us/page.aspx?item=13473.

4. Rev. Proc. 2007-66, 2007-45 I.R.B. 970.

5. Deficit Reduction Act of 2005, Pub. L. 109-171, 120 Stat. 4 (2006).

A. Expansion of the Lookback Period from Three Years to Five Years

Under pre-DRA law, the lookback period was thirty-six months for most transfers and sixty months for transfers to or from certain trusts. The DRA amends the law to require a sixty-month lookback for all transfers.⁶

B. Change of the Penalty Period Start Date

Under pre-DRA law, once a disallowed transfer of assets is identified, a penalty is imposed in the form of a period of ineligibility for Medicaid long-term-care assistance for the period of time that the transferred assets could have paid for institutional care at the private-pay rate. The beginning of this penalty period was set as the month during which the transfer of assets took place.⁷ Under the DRA, the penalty period is shifted from the date of a transfer to the date on which the applicant would otherwise be eligible for Medicaid benefits, but for the transfer.⁸ This significant change means that a penalty period will not start to run until after the applicant is institutionalized or perhaps receiving an equivalent level of care. CMS has issued guidance to the states for implementation of this rule. The CMS guidance implies that a penalty period may not start until the applicant is actually institutionalized.⁹ The plain language of the DRA, however, states that the penalty period may start when the applicant medically qualifies for institutionalization, even if not institutionalized yet.¹⁰ For most people, the penalty period will begin at the time of Medicaid application; however, nothing in the CMS guidance or the statute suggests that an application is required for the penalty period to start. Assuming that one can establish both financial and medical eligibility at some date prior to the application, the penalty start date can be set to that date.

This change severely restricts planners' ability to use asset transfers to pre-plan for Medicaid eligibility. The legislation was intended to and does eliminate the use of so-called "half-a-loaf" gifting (and its cousin, monthly gifting). Any gifting strategy under post-DRA will require careful thought and execution, perhaps relying on a single gift event, coupled with some other

6. Pub. L. 109-171, § 6011(a), 120 Stat. 61.

7. *Id.*

8. *Id.*

9. The CMS letter indicates that the ineligibility period begins "the date on which the individual is eligible for medical assistance . . . and *is receiving* institutional level of care services . . ." *Id.* (emphasis added). In contrast, the corresponding language from DRA states that ineligibility begins "the date on which the individual is eligible for medical assistance . . . and *would otherwise be receiving* institutional level care . . ." Pub. L. 109-171, § 6011(b), 120 Stat. 62 (emphasis added).

10. Pub. L. 109-171, § 6011(b), 120 Stat. 62.

mechanism, such as the use of a trust or annuity, a partial gift back, or a promissory note, to create immediate impoverishment so that the penalty period for the asset transfer begins to run. The use of annuities, pooled trusts, long term care insurance, and life care contracts will probably increase as a result of this change.

C. Rules Relating to Purchase of Annuities Tightened

Under Illinois' implementation of existing law, the purchase of an annuity is considered a transfer of assets unless the annuity is actuarially sound (i.e., is expected to pay out the purchase price within the annuitant's life expectancy), and the payments are made in substantially equal periodic amounts. An annuity with a large balloon payment, for instance, will result in the determination that an asset transfer occurred when the annuity was purchased.¹¹ The DRA formalizes these rules into federal law but further provides that any annuity purchased by an applicant will be treated as a transfer of assets, even if actuarially sound, unless the state is named as the remainder beneficiary of the annuity.¹²

D. "Income First" Computation of Community Spouse Maintenance Needs Allowance

One technique to raise the income level of a community spouse where the community spouse's separate income does not meet the Community Spouse Maintenance Needs Allowance is being eliminated by the DRA. The current rules allow a transfer of assets to the community spouse where the community spouse's income is below the allowance, even if the nursing home spouse's income could adequately supplement the community spouse's income.¹³ A large asset can instead be transferred to the community spouse in excess of the Community Spouse Asset Allowance, under the theory that the additional asset allows the community spouse to generate sufficient income to reach the Community Spouse Maintenance Needs Allowance.¹⁴ The nursing home spouse's income is used for nursing home care, which results in lower state payments to the facility. DRA eliminates this plan by instead imposing an

11. See 89 Ill. Adm. Code tit. 89, § 120.387(e)(13) (West 2008); *Gillmore v. Ill. Dept. of Human Serv.*, 218 Ill. 2d 302, 843 N.E.2d 336 (2006).

12. Pub. L. 109-171, § 6012(b), 120 Stat. 63.

13. See generally, Martin W. Siemer, *Spousal Elections in Medicaid Planning*, Elder Law, Volume 12, No. 2 (Illinois State Bar Assoc., February 2007).

14. 42 U.S.C. § 1396r-5(e)(2)(C) (1996). Note that the law requires the increase in the asset allowance to be determined at an administrative hearing and not independently by the applicant. *Id.*

“income first” rule, which requires the nursing home spouse’s income to be diverted to the community spouse before any application may be made to transfer assets in excess of the Community Spouse Asset Allowance.¹⁵

E. Cap on Value of Exempt Home Equity

Prior to the DRA, the residence of a nursing home resident was considered exempt from being counted when determining eligibility for Medicaid, regardless of value.¹⁶ The DRA places a \$500,000 cap on the equity that may be considered exempt. (Individual states may increase this number to \$750,000).¹⁷ After 2011, the \$500,000 figure will increase with the consumer price index.¹⁸ The cap will not apply where the community spouse or a minor, blind, or disabled child of the applicant is living in the house.¹⁹

F. Requirement That Penalty Periods Not Be Rounded Down

Prior to the DRA, the penalty period imposed for a disallowed transfer was rounded down to the nearest month, that is, a mathematical penalty of 5.8 months would be rounded down to a five month period of ineligibility. The DRA prohibits such rounding.²⁰ Thus, in the previous example, the penalty would be 5.8 months. It is not yet clear whether any *de minimus* gifts will be ignored in any Illinois regulation; the DRA is silent on this question.²¹

G. Actuarial Requirements on Issuance of Loans

Prior to the DRA, no particular rules applied in analyzing whether an applicant made a disallowed transfer by issuing a loan to another person. The DRA now imposes specific requirements on the terms of the note. For the note not to be considered a disallowed transfer, it must (1) require payment in equal installments; (2) be satisfied during the lifetime of the applicant; and (3) prohibit cancellation upon the death of the applicant.²²

15. Pub. L. 109-171, § 6013, 120 Stat. 64.

16. 42 U.S.C. § 1382b(a)(1) (2006).

17. Pub. L. 109-171, § 6014, 120 Stat. 64-65.

18. *Id.* at 65.

19. *Id.* at 65.

20. Pub. L. 109-171, § 6016(a), 120 Stat. 66.

21. *Id.*

22. Pub. L. 109-171, § 6016(c), 120 Stat. 66-67.

H. New Rules on the Purchase of a Life Estate

Prior to the DRA, one planning technique was for the applicant to purchase a life estate in the home of his or her child, effectively transferring cash to the child. The DRA creates a safe harbor for when such transactions will escape application of a penalty. To meet the safe harbor, the applicant must live in the residence for one year after the purchase of the life estate, and the purchase price must be fair market value (or less).²³ Failure to meet this safe harbor will result in the transaction being treated as a transfer of assets.²⁴

I. Implementation in Illinois

For the Illinois practitioner, the most important provision of the DRA has turned out to be its implementation deadline. The DRA requires individual states to implement its changes through new legislation or administrative regulation by the first day of the calendar quarter following the end of the legislative session in place on February 8, 2006. For Illinois, this means implementing regulations were mandated to be in place by July 1, 2007. As this article heads to publication, the Illinois Department of Healthcare and Family Services has not released proposed regulations. In other words, the state of Illinois, along with several other states,²⁵ is in violation of federal law and at risk of having the Center for Medicare and Medicaid Services (CMS) withhold all funding of the program in this state.

It seems unlikely that the state would take the risk of losing all its Medicaid funding, and we assume that officials have received some indications from CMS that the agency will remain lenient for a time. Left strictly to rumor and innuendo, however, is how long that time will last and what the Illinois regulations, once introduced, will look like. It is a particularly troubling question in light of Illinois's non-standard approach to transfers of assets between spouses.²⁶

This situation creates challenges for the elder law practitioner in Illinois. The first challenge is the need to comprehend two sets of rules. Second, and of more pressing importance, is whether to advise clients engaged in Medicaid

23. Pub. L. 109-171, § 6016(d), 120 Stat. 67.

24. *Id.*

25. As of this writing, Illinois is one of fourteen states that has not implemented the DRA. The other states are: California, Hawaii, Indiana, Louisiana, Maine, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, West Virginia and Wyoming.

26. *See generally*, Charles A. LeFebvre, *Medicaid Planning—Understanding the Difference Between Illinois and Federal Community Spouse Asset Allowance*, *Elder Law*, Volume 8, No. 4 (Ill. State Bar Assoc., 2003).

planning today which set of rules will apply to their asset transfers. In other words, once Illinois does implement the DRA,²⁷ will the rules be made retroactive? CMS has advised states that their implementation rules must apply to all property transfers that follow the enactment of the DRA on February 8, 2006;²⁸ the fact that states have ignored the implementation deadlines without penalty would seem to indicate that they will have no difficulty making their regulations prospective if they choose. Given the administrative burden that would accompany the enactment of retroactive rules, experts in this field are generally in agreement that the Illinois regulations are likely to be prospective.

J. Challenges to the Deficit Reduction Act

In the immediate aftermath of the passage of the DRA, there were several court challenges to its passage. Following are summaries of recent decisions of interest regarding these challenges:

1. Public Citizen v. United States District Court for the District Of Columbia²⁹

The not-for-profit public advocacy group, Public Citizen, filed suit seeking to have the Deficit Reduction Act of 2005 declared invalid, claiming it was unconstitutional because the bill passed by the House of Representatives was not identical to the bill passed earlier by the Senate.³⁰

The court rejected the challenge, stating that “no less than in 1892, the spectacle of courts directing legislative authentication procedures and otherwise meddling in the inner workings of Congress ‘disregards that coequal position . . . of the three [branches] of government.’”³¹

27. Whether the state *ever* implements the requirements of the DRA is itself an open question. One can at least speculate that Congress will enact additional changes to Medicaid before Illinois implements the DRA regulations. After the 2006 congressional election, it seemed plausible that the new political majority in Congress would partially or fully repeal the DRA, but now that a majority of states have implemented regulations, that seems far less likely. What seems plausible, though, is for Congress to enact some sort of Medicaid reform before the Department of Healthcare and Family Services acts. In this scenario, the new Illinois regulations would embody both the DRA and whatever new federal legislation passes in the interim.

28. State Medicaid Director Letter 06-018 (July 27, 2006), Center for Medicare and Medicaid Services, Enclosure, p. 8.

29. Public Citizen v. United States Dist. Court for Dist. of Columbia, 486 F.3d 1342 (D.C. Cir. 2007) (*cert. denied*, 128 S.Ct. 823 (Dec. 10, 2007)).

30. *Id.* at 1343.

31. *Id.* at 1355 (citing *Marshall Field & Co. v. Clark*, 143 U.S. 649, 676 (1892)).

2. OneSimpleLoan v. United States Secretary of Education³²

OneSimpleLoan, a company that markets and finances student loans, claimed injury because the DRA placed restrictions on consolidated student loans under the Federal Family Education Loan Program. The company claimed that the DRA was unconstitutional because the bill passed by the House of Representatives was not identical to the bill passed earlier by the Senate.³³

Agreeing with *Public Citizen*,³⁴ the court concluded that the U.S. Supreme Court's holding in *Marshall Field & Co. v. Clark*,³⁵ is directly on point and that the Supreme Court has not overruled or narrowed that holding. Absent Supreme Court direction, the court may not reassess the need for an enrolled bill rule or create exceptions to that rule on the basis of technological and political developments since *Marshall Field* was decided. Thus, faced with allegations that a law is unconstitutional because both houses of Congress did not pass identical bills, the court may not look beyond the version of the bill authenticated by the signatures of the presiding officers of the House of Representatives and Senate.³⁶

3. Zeigler v. Gonzales³⁷

Another challenge was presented in *Zeigler* on the basis that the version of the DRA voted on by the House was not identical to that passed by the Senate, in apparent violation of the U.S. Constitution's requirement that both chambers of Congress pass identical versions of a bill before it can be signed into law. Like *OneSimpleLoan* and *Public Citizen*, this case was also dismissed.

The court granted the Justice Department's motion to dismiss, relying again on *Marshall Field & Co. v. Clark*.³⁸ Once the President has signed a bill that the presiding officers of both houses attest is the bill passed by Congress, a court should not look behind the President's signature to question whether it in fact passed both houses. The court noted that at least three other federal

32. *OneSimpleLoan v. U.S. Sec'y of Educ.*, 496 F.3d 197 (2d Cir. 2007).

33. *Id.* at 198–99.

34. *Public Citizen*, 486 F.3d 1342.

35. *Marshall Field & Co.*, 143 U.S. 649.

36. *OneSimpleLoan*, 496 F.3d at 207–09.

37. *Zeigler v. Gonzalez*, 2007 WL 1875945 (S.D. Ala., No. 06–0080-CG-M, June 28, 2007).

38. *Marshall Field & Co.*, 143 U.S. 649.

courts hearing similar challenges to the DRA have also ruled that *Marshall Field & Co.* applies.³⁹

IV. CASES

A. Mental Health and Developmental Disabilities Code

1. *In re Hannah E. I*⁴⁰

Mae Wormely, an employee of Chicago's department of animal care and control, went to the home of Hannah E. and found

a strong odor and saw feces completely covering the floor. A squirrel with shaved eyes was inside a cage in the middle of the floor. There were syringes and needles on the floor and a fish tank with a turtle and a dead baby alligator inside. A big turtle and four dead turtles lined the floor near the wall. When Wormely picked up the dead turtles, they disintegrated in her hands. A woodchuck ran past her and two cats were also present. The squirrel ran out of its cage into the kitchen. When Wormely followed the squirrel, a parrot flew by her head, swearing. There were bones sitting near the window, and there was no running water in the home. Wormely stated that she was overwhelmed by the stench inside the home.⁴¹

Wormely signed a certificate and petition of involuntary admission of Hannah E. under the Mental Health and Developmental Disabilities Code. The trial court granted the petition. On appeal, the respondent contends that the supporting certificate for admission from Dr. Kapoor was not valid, as Dr. Kapoor conducted his examination of the respondent over the telephone. 405 ILCS 5/3-602 provides that the petition for involuntary admission must be accompanied by a certificate from a physician, qualified examiner or clinical psychologist who personally examined the respondent not more than seventy-two hours prior to admission.⁴²

The appellate court rejects the respondent's contention that a telephone examination does not meet the requirement of personally examining the respondent. The court states that since Dr. Kapoor was the respondent's

39. *Zeigler*, 2007 WL 1875945 at *2-3.

40. *In re Hannah E.*, 372 Ill. App. 3d 251, 865 N.E.2d 294 (1st Dist. 2007).

41. *Id.* at 253, 865 N.E.2d at 296.

42. *Id.* at 257, 865 N.E.2d at 299.

treating physician and he performed the telephone examination himself (“personally”), the requirements were met.⁴³

2. *In re Hannah E. II*⁴⁴

In the continuing saga of *Hannah E.*, the First District considers the third commitment order involving this same respondent. In this appeal, the respondent makes several contentions in arguing for reversal of the trial court’s granting of the petition for involuntary admission.

Respondent first argues that the hearing on the petition was not timely, as continuances not requested by her extended the hearing beyond the mandated fifteen-day time period. The appellate court found that continuances originating with the court were not an abuse of discretion and did not prejudice the respondent.⁴⁵

Respondent argues that the certificate of Dr. Morales did not meet the requirements of Section 3–602 because she was no longer respondent’s treating physician, did not speak to her, did not review her medical records and based the certificate on past actions. On review, the court held that respondent waived this issue by not objecting at the beginning of the hearing. Further, Dr. Morales made attempts to examine and speak with respondent on the day the petition was filed. When those attempts were refused, Dr. Morales reviewed the medical record from the time she was last the treating physician through the date of the certificate. This the court found sufficient under the circumstances.⁴⁶

The court also rejected remaining arguments relating to the finding of harm and the least restrictive alternative. This petition for involuntary admission was also affirmed.⁴⁷

3. *In re Alex T.*⁴⁸

An order for involuntary admission for mental health treatment was entered against Alex T. At the time of entry of this order, a felony charge was pending against him. 405 ILCS 5/3–100 states that for purposes of a petition for involuntary admission, a circuit court has jurisdiction “over persons not

43. *Id.* at 258, 865 N.E.2d at 299–300.

44. *In re Hannah E.*, 376 Ill. App. 3d 648, 877 N.E.2d 63 (1st Dist. 2007).

45. *Id.* at 657–58, 877 N.E.2d at 72.

46. *Id.* at 658–60, 877 N.E.2d at 73–74.

47. *Id.* at 665, 877 N.E.2d at 78.

48. *In re Alex T.*, 375 Ill. App. 3d 758, 873 N.E.2d 1015 (2d Dist. 2007).

charged with a felony who are subject to involuntary admission.⁴⁹ While this provision seems on its face to conflict with Section 9 of Article VI of the Illinois Constitution (providing that circuit courts have original jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction), the court here reads the statute as not being a limitation on personal jurisdiction, but rather a limitation on the power to enter an order for involuntary admission against a person charged with a felony.⁵⁰

The appellate court here also took judicial notice of the pending felony charge, even though a reviewing court should generally not take judicial notice of critical evidence that was not before the trial court. Judicial notice was appropriate as the State did not object to consideration of the felony charge and acknowledged it in argument. Further, the fact that evidence would render an order void favors consideration of that evidence.⁵¹

4. *In re Dorothy J.N.*⁵²

Petition was granted to authorize involuntary treatment in the form of psychotropic medication. On appeal, respondent contends that she was not notified in writing about the medications, as required by 405 ILCS 5/2–102. The State contends that information was not provided in writing at the hearing (apparently after the issue of no notification was raised, though the record is not clear that the information was ever provided at the hearing).⁵³

The appellate court reaffirms prior holdings that verbal notification is not sufficient to protect a respondent's due process rights and that the written notification requirement is not subject to a harmless-error analysis. The court also rejects the State's argument that the writing can be excused when the treating physician believes the respondent lacks the capacity to understand and act upon the information.⁵⁴

The decision is also significant for its concurring opinion.⁵⁵ Due to the significant increase in cases involving involuntary admissions, and because the same issues tend to arise in case after case, this opinion calls for more training in these cases for judges, prosecutors and defense counsel. It also calls for implementation of a flowchart for these proceedings, emphasizing “precisely who should be doing what—and when—with regard to the respondents in these

49. *Id.* at 759–60, 873 N.E.2d at 1016. *See* 405 ILL. COMP. STAT. 5/3–100 (West 2006).

50. *Id.* at 761–63, 873 N.E.2d at 1018–19.

51. *Id.* at 764, 873 N.E.2d at 1020.

52. *In re Dorothy J.N.*, 373 Ill. App. 3d 332, 869 N.E.2d 413 (4th Dist. 2007).

53. *Id.* at 334, 869 N.E.2d at 415.

54. *Id.* at 336, 869 N.E.2d at 417.

55. *Id.* at 337, 869 N.E.2d at 417.

proceedings.” The opinion calls for specific procedures for complying with the requirement of a written list of side effects, risks, benefits and alternatives of proposed treatment. The concurring opinion notes that the Fourth District had rendered fifty decisions in involuntary admission cases within the last year.⁵⁶

5. *In re Dru G.*⁵⁷

Respondent appealed from granting of petition for involuntary administration of psychotropic medication, arguing that he was denied due process when a psychologist instead of a psychiatrist was appointed to conduct an independent examination.⁵⁸ 405 ILCS 5/3–804 entitles a respondent to “an independent examination by a physician, qualified examiner, clinical psychologist or other expert of his choice.”⁵⁹ Since only a physician, such as a psychiatrist, can prescribe medication, use of a psychologist would not allow for meaningful opinions on the possible harmful effects of any proposed medications. The right to an independent examination by a qualified expert is a procedural safeguard requiring strict construction. The trial court’s order was reversed.⁶⁰

6. *In re Shirley M.*⁶¹

The trial court granted a petition for involuntary admission. At the hearing, the respondent was not present. Respondent refused to speak with her attorney or attend the hearing. Respondent also refused to speak with the testifying expert.⁶² On appeal, respondent argues that her due process rights were violated.⁶³

Distinguishing the case from prior holdings, the court here found that respondent refused to speak with her appointed attorney or attend the hearing under any circumstances. She was not prevented from doing so, and she did not request a different attorney. The trial court was permitted to hold the hearing under these circumstances.⁶⁴

56. *Id.* at 338, 869 N.E.2d at 418.

57. *In re Dru G.*, 369 Ill. App. 3d 650, 860 N.E.2d 845 (2d Dist. 2006).

58. *Id.* at 651, 860 N.E.2d at 846.

59. *Id.* at 656, 860 N.E.2d at 850; 405 Ill. Comp. Stat. 5/3–804 (West 2007).

60. *Id.* at 659, 860 N.E.2d at 852–53.

61. *In re Shirley M.*, 368 Ill. App. 3d 1187, 860 N.E.2d 353 (4th Dist. 2006).

62. *Id.* at 1189, 860 N.E.2d at 355.

63. *Id.* at 1190, 860 N.E.2d at 356.

64. *Id.* at 1190–91, 860 N.E.2d at 356–57.

Respondent also argues that the testifying expert did not meet the statutory requirements of one who had examined the respondent. The expert, Dr. Myers, did not examine the respondent but was a member of the treatment team. Respondent refused to meet with Dr. Myers, but Dr. Myers was able to observe respondent and review her medical records. Based on these facts, the statutory requirements were met.⁶⁵

7. *In re Sharon L.N.*⁶⁶

A petition for involuntary admission was granted by the trial court. The same Dr. Myers as in *Shirley M.* above, testified at the hearing for this respondent. Respondent refused to speak with Dr. Myers, who based his testimony on his work with respondent during a prior hospitalization and on a review of current medical records.⁶⁷ Respondent appealed on other grounds, but the appellate court reviewed on the basis that the statutory requirement of testimony from an examining expert was not met.⁶⁸

The appellate court reversed the order for involuntary admission. Even though the respondent refused to speak with Dr. Myers in connection with the current episode, and even though Dr. Myers could again rely on his past treatment of the respondent and current observation, as well as a review of current medical records, here there were two other certified professionals who were able to personally examine the respondent. The State offered no reason as to why Dr. Myers testified instead. On these facts, the statutory requirement was not met.⁶⁹

B. Medicaid

1. *Jones v. Dept. of Public Aid*⁷⁰

Michael Jones suffered a severe spinal cord injury as a child and received twenty-four-hour in-home care under a Medicaid waiver program, the Medically Fragile/Technology Dependent (MF/TD) home service program. Upon turning twenty-one, Michael was no longer eligible for this program and instead received benefits under a different waiver program. Funding for in-

65. *Id.* at 1192–93, 860 N.E.2d at 357–59.

66. *In re Sharon L.N.*, 368 Ill. App. 3d 1177, 859 N.E.2d 627 (4th Dist. 2006).

67. *Id.* at 1179–80, 859 N.E.2d at 628–29.

68. *Id.* at 1180, 859 N.E.2d at 629–30.

69. *Id.* at 1182–83, 859 N.E.2d at 631.

70. *Jones v. Dept. of Pub. Aid*, 373 Ill. App. 3d 184, 867 N.E.2d 563 (3d Dist. 2007).

home care under this new program was “considerably reduced.”⁷¹ Michael filed for injunctive relief pending administrative review of the change in his service plan.⁷² The trial court granted the relief and ordered the Department to continue paying for Michael’s care at the rate provided under the MF/TD program. The Department was also ordered to pay the arrearage for the difference in the rates between the two programs from the date of the change through the date of the order. The Department appealed.⁷³

It was noted that Michael’s needs and condition did not change upon turning twenty-one, and the benefits provided under the new program would not be sufficient to allow Michael to remain at home with the same level of care. Even the cost of providing the benefits of the original waiver program would be far less than the cost of the highly specialized institutional care that Michael would otherwise require.⁷⁴

Using an ADA analysis, the appellate court held that continuing to provide the benefits of the original waiver program would be a reasonable modification of an existing program, necessary to provide the most integrated setting appropriate, rather than a fundamental alteration of the state’s services and programs. The trial court was affirmed as to the order requiring the former services to again be provided. However, that portion of the order requiring payment of the arrearage was vacated as violating the State Lawsuit Immunity Act. Such a claim can only be brought in the Court of Claims, so the Circuit Court did not have jurisdiction to consider the claim for an arrearage.⁷⁵

2. *Poindexter v. State ex rel. Dept. of Human Services*⁷⁶

Community spouses filed a complaint for injunctive and declaratory relief against the State, arguing that the State was illegally attempting to collect support from them for the support of their institutionalized spouses. State law provides spousal support for the amount the community spouse’s income exceeds the minimum monthly maintenance needs allowance established pursuant to the Medicare Catastrophic Coverage Act of 1988 (MCCA). It was argued that federal law (MCCA) preempts the ability of a state to seek this spousal support in that it does not distinguish between

71. *Id.* at 185–87, 867 N.E.2d at 565–66.

72. *Id.* at 188, 867 N.E.2d at 568.

73. *Id.* at 190, 867 N.E.2d at 569.

74. *Id.* at 195–97, 867 N.E.2d at 573–76.

75. *Id.* at 197–98, 867 N.E.2d at 575–76.

76. *Poindexter v. State ex rel. Dept. of Human Serv.*, 372 Ill. App. 3d 1021, 869 N.E.2d 139 (4th Dist. 2006).

eligibility and post-eligibility support. The State argued that preemption did not apply and, further, that the plaintiffs had failed to exhaust their administrative remedies. The trial court found in favor of the plaintiffs. The State appealed.⁷⁷

On appeal, the court held that because the issue was one of law only, it was not within the expertise of any administrative agency and the plaintiffs were not required to exhaust administrative remedies.⁷⁸ The court further held that preemption did not apply. The trial court was reversed.⁷⁹

In its analysis, the appellate court found that there was no express preemption.⁸⁰ There was no implied preemption in part due to the very nature of the federal Medicaid laws being an example of “cooperative federalism” with both the federal and state governments setting policy.⁸¹ Finally, it could not be said that it was impossible to comply with both the federal and state laws or that the state law stands as an obstacle to accomplishing the intent of Congress. The court engaged in a detailed analysis of Medicaid law in reaching this final conclusion. The court relied on its determination that the MCCA is for the purpose of determining eligibility (as opposed to post-eligibility issues); on pronouncements from the U.S. Supreme Court that the Medicaid eligibility provisions do not affect family responsibility laws and the MCCA did not address that pronouncement except for eligibility purposes; on the protections of the community spouse eligibility rules; on the deference to be given to an agency’s interpretation of its own regulations (and the State Medicaid Manual from CMS makes it clear that there was no preemption); and on determinations of other states recognizing similar support obligations.⁸²

3. Hines v. Ill. Dept. of Public Aid⁸³

The institutionalized spouse (Julius) entered the nursing home and received Medicaid benefits for some time while there. After he died, his wife (Beverly) received the marital residence as the surviving joint tenant. Beverly later died, and the state sought recovery of its Medicaid payments by filing a claim against Beverly's estate. This procedure is authorized by 305 ILCS 5/5–13.⁸⁴

77. *Id.* at 1022–23, 869 N.E.2d at 142.

78. *Id.* at 1024–25, 869 N.E.2d at 143.

79. *Id.* at 1035, 869 N.E.2d at 152.

80. *Id.* at 1027, 869 N.E.2d at 145.

81. *Id.* at 1027, 869 N.E.2d at 146.

82. *Id.* at 1028–35, 869 N.E.2d at 146–52.

83. *Hines v. Ill. Dept. of Pub. Aid*, 221 Ill. 2d 222, 850 N.E.2d 148 (2006).

84. *Id.* at 224–25, 850 N.E.2d at 150. *See* 305 ILL. COMP. STAT. 5/5–13 (2006).

The executor sought direction from the probate court as to how to treat the claim, pointing out that federal law was apparently in conflict with the state statute. Specifically, federal law (42 U.S.C. § 1396p(b)) purported to restrict Medicaid recovery to specific situations, none of which include seeking recovery against the estate of the community spouse.⁸⁵

The trial court ruled in favor of the state, but the appellate and supreme courts both disagreed, observing that the federal statute set forth a general prohibition against Medicaid recovery, except for three specific exceptions. Only one of those exceptions—estate recovery—was applicable. The appellate and supreme courts noted that the federal Medicaid law allowed recovery against the estate of the Medicaid recipient and not the estate of the recipient's surviving spouse. Accordingly, the courts held, the state's attempt the claim against Beverly's estate was improper.⁸⁶

4. Gillmore v. Department of Human Services⁸⁷

The plaintiff's decedent (Mary) qualified for Medicaid assistance in January 2002 and purchased an annuity the same month. The purchase price was \$73,713, and the annuity returned this full purchase price to the decedent within her life expectancy of 116 months. However, the annuity payments were heavily skewed toward a balloon payment in the 116th month.⁸⁸

DHS imposed a 22-month penalty period, based on the Illinois regulations requiring that a Medicaid-qualified annuity pay out in "approximately equal periodic payments" over its term. The decedent sought administrative review, then review by the circuit court, then the appellate court, and finally the Illinois Supreme Court. In each instance, she argued that this Illinois regulation contradicted the federal Medicaid law.⁸⁹

The courts disagreed, noting that the State Medicaid Manual encourages states to make a determination as to the ultimate purpose of the annuity; that is, whether it is a retirement tool or a device to transfer assets and qualify for Medicaid. The courts held that the Illinois regulations requiring approximately equal periodic payments from the annuity were consistent with the intent of the federal legislation, even if the regulations did not track the specific examples in the State Medicaid Manual. The Supreme Court further held that a "balloon annuity returns fair market value only in a technical sense because the person

85. *Hines*, 221 Ill. 2d at 225–26, 850 N.E.2d at 150–51. See 42 U.S.C. § 1396p(b) (2006).

86. *Hines*, 221 Ill. 2d at 229–31, 850 N.E.2d at 152–53.

87. *Gillmore v. Dept. of Human Services*, 218 Ill. 2d 302, 843 N.E.2d 336 (2006).

88. *Id.* at 309, 843 N.E.2d at 340.

89. *Id.* at 309–13, 843 N.E.2d at 340–42.

purchasing it receives the disproportionately largest payment on the last day of her life, when she is unable to spend it”⁹⁰

C. Financial Exploitation

1. In re Estate of Hoellen⁹¹

A Chicago police officer became familiar with the ward, Theodore Hoellen, by responding to a 1999 complaint by Hoellen’s neighbor that Hoellen had entered the neighbor’s house in a confused state, believing it to be his own house. Thereafter, the officer, Donald Owsley, visited Hoellen frequently. Hoellen was eighty-nine years of age and unable to use independent judgment regarding the management of his estate, due to mental impairment.⁹²

Owsley induced Hoellen to (1) name Owsley as the beneficiary of his retirement plan; (2) execute POAs for property and health care, naming Owsley as his agent; (3) execute a living trust, which provided that Owsley would be the sole beneficiary of Hoellen’s trust estate after Hoellen’s death; and (4) designate Owsley as the beneficiary of a \$50,000 CD.⁹³

The public guardian became involved in response to a complaint that Owsley was financially exploiting Hoellen. In a subsequent guardianship citation proceeding, the court concluded that Owsley had exercised undue influence and “flagrantly and intentionally” breached a fiduciary duty owed to Hoellen. The trial court set aside all of the benefits Owsley had obtained, awarded the public guardian one dollar in nominal damages, and \$50,000.00 in punitive damages. The appellate court upheld this award.⁹⁴

2. Russ v. Russ⁹⁵

Johnnie Russ opened a joint bank account with her son, Elliot, in 1992. They agreed to deposit all of Johnnie's income into this account. In 1999, Johnnie executed a durable power of attorney naming Elliot as her agent. No authority to make gifts was granted. After admission to a nursing home, Johnnie was declared incompetent, the power of attorney was terminated, and a guardian was appointed. The guardian filed suit seeking recovery of funds

90. *Id.* at 323–25, 843 N.E.2d at 348–49.

91. *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 854 N.E.2d 774 (1st Dist. 2006).

92. *Id.* at 242, 854 N.E.2d at 778.

93. *Id.*

94. *Id.* at 244, 253, 854 N.E.2d at 778–79, 787.

95. *Russ v. Russ*, 302 Wis. 2d 264, 734 N.W.2d 874 (Wis. 2007).

Elliot withdrew from the joint account between March 1999 and April 2002, for expenses related to himself, his business and his wife. The suit alleged improper self-dealing; Elliot countered that, as part of a joint account, he was entitled to spend the money. The trial court dismissed the claim, found no breach of fiduciary duty, and reformed the power of attorney to authorize Elliot's access to the joint account.⁹⁶

The Supreme Court of Wisconsin found conflicting presumptions. The establishment of a joint checking account established prior to execution of the power of attorney creates a presumption of donative intent. The transfer of funds from a joint account by an agent for the agent's own use creates a presumption of fraud (absent a specific gifting power). When there are two conflicting presumptions, the court may make a determination based on facts and credibility of witnesses. The Supreme Court affirmed based on the conflicting presumptions approach but declined to adopt the analysis of the trial court. It was felt that use of the doctrines of reformation and equitable estoppel would be inefficient.⁹⁷

The Wisconsin Supreme Court relied heavily on a line of Illinois cases⁹⁸ and, in fact, specifically adopted the approach used in *In re Estate of Harms*;⁹⁹ *In re Estate of Rybolt*;¹⁰⁰ and *In re Estate of Teall*.¹⁰¹ In *Teall*, the Illinois appellate court stated, "[W]here the attorney-in-fact actively uses his position to create the joint tenancies the presumptions do not cancel; instead, the controlling presumption is the presumption of fraud, which requires strong evidence to overcome."¹⁰²

D. Guardianships

1. *In re* Guardianship of J.D.¹⁰³

Glen Dresher and his former wife, Rosanne Dresher, were co-guardians for their disabled son, J.D. After Glen was convicted of attempted murder and aggravated domestic battery for striking Rosanne with his car several times, a motion was filed to remove Glen as co-guardian. The trial court "temporarily removed" Glen as guardian and issued a citation to remove. This

96. *Id.* at 268–73, 734 N.W.2d at 877–79.

97. *Id.* at 287–88, 734 N.W.2d at 887.

98. *Id.* at 282–84, 734 N.W.2d at 884–85.

99. 236 Ill. App. 3d 630, 603 N.E.2d 37 (4th Dist. 1992).

100. 258 Ill. App. 3d 886, 631 N.E.2d 792 (4th Dist. 1994).

101. 329 Ill. App. 3d 83, 768 N.E.2d 124 (1st Dist. 2002).

102. *Id.* at 88, 768 N.E.2d at 130.

103. *In re* Guardianship of J.D., 376 Ill. App. 3d 673, 878 N.E.2d 141 (1st Dist. 2007).

order also stated that “there is no just cause or reason to delay enforcement or appeal of this order.” Glen appealed.¹⁰⁴

Despite the language of the trial court that there was no just cause to delay appeal; there was no final judgment as required by Supreme Court Rule 304. Glen’s removal was temporary pending a final order on the citation to remove. The exception of Supreme Court Rule 306(a)(5), allowing appeals from interlocutory orders affecting the care and custody of unemancipated minors, did not apply. J.D. was thirty-five years of age and not a minor. The court rejects Glen’s argument that, because J.D. was disabled as a minor and could never become emancipated, this exception should apply. The appeal was dismissed.¹⁰⁵

2. Grate v. Grzetich¹⁰⁶

Plaintiff filed a claim against Edward Grzetich, guardian of the estate of Catherine Grzetich. It was alleged that Edward breached his fiduciary duties while serving as trustee of a testamentary trust. Judgment was entered against Edward, finding he converted \$38,592 of trust money for his personal use. The judgment also ordered half of Edward’s attorney’s fee of \$11,194.71 incurred in defending the action be paid out of the trust.¹⁰⁷

Plaintiff appealed the award of attorney’s fees. The appellate court found sufficient evidence supporting the trial court’s finding that Edward converted trust assets to his personal use. The law is well settled that trustees cannot reimburse themselves from the trust estate for their attorney’s fee, unless those fees were incurred in the management and preservation of the trust estate. Edward’s defense of these claims against him clearly did not qualify.¹⁰⁸

3. In re Mark W.¹⁰⁹

This case had its genesis with a petition for adjudication of wardship of the child of a mentally disabled mother.¹¹⁰ The court’s decision is an interesting read and provides a nice reminder of black letter guardianship law. Among other notable holdings, the court states:

104. *Id.* at 674–75, 878 N.E.2d at 142–43.

105. *Id.* at 677–79, 878 N.E.2d at 144–46.

106. *Grate v. Grzetich*, 373 Ill. App. 3d 228, 867 N.E.2d 577 (3d Dist. 2007).

107. *Id.* at 229–30, 867 N.E.2d at 578–79.

108. *Id.* at 231, 867 N.E.2d at 579–80.

109. *In re Mark W.*, 371 Ill. App. 3d 81, 862 N.E.2d 589 (1st Dist. 2006).

110. *Id.* at 83, 862 N.E.2d at 589–90.

- 1) A guardian ad litem functions as the eyes and ears of the court and not as the ward's attorney.
- 2) The GAL represents the best interests of the ward, as the GAL sees them, not as the ward sees them.
- 3) The court must appoint separate counsel if the ward requests it or if the ward and GAL take different positions.
- 4) A GAL is required only prior to a hearing on the ward's competency. Once the ward is found competent or a plenary guardian is appointed, a GAL is optional.
- 5) The court is not divested of jurisdiction once the plenary guardian is appointed; jurisdiction continues until the adjudication of disability is terminated or the ward dies.
- 6) Guardians act only as the hand of the court and are at all times subject to its direction in the manner in which they provide for care and support of the ward.
- 7) The court is required to intervene if the guardian of the person is about to cause harm or threaten harm to the ward.
- 8) Plenary guardians can exercise all statutory powers of guardian even if not specifically enumerated in court order; limited guardians can exercise only those powers specifically enumerated in court order.¹¹¹

4. *In re Estate of Wilson*¹¹²

Arnetta Williams was appointed temporary guardian of her cousin, Mary Ann Wilson, after finding Wilson in "deplorable circumstances." At the hearing on the petition for temporary guardianship, the GAL reported that the ward had a power of attorney, but it appeared that the agent had withdrawn more than \$180,000 from the ward's bank accounts. In its temporary order, the court suspended the agent's authority under the power of attorney.¹¹³

The agent subsequently filed a motion to vacate the temporary order and issue a temporary restraining order against Williams, claiming she did not have notice and the court did not have subject matter jurisdiction (since the court did not comply with various provisions of the Probate Act and the Power of Attorney Act). The agent testified at the hearing on her motion that she had indeed withdrawn \$150,000 in cash from Wilson's account and added it to an existing \$50,000 in a box stored in Wilson's closet. These funds were used to build an addition to the agent's home, so that Wilson could live with the agent

111. *Id.* at 95–98, 862 N.E.2d at 601–03.

112. *In re Estate of Wilson*, 373 Ill. App. 3d 1066, 869 N.E.2d 824 (1st Dist. 2007).

113. *Id.* at 1067–68, 869 N.E.2d at 826–27.

and her husband. The agent claimed to have paid the contractor in cash, with no receipts. The motion was denied, and the agent appealed.¹¹⁴

The appellate court provides a thorough analysis of subject matter jurisdiction, concluding that Williams presented a “justiciable matter” in the guardianship.¹¹⁵ Though not argued by the agent on appeal, the appellate court also refutes any notion that the trial court improperly denied the motion to vacate, as the agent “did not and could not articulate the required elements for such relief.”¹¹⁶

5. *In re Estate of Doyle*¹¹⁷

The Power of Attorney Act provides that a court appointed guardian lacks the authority to act as to any matter on which an agent appointed pursuant to a durable power of attorney may act.¹¹⁸ The Act further provides that an interested person may petition the court to authorize the guardian to take any action that the principal could take under the agency, including revocation of the agency.¹¹⁹

The Act allows the court to take such action only after finding that the principal lacks the capacity to control or revoke the agency and that the agent is not acting in accordance with the terms of the agency, or the agent's actions or inactions have caused or threatens substantial harm to the principal's person or property in a manner not intended by the principal.¹²⁰

In this case, the court presided over a guardianship case where the agent (the ward's daughter) was accused of mismanaging the ward's estate. The court appointed a different person to be guardian. No party petitioned the court to authorize the guardian to revoke the agency; however, the court, in ruling, stated the following:

Although the [c]ourt acknowledge[s] the time and efforts [the agent] has spent in taking care of the needs of her parents, it does appear there came a time when her devotion turned to abuse.

114. *Id.* at 1068–71, 869 N.E.2d at 827–29.

115. *Id.* at 1075, 869 N.E.2d at 832.

116. *Id.* at 1076–77, 869 N.E.2d at 833–34.

117. *In re Estate of Doyle*, 362 Ill. App. 3d 293, 838 N.E.2d 355 (4th Dist. 2005).

118. 755 ILL. COMP. STAT. 45/1–0.01 *et seq.* (West 2007).

119. 755 ILL. COMP. STAT. 45/2–10.

120. *Id.*

It also is this [c]ourt's opinion that there exists inconsistencies in the manner in which [the agent] managed the funds and property of [the principal]. That took place over a number of years, and if permitted to continue would dissipate the assets of [the ward]. It is my further opinion [that] she would bankrupt her estate. This concerns the [c]ourt. It does not appear that the best interest of [the agent] was the primary concern of [the principal] at this time.¹²¹

On appeal, the Fourth District held that the above pronouncement implicitly revoked the power of attorney.¹²²

Justice Cook dissented, and his dissent emphasized the intent of the legislature, in drafting the Power of Attorney Act, to create a high threshold before a durable power of attorney may be revoked.¹²³

The fourth district also held that the thirty-day time limit for the court to conduct a hearing after a petition for guardianship is filed is not mandatory but is instead directory. This part of the opinion, however, was not shared by any panel member.¹²⁴ Justice Cook dissented, and Justice Turner filed a special concurrence in which he argued that the court did not need to address this question.¹²⁵

E. Wills, Trusts and Estates

I. *Applebaum v. Rush University Medical Center*¹²⁶

Decedent, Joseph Appelbaum, died on December 2, 2003 following treatment at Defendant's facility. Decedent's son and sole heir, Michael, was appointed special administrator and filed a complaint for medical malpractice on December 1, 2005. Michael was admitted to the bar in 1988 but assumed inactive status as of January 6, 2005. He signed the original complaint as "Attorney at Law." An amended complaint was endorsed "Plaintiff Pro Se." After the filing of the amended complaint, Michael's active status was restored.¹²⁷

Defendant moved to dismiss the complaint as a nullity, arguing that Michael, though not licensed to practice law, filed the suit in a representative

121. *Doyle*, 362 Ill. App. 3d at 300–01, 838 N.E.2d at 362.

122. *Id.* at 301, 838 N.E.2d at 362.

123. *Id.* at 305, 838 N.E.2d at 365 (Cook, dissenting).

124. *Id.* at 298–99, 838 N.E.2d at 360–61 (Majority opinion).

125. *Id.* at 305, 838 N.E.2d at 365 (Cook, dissenting).

126. *Applebaum v. Rush Univ. Med. Ctr.*, 376 Ill. App. 3d 993, 877 N.E.2d 80 (1st Dist. 2007).

127. *Id.* at 994, 877 N.E.2d at 81–82.

capacity. Prior case law establishes the “nullity rule” requiring dismissal of a cause of action filed by a non-attorney in a representative capacity, even when there is a subsequent appearance by an attorney.¹²⁸

Recognizing the harshness of the nullity rule and that exceptions exist under unique circumstances, the court still found the nullity rule applicable. Rather than mitigating against application of the nullity rule, Michael’s status as a formerly and currently licensed attorney with proper legal training held him to a higher standard. As he was the only one who would benefit from the suit, Michael argued that a previously recognized exception for unique circumstances should apply. The court held that Michael was not only on notice to determine his ability to practice law, he should have known he was unauthorized to practice.¹²⁹

2. In re Estate of Phelan¹³⁰

Decedent, John J. Phelan, established two separate trusts and a pourover will. He created an irrevocable life insurance trust naming two adult daughters from prior marriages as beneficiaries. He also created a revocable trust providing for his wife and two minor sons. He signed a will naming the revocable trust as the residuary beneficiary.¹³¹

The irrevocable trust was to be funded with life insurance proceeds of \$1.3 million. This trust also contained a provision stating that if Phelan died within three years of giving up incidence of ownership of the funding policies forming the corpus of the trust, proceeds of the policies would go to his estate instead of the irrevocable trust. Testimony indicated that Phelan understood this provision and that his main concern was to provide for his minor sons.¹³²

Phelan died less than two years after establishing and attempting to fund the trusts. Proceeds of the life insurance were paid to his estate, which would then go to the revocable trust leaving nothing for the two adult daughters. One of the daughters petitioned to contest the will and for reformation of the trusts.¹³³

Reformation of the trusts was not allowed. The evidence did not support the daughters’ assertions that the revocable trust was signed based only on the mistaken belief that the daughters were taken care of under the terms of the

128. *Id.* at 994–95, 877 N.E.2d at 82.

129. *Id.* at 999–1000, 877 N.E.2d at 86.

130. *In re Estate of Phelan*, 375 Ill. App. 3d 875, 874 N.E.2d 185 (1st Dist. 2007).

131. *Id.* at 878–80, 874 N.E.2d at 188–90.

132. *Id.* at 878, 874 N.E.2d at 188.

133. *Id.* at 877–80, 874 N.E.2d at 188–90.

irrevocable trust. The court adhered to the principle that an unfunded trust cannot be reformed.¹³⁴

The revocable trust was properly incorporated by reference into the will. One of the requirements for incorporation by reference is that the incorporated document be in existence at the time the will is signed. There was no direct proof as to the order in which the will and revocable trust were signed, though they were generally signed contemporaneously. Under these circumstances, it is not required that the trust be signed first.¹³⁵

3. *In re Estate of Lambrecht*¹³⁶

Decedent, Karl Lambrecht, held a one-third interest in certain real estate at the time of his death. Three of his children held the other two-thirds interest. The administrator was authorized by the court to hire an appraiser for the purpose of selling the one-third interest to the owners of the two-thirds interest for the appraised price of the one-third interest.¹³⁷

The appraiser selected by the administrator valued the entire tract at \$1,000,000. Decedent's son, Carl, objected to this value and presented another appraiser valuing the real estate at \$1,500,000.¹³⁸

The appraiser selected by the administrator was independent, had looked at about 150 buildings in the area of the subject property and based his valuation on the income capitalization approach and sales comparison approach without adjustments of note.¹³⁹ Carl's appraiser had known Carl for five years, had completed only one appraisal in the area of the subject property, and used the sales comparison approach while assigning a price adjusted upwards on ten of eleven comparable properties. Without the upward adjustments, the valuation of the subject property would have been \$1,075,000.¹⁴⁰

The trial court's finding that the administrator's appraiser was more credible was not against the manifest weight of the evidence under these circumstances.¹⁴¹

134. *Id.* at 882–83, 874 N.E.2d at 191–92.

135. *Id.* at 887–88, 874 N.E.2d at 195.

136. *In re Estate of Lambrecht*, 375 Ill. App. 3d. 865, 874 N.E.2d at 170 (1st Dist. 2007).

137. *Id.* at 865, 874 N.E.2d at 171–72.

138. *Id.* at 865–66, 874 N.E.2d at 172.

139. *Id.* at 869, 874 N.E.2d at 174–75.

140. *Id.* at 870, 874 N.E.2d at 175.

141. *Id.* at 872, 874 N.E.2d at 177.

4. *In re Estate of Stark*¹⁴²

Kenneth and Vesta Stark were married for fifteen years prior to Kenneth's death in 2004 at age ninety-seven. Kenneth had no children. Vesta had two sons from a prior marriage. Through one of her sons, Mark Reynolds, agent for Vesta under a power of attorney for property, Vesta renounced Kenneth's will. The residue of Kenneth's will, left to Southern Illinois University Foundation and Shriner's Hospital for Children, was valued at more than \$4,600,000.¹⁴³

SIU and Shriner's filed a motion to vacate the renunciation. It was alleged that Mark's power of attorney was invalid because Vesta was not competent when she signed it. It was further alleged that the renunciation was not for Vesta's benefit under Section 2-7 of the Power of Attorney Act.¹⁴⁴ Summary judgment was granted by the trial court in favor of Mark based on (1) the assumption that the power of attorney was valid; (2) the fact that the power of attorney contains no provision limiting authority to renounce; and (3) a failure to show that Mark was not acting in Vesta's benefit.¹⁴⁵

On the Supreme Court Rule 304(a) appeal, the appellate court declined to reach the merits. While the order of the trial court stated that there was no just reason to delay enforcement, as required by Rule 304, a mere recitation of this statement does not automatically confer jurisdiction. With the issue of whether Vesta was competent at the time of signing the power of attorney still before the trial court, and since resolution of that issue could render review moot, there was just reason to delay the appeal.¹⁴⁶

5. *Northern Trust Co. v. Knox*¹⁴⁷

Northern Trust brought suit against more than 180 defendants, seeking instructions from the trial court as to distribution of trust principal on termination.¹⁴⁸ Caroline Haskell executed a trust in 1892, naming seventeen individuals to receive an income interest. Lucy Smith, Haskell's sister, was to receive one-sixth of the interest income for her life. Smith's "lawful heirs" were to receive this income interest after Haskell's death, per stirpes. On

142. *In re Estate of Stark*, 374 Ill. App. 3d 516, 872 N.E.2d 1011 (4th Dist. 2007).

143. *Id.* at 517-18, 872 N.E.2d at 1012-13.

144. 755 ILL. COMP. STAT. 45/2-7 (2006).

145. *Stark*, at 520-21, 872 N.E.2d at 1014-15.

146. *Id.* at 524-25, 872 N.E.2d at 1018.

147. *Northern Trust Co. v. Knox*, 373 Ill. App. 3d 479, 869 N.E. 2d 401 (1st Dist. 2007).

148. *Id.* at 479-80, 869 N.E.2d at 401-04.

termination, one-sixth of the remaining trust principal was to be distributed to Smith's lawful heirs, per stirpes. The trust terminated on October 14, 2003.¹⁴⁹

One of Smith's descendants attempted to bequeath her interest in the final distribution to the New England Conservatory of Music. The Conservatory and Charles Eliot (Smith's only surviving heir) each claimed Smith's one-sixth share of the remaining trust principal. The Conservatory argued that the trust vested upon Smith's death, with her "lawful heirs" being determined as of that date. Under this interpretation, the descendant bequeathing an interest to the Conservatory would have been one of the lawful heirs. Eliot claimed that vesting was determined only upon termination of the trust, so that his ancestors had no right to bequeath a non-vested interest.¹⁵⁰

This trust had spawned two earlier court cases, resulting in a 1929 decision by the Illinois Supreme Court and a 1933 circuit court decree.¹⁵¹ Relying on these earlier decisions and various rules of construction, the appellate court determined that the right to principal vested upon termination of the trust and thus Eliot was entitled to Smith's share.¹⁵²

6. *In re Estate of Howell*¹⁵³

Tina and Stephen Quick filed a petition to contest the will of Tina's father. Letters of office had issued on June 21, 2005. The will contest was filed on December 21, 2005. The contest was captioned by Tina and Stephen as a probate matter for filing in the pending probate case, but the circuit court filed the contest as a chancery matter, giving it a different case number than the probate case. Summons was issued on December 21 and served on the executor on December 31.¹⁵⁴

The executor filed a motion to dismiss the will contest petition on the basis that (1) the petition had not been filed in the proper proceeding within the six-month time period for will contests and (2) the executor had not been served within the six-month period.¹⁵⁵

The trial court held that the incorrect filing of the petition did not deprive the court of jurisdiction to hear the matter and that transfer of the petition to the probate proceeding was the proper remedy. However, the trial court also

149. *Id.* at 481, 869 N.E.2d at 404.

150. *Id.* at 482, 869 N.E.2d at 405.

151. *Id.*

152. *Id.* at 492, 869 N.E.2d at 413.

153. *In re Estate of Howell*, 373 Ill. App. 3d 342, 867 N.E.2d 559 (5th Dist. 2007).

154. *Id.* at 343, 867 N.E.2d at 560.

155. *Id.*

ruled that the failure to serve the executor within the six-month period was fatal to the petition.¹⁵⁶

The appellate court held that the timely filing of a will contest is a jurisdictional prerequisite, but the filing of the petition in the wrong division is a procedural defect, not a jurisdictional defect.¹⁵⁷ The appellate court further held that the Probate Act does not contain any time limitation for providing notice of the filing of a petition to the executor. The trial court order was reversed.¹⁵⁸

7. *In re Estate of Beckhart*¹⁵⁹

Mother and father divorced in 2001. As a part of the settlement agreement incorporated as part of the judgment of dissolution of marriage, both were required to name their minor son as the beneficiary on any life insurance policies provided by an employer at no cost. Father had such a policy naming his estate as the beneficiary, but he did not change the beneficiary designation as ordered. Father died in 2004. Proceeds of the insurance policy were paid to his estate.¹⁶⁰

Mother filed an estate claim on behalf of the child, seeking payment of the proceeds. After one year, mother hired a new attorney and filed a motion to establish a constructive trust. The estate asserted the affirmative defense of laches, claiming that the delay in filing the motion for a constructive trust prejudiced the estate since proceeds had been used for estate expenses.¹⁶¹

The appellate court held that the judgment of dissolution of marriage created a vested interest in the insurance proceeds. A constructive trust is an appropriate remedy under the circumstances.¹⁶² The defense of laches was not available because it does not apply to minors. Further, the filing of the estate claim put the estate on notice of the asserted claim to the proceeds.¹⁶³

156. *Id.*

157. *Id.* at 344, 867 N.E.2d at 561.

158. *Id.* at 345–46, 867 N.E.2d at 562–63.

159. *In re Estate of Beckhart*, 371 Ill. App. 3d 1165, 864 N.E.2d 1002 (3d Dist. 2007).

160. *Id.* at 1167, 864 N.E.2d at 1004.

161. *Id.* at 1167–68, 864 N.E.2d at 1004–05.

162. *Id.* at 1169, 864 N.E.2d at 1005–06.

163. *Id.* at 1171, 864 N.E.2d at 1007.

8. *In re Estate of Lashmett*¹⁶⁴

Marcella T. Lashmett died testate on December 19, 1999. Prior to her death, Marcella had a history of allowing her daughter Christine to use her farm equipment, trade it in on new equipment and title the new equipment in Christine's name. This was last done three months prior to Marcella's death, at a time that Christine was also agent for Marcella under a power of attorney for property. Marcella's equipment produced a trade-in credit of \$55,296.28. On December 16, 2005, the personal representative of Marcella's estate, Christine's sister, filed a citation to recover the proceeds.¹⁶⁵

Christine defended on the basis that the citation, filed more than five years after Marcella's death, was barred by the general statute of limitations of 735 ILCS 5/13–205. Christine further alleged that the citation improperly sought to collect a debt.¹⁶⁶

The court held that the statute of limitations did not apply to a citation proceeding. Since the probate court's jurisdiction extends to all property of the decedent, no matter where or when it may be found, the general statute of limitations "does not and cannot apply." It would otherwise serve to "defeat the jurisdiction of the probate court and effectively restrict the statutory and common-law power of the court to supervise the administration and disposition of estates."¹⁶⁷

In arguing that a citation to recover assets cannot be used to collect a debt, Christine relied on a 1930 case from the Illinois Supreme Court.¹⁶⁸ The court found that the proceeds from the trade-in of the farm equipment are not a debt but the proceeds of a conversion.¹⁶⁹ Further, there is an exception to the general rule against using a citation to collect a debt when the debtor is a fiduciary.¹⁷⁰ Christine's argument that the estate should have been awarded a percentage interest in the new equipment rather than a monetary judgment was rejected.¹⁷¹

164. *In re Estate of Lashmett*, 369 Ill. App. 3d 1013, 874 N.E.2d 65 (4th Dist. 2007).

165. *Id.* at 1015–16, 874 N.E.2d at 67–68.

166. *Id.* at 1016, 874 N.E.2d at 68.

167. *Id.* at 1018, 874 N.E.2d at 69.

168. *Id.* at 1018, 874 N.E.2d at 69.

169. *Id.* at 1020, 874 N.E.2d at 71.

170. *Id.* at 1020, 874 N.E.2d at 71.

171. *Id.* at 1021–22, 874 N.E.2d at 72.

9. Estate of Malik v. Lashkariya¹⁷²

Decedent died testate in 1995. Decedent's will stated that if his estate were subject to any federal estate taxes, "all taxes shall be paid by my estate." The estate filed a petition to apportion taxes between the estate and the recipients of nonprobate assets.¹⁷³ While Illinois has no statutory provisions on equitable apportionment, equitable apportionment has been allowed when the decedent died intestate or did not provide direction for the payment of taxes by will. When the decedent specifically directs that taxes be paid from the residue, equitable apportionment does not apply and the residue pays the burden of the taxes without contribution from recipients of nonprobate assets.¹⁷⁴

In this case, the will directed payment of taxes from "my estate," as opposed to "the residue of my estate." Thus, the court had to consider whether the phrase "my estate" is broad enough to include recipients of nonprobate assets. The court concluded that the phrase "my estate" does not include nonprobate assets and equitable apportionment was precluded.¹⁷⁵

10. In re Estate of Lower¹⁷⁶

The decedent's spouse was awarded \$100,000 as her statutory custodial care award pursuant to section 18-1.1 of the Probate Act of 1975.¹⁷⁷ That section requires a showing that the claimant dedicated herself to living with and caring for the disabled person for at least 3 years.¹⁷⁸ The court held that (1) for the purpose of this section, proof that the decedent was "disabled" according to the definition of the guardianship statute¹⁷⁹ was sufficient to show that the decedent was 100% disabled; (2) the evidence showed that the decedent, who suffered from Parkinson's disease for many years, met that definition,¹⁸⁰ and (3) the claimant qualified for the claim even though she was physically incapable of caring for the decedent and relied upon third parties to assist in providing him care.¹⁸¹

172. Estate of Malik v. Lashkariya, 369 Ill. App. 3d 457, 861 N.E.2d 272 (1st Dist. 2006).

173. *Id.* at 457-58, 861 N.E.2d at 274.

174. *Id.* at 458, 861 N.E.2d at 274.

175. *Id.* at 459, 861 N.E.2d at 275.

176. In re Estate of Lower, 365 Ill. App. 3d 469, 848 N.E.2d 645 (2d Dist. 2006).

177. 755 ILL. COMP. STAT. 5/18-1.1 (2006).

178. Lower, 365 Ill. App. 3d at 475-76, 848 N.E.2d at 651-52.

179. 755 ILL. COMP. STAT. 5/11a-2.

180. Lower, 365 Ill. App. 3d at 476-77, 848 N.E.2d at 652-53.

181. *Id.* at 478-79, 848 N.E.2d at 654.

*11. Peck v. Froehlich*¹⁸²

A trust settlor established two trusts, an ordinary living trust, and then a second trust containing the following “special needs” language:

[I]n the event I should require long-term care for physical or mental disabilities, or a combination thereof, Trustee shall, for my lifetime, use the income and principal of this Trust to provide me with those benefits and services, and only those benefits and services that, in Trustee's judgment, are not otherwise available to me from other sources, as or when needed to enable me to lead as normal, comfortable, and fulfilling a life as possible. It is my specific intent not to displace any source of funds otherwise available to me for my basic support, *for which I may from time to time be eligible by reason of my age, disability, or other factors, from federal, state, or local government, or charitable sources, from all of which sources, as appropriate, I direct Trustee to seek such basic support in my behalf, and I further direct Trustee to deny any request made by any agency or governmental entity requesting disbursement of Trust funds, whether from income or principal, to satisfy my support needs.* Trustee's discretion in making or not making disbursement of income or principal from this Trust is final even if found arbitrary or unreasonable, Trustee's sole and independent judgment being the criterion upon which any such disbursements are made or withheld.¹⁸³

The settlor required long term care following a stroke, and the trustee of her ordinary trust paid her medical expenses, periodically demanding reimbursement from the special needs trust. The trustee of the SNT refused to provide reimbursement. Following the settlor's death, the trustee of the living trust brought suit against the SNT.¹⁸⁴

The court focused on the language referring specifically to government and charitable sources, and held that the settlor's intended effect was only to prevent the trust assets from being counted in the event she otherwise became eligible for governmental assistance. Accordingly, the court held that the living trust was entitled to reimbursement.¹⁸⁵

Justice Steigmann dissented, writing that the settlor literally could not have more clearly stated that the SNT trustee's discretion was intended to be absolute and, accordingly, beyond court oversight: “An interesting exercise

182. *Peck v. Froehlich*, 367 Ill. App. 3d 225, 853 N.E.2d 927 (4th Dist. 2006).

183. *Id.* at 228, 853 N.E.2d at 931 (emphasis in original).

184. *Id.* at 227, 853 N.E.2d at 930.

185. *Id.* at 230, 853 N.E.2d at 932–33.

for the majority would be to ask: Assuming [the settlor] in fact wished to grant the trustee essentially unlimited discretion, what additional language could she have employed to make her wishes clear?¹⁸⁶

H. Miscellaneous

*1. In re Application of the County Collector for Judgment and Sale Against Lands and Lots Returned Delinquent for Nonpayment of General Taxes and/or Special Assessments for the Years 1991 and Prior Years (Apex Tax Investments, Inc. v. Estate of Lowe)*¹⁸⁷

Public guardian filed petition to set aside a tax deed, claiming that notice required by statute was inadequate since owner was mentally incapacitated and hospitalized at the time of notice.¹⁸⁸ The trial court denied the petition; the Appellate Court and Illinois Supreme Court affirmed.¹⁸⁹ The public guardian's petition for writ of certiorari to the U.S. Supreme Court was granted and the judgment was vacated. The cause was remanded to the Illinois Supreme Court for further consideration of the petition in light of a recent U.S. Supreme Court opinion.¹⁹⁰

In a case that highlights the necessary procedural requirements in the purchase of delinquent property taxes, the "take notices" to be served on the owners and occupants of property could not be served. The sheriff's return noted that the house was vacant according to neighbors and that the occupants had moved. Notices subsequently sent by certified mail were returned with notations of "deceased" and "Person is Hospitalized" on the envelopes. Evidence showed that Mary Lowe, an owner, was mentally disabled and hospitalized at a mental health center at the time of the notices.¹⁹¹

The court held that the notices were sufficient under the circumstances. Reliance on the information that the intended recipients had moved was reasonable, there was no evidence that further investigation would have located the intended recipients, and the court will not require an open-ended search.¹⁹²

186. *Id.* at 235, 853 N.E.2d at 936.

187. *In re Application of County Collector (Apex Tax Investments, Inc. v. Estate of Lowe)*, 225 Ill. 2d 208, 867 N.E.2d 941 (2007).

188. *Id.* at 217, 867 N.E.2d at 945.

189. *Id.* at 219, 867 N.E.2d at 946.

190. *Id.* at 221, 867 N.E.2d at 948.

191. *Id.* at 216–18, 867 N.E.2d at 945–46.

192. *Id.* at 230–31, 867 N.E.2d at 952–53.

2 Financial Freedom v. Kirgis¹⁹³

Decedent, Mabel Kirgis, executed a reverse mortgage instrument with Plaintiff in 1997, securing a maximum of \$184,500 in principal indebtedness. Real estate in Chicago Heights was pledged as collateral. The mortgage and note were both signed by Mabel's son and attorney-in-fact, Raymond Kirgis, Jr. Mabel died June 23, 1999. Plaintiff filed a complaint to foreclose the reverse mortgage on September 16, 2002, more than three years after Mabel's death.¹⁹⁴

Raymond, a co-defendant, argued (1) that the court lacked subject matter jurisdiction since the complaint named Mabel, a deceased person, as a defendant; (2) that Plaintiff's claims were time barred by the two-year statute of limitations set forth at 755 ILL. COMP. STAT. 5/18-12; and (3) that the mortgage was procured by fraud.¹⁹⁵

Relying primarily on an 1896 Illinois Supreme Court decision, *Waughop v. Bartlett*, 165 Ill. 124, 46 N.E. 197 (1896), the court held that a mortgage foreclosure claim is in the nature of an in rem proceeding; it is not a claim against the estate or an in personam proceeding.¹⁹⁶ As such, it could not be barred by the Probate Act's two-year statute of limitations to the extent it would reach the real estate specifically pledged. No deficiency judgment would lie.¹⁹⁷

Raymond's claim that there was no subject matter jurisdiction because Mabel was a necessary party to the foreclosure proceedings and could not participate was also rejected. This was based in part on the in rem nature of the proceedings and in part on Raymond's failure to cite supporting authority, waiving the issue on appeal. The fraud claim was also rejected.¹⁹⁸

3. Estate of Bass ex rel. Bass v. Katten¹⁹⁹

Decedent, William Bass, executed conflicting estate plans in 2000 and 2002. In 2000, Bass created a will and trust with specific gifts to two individuals and the residue to the Bill Bass Foundation. The attorney drafting the estate plan was named as a co-executor and successor co-trustee. In 2002, a new will and trust were drafted by a new attorney and signed, with certain

193. *Financial Freedom v. Kirgis*, 377 Ill. App. 3d 107, 877 N.E.2d 24 (1st Dist. 2007).

194. *Id.* at 109-11, 877 N.E.2d at 28-29. See 755 ILL. COMP. STAT. 5/18-12 (2006).

195. *Id.* at 109, 877 N.E.2d at 28.

196. *Id.* at 128-29, 877 N.E.2d at 42-43 (citing *Waughop v. Bartlett*, 165 Ill. 124, 46 N.E. 197 (1896)).

197. *Id.* at 128-29, 877 N.E.2d at 42-43.

198. *Id.* at 129-30, 877 N.E.2d at 43.

199. *Estate of Bass ex rel. Bass v. Katten*, 375 Ill. App. 3d 62, 871 N.E.2d 914 (1st Dist. 2007).

specific bequests and the residue in equal shares to the same two individuals named in the earlier will and the Northwestern Medical Faculty Foundation. One of the drafting attorneys was again named a co-executor and co-trustee.²⁰⁰

Various allegations were made against the drafting attorneys, largely related to the discovery of the existence of the other estate plan and funding of the trusts. The 2002 will was admitted to probate. Assets of the 2000 trust, apparently exceeding \$30 million, were partially liquidated at a loss. The Northwestern foundation challenged the 2000 trust and filed a citation petition. That petition was dismissed and then appealed. The 2002 estate and beneficiaries filed a complaint against the attorneys involved for malpractice, breach of fiduciary duty and intentional misconduct. The complaint was dismissed as premature in light of the pending appeal on the citation petition. The outcome of that appeal, if reversed, could result in the plaintiffs suffering no damages.²⁰¹

Upon dismissal of the malpractice complaint, plaintiffs asked for, and were granted, a stay of all proceedings pending resolution of the probate appeal. Without a stay, the statute of repose may have barred the re-filing of further proceedings even if otherwise valid.²⁰²

While dismissal without prejudice (and with no stay of the proceedings) would have been appropriate, the trial court was within its discretion to stay the proceedings. The appellate court held that the stay actually provides an additional measure of protection to the parties by maintaining the status quo.²⁰³

4. In re Estate of Horwitz²⁰⁴

In 2000, Sylvia Horwitz filed a medical malpractice action. Nicholas Albuquerk represented her under a contingent fee agreement. As part of this agreement, Sylvia would reimburse Albuquerk for expenses incurred. Sylvia died in 2003, after settlement with one defendant but prior to resolution as to all defendants.²⁰⁵ Letters of office issued to her two sons. The sons refused to authorize further prosecution of the case. Albuquerk filed a claim for fees and expenses.²⁰⁶

The trial court found that Albuquerk had breached the contingent fee agreement by seeking the payment of the expenses. The trial court was

200. *Id.* at 64, 871 N.E.2d at 919.

201. *Id.* at 64–65, 871 N.E.2d at 920.

202. *Id.* at 65–66, 871 N.E.2d at 920–21.

203. *Id.* at 69, 871 N.E.2d at 924.

204. *In re Estate of Horwitz*, 371 Ill. App. 3d 625, 863 N.E.2d 842 (1st Dist. 2007).

205. *Id.* at 626–27, 863 N.E.2d at 843.

206. *Id.* at 628, 863 N.E.2d at 844.

reversed on appeal.²⁰⁷ Albuquerk was discharged as attorney upon his client's death, requiring approval from a representative of the estate to continue. With the refusal of the sons to authorize further prosecution of the case, and with approval for certain expenditures having been given prior to Sylvia's death, Albuquerk had not breached the agreement and was entitled to recover fees on a quantum meruit basis.²⁰⁸

V. NEW LEGISLATION FROM THE 95th GENERAL ASSEMBLY

With the advent of a new year, and the close of an interesting and eventful legislative year, there are several new laws impacting the elder law practitioner. While perhaps not grabbing quite the same headlines as the budget battles and the mass transit melee, the laws affecting the elderly (and the lawyers who represent them) cannot be overlooked.

A brief sample of the legislation shows the new laws cover: the establishment of elder abuse fatality teams to review cases of death of persons age sixty or older;²⁰⁹ congregate or home-delivered meals to communities of less than 5,000;²¹⁰ changes to the Community Care program;²¹¹ emergency response to reports of elder abuse and neglect;²¹² requirements for the heating and air conditioning of nursing homes;²¹³ and services by the Long Term Care Ombudsman to those under age sixty.²¹⁴

While not attempting to downplay the significance of these and other legislative changes, the focus here will be on three changes to the Probate Act²¹⁵ and the revitalization of the Long Term Care Insurance Partnership Program following enactment of the Deficit Reduction Act of 2005.²¹⁶

207. *Id.* at 630, 863 N.E.2d at 846.

208. *Id.* at 632, 863 N.E.2d at 847.

209. 320 ILL. COMP. STAT. 20/15, established by Pub. Act 95-402 and effective as of June 1, 2008.

210. 20 ILL. COMP. STAT. 105/4.08, established by Pub. Act 95-68 and effective as of Aug. 13, 2007.

211. 20 ILL. COMP. STAT. 105/4.02, amended by Pub. Act 95-565 and effective as of June 1, 2008; and amended by Pub. Act 95-473, effective Aug. 27, 2007.

212. 320 ILL. COMP. STAT. 20/3, amended by Pub. Act 95-76 and effective as of June 1, 2008.

213. 210 ILL. COMP. STAT. 45/3-202, amended by Pub. Act 95-31, and 30 ILL. COMP. STAT. 805/8.31, established by Pub. Act 95-31, both effective as of Aug. 9, 2007.

214. 20 ILL. COMP. STAT. 105/4.04, amended by Pub. Act 95-620 and effective as of September 17, 2007.

215. 755 ILL. COMP. STAT. 5/1-1, *et seq.*

216. 215 ILL. COMP. STAT. 132/1, *et seq.*, established by Pub. A. 95-0200.

A. Guardian Ad Litem Fees

The first amendment to the Probate Act is an amendment regarding guardian ad litem or legal fees.²¹⁷ Generally, GAL fees, fees for an attorney appointed for the ward, and other related legal fees must be paid by the ward's estate or, if those funds are insufficient, by the petitioner.²¹⁸ However, there is an exception to this general rule when the petitioner is either the Office of State Guardian under the Guardianship and Advocacy Act²¹⁹ or an elder abuse provider agency under the Elder Abuse and Neglect Act.²²⁰ Public Act 95-373, effective August 23, 2007, provides an additional exception for when the Department of Human Services Office of Inspector General is the petitioner under the Abuse of Adults with Disabilities Intervention Act.²²¹

Perhaps the most practical effect of this amendment to 755 ILL. COMP. STAT. 5/11a-10 is that it expands the number of situations when an attorney appointed to serve as guardian ad litem or to represent the ward in a guardianship proceeding will find they are doing so without compensation. To the extent the ward does not have sufficient funds to cover a reasonable fee, and one of these three agencies initiated the petition, the court is without authority to effectively order payment of the fee.

B. Short-term Guardians for Minors

The second amendment of note affects short-term guardians for minors. Under existing law, a short-term guardian for a minor can be appointed by the parents for a period of up to sixty days.²²² This could often lead to the continual renewal of the guardianship appointment for consecutive sixty-day periods. Particularly if being appointed for the purpose of establishing residency in a school district, the desired appointment of a short-term guardian might require several separate but consecutive appointments, though perhaps against the spirit of existing law.

Pursuant to Public Act 95-568, effective as of June 1, 2008, a short-term guardian can be appointed for a period of up to 365 days. For grandparents raising grandchildren, this can be an effective manner of obtaining legal custody with the consent of the parents, without the need to renew the appointment documents every couple of months. Parents can still withhold an

217. 755 ILL. COMP. STAT. 5/11a-10 (West 2007).

218. *Id.*

219. 20 ILL. COMP. STAT. 3955/1, *et seq.* (West 2007).

220. 320 ILL. COMP. STAT. 20/1, *et seq.* (West 2007).

221. 20 ILL. COMP. STAT. 2435/1, *et seq.* (West 2007).

222. 755 ILL. COMP. STAT. 5/11-5.4; 755 ILL. COMP. STAT. 5/11-13.2 (West 2007).

extended appointment and opt for sixty days or less, but longer periods can be utilized with greater ease under the new revisions.

C. Statutory Custodial Claims

The third amendment to the Probate Act to be discussed here is a significant change to the statutory custodial claim provisions.²²³ Under prior law, a relative who dedicated himself or herself to the care of a disabled person was entitled to a claim against the estate upon the death of the disabled person. To meet the requirements for the statutory custodial claim, the claimant must establish these threshold factors: (1) the requisite degree of kinship (spouse, parent, brother, sister or child of the disabled person); (2) that the claimant lived with and personally cared for the disabled person; (3) that this level of care was provided for at least 3 years (not necessarily the three years immediately preceding death); and (4) the extent of the disabled person's disability.²²⁴ Upon establishing these factors, the claimant was entitled to a minimum claim, subject to the extent of available assets, in the amount of \$100,000 if the decedent was 100% disabled, \$75,000 if 75% disabled, \$50,000 if 50% disabled, and \$25,000 if 25% disabled.²²⁵

The amount of the claim could be increased upon consideration of various additional factors, including the claimant's lost employment opportunities, lost lifestyle opportunities, and emotional distress experienced as a result of personally caring for the disabled person. The claim was in addition to any other claim the claimant might have against the estate, such as a claim for nursing and other care.²²⁶ It was (and continues to be) a second class claim, under that section of the Probate Act setting forth the order for payment of claims.²²⁷

What the prior law lacked in flexibility and court discretion, it made up for in clarity and certainty. If the claimant could meet the threshold criteria, and if there were sufficient funds in the estate, the claimant had a right to a minimum claim award based on the degree of disability. While a relative is presumed in case law to provide care and personal services gratuitously,²²⁸ making recovery of any claim for nursing and other care difficult at best, the

223. 755 ILL. COMP. STAT. 5/18-1.1 (West 2007).

224. *Id.*

225. *Id.*

226. *Id.*

227. 755 ILL. COMP. STAT. 5/18-10 (West 2007).

228. See *e.g.*, *In re Estate of Milborn*, 122 Ill. App. 3d 688, 692, 461 N.E.2d 1075, 1079 (3d Dist. 1984).

statutory custodial claim provided a safe harbor, allowing the minimum claim for a relative if the threshold factors were present.

In 2006, an appellate court decision noted what could be considered a flaw of the prior provisions for the statutory custodial claim.²²⁹ While lost employment opportunities, lost lifestyle opportunities and emotional distress were all factors probative of whether the amount of the claim should be increased over the minimum amounts, they were irrelevant in determining the entitlement to those minimums. In other words, the claimant could recover the minimum even if his or her dedication to the care of the disabled person did not lead to any of these problems.²³⁰ Thus, there was a conflict between the presumption against a claim under case law and the entitlement to a claim by statute.

Public Act 95–315, passed into law on August 20, 2007 and effective as of January 1, 2008, amends the statutory custodial claim provisions of the Probate Act. The threshold requirements remain the same, the factors for increasing the award remain the same, and the “minimum” claim amounts increase. Now, the claim is in the amount of \$180,000 if the decedent was 100% disabled, \$135,000 if 75% disabled, \$90,000 if 50% disabled, and \$45,000 if 25% disabled.²³¹ However, no longer can these amounts be looked upon as true minimum awards.

Regardless of the stated minimum award amounts, courts now have the discretion to decrease the amount of the claim award “to the extent that the living arrangements were intended to and did in fact also provide a physical or financial benefit to the claimant.”²³² The court may consider the following factors in making this determination: (1) the free or low cost of housing provided to the claimant; (2) the alleviation of the need for the claimant to be employed full time; (3) any financial benefit provided to the claimant; (4) the personal care received by the claimant from the decedent or others; and (5) the proximity of the care provided by the claimant to the decedent to the time of the decedent’s death.²³³

While the temptation may be to analyze the appropriate amount of the claim award in the context of existing case law and the presumption of gratuitous services by a relative, the intent of the claimant and whether payment for care or services was contemplated at the time of rendering

229. *In re Estate of Lower*, 365 Ill. App. 3d 469, 848 N.E.2d 645 (2d Dist. 2006).

230. *Id.* at 479, 848 N.E.2d at 654.

231. 755 ILL. COMP. STAT. 5/18–1.1, as amended by Pub. A. 95–0315, effective Jan. 1, 2008.

232. *Id.*

233. *Id.*

services is not one of the factors specifically enumerated in the revised law.²³⁴ It will be interesting to see how interpretation and application of the revised statutory custodial claim develops. It is clear, however, that courts now have much more discretion in determining the amount of an award, and executors wishing to challenge a statutory custodial claim now have more ammunition in doing so.

D. The Illinois Long-Term Care Partnership Program

Among the many provisions of the Deficit Reduction Act of 2005, Congress included provisions for a long-term care insurance partnership program. In response, the Illinois General Assembly has enacted legislation establishing the Illinois Long-Term Care Partnership Program.²³⁵

The Illinois Long-Term Care Partnership Program (the “Program”) is to be administered by the Department of Healthcare and Family Services, with the assistance of the Department of Financial and Professional Regulation. The Program is to:

- (1) provide incentives for individuals to insure against the costs of providing for their long-term care needs;
- (2) provide a mechanism for individuals to qualify for coverage of the cost of their long-term care needs under Medicaid without first being required to substantially exhaust their resources;
- (3) provide counseling services to individuals planning for their long-term care needs; and
- (4) alleviate the financial burden on the State’s medical assistance program by encouraging the pursuit of private initiatives.²³⁶

Under this legislation, the Department of Healthcare and Family Services is to apply to the federal Department of Health and Human Services for a State Medicaid plan amendment to establish that “if an individual is a beneficiary of a long-term care partnership program certified policy, the total assets an individual owns and may retain under Medicaid and still qualify for benefits under Medicaid at the time the individual applies for long-term care benefits are increased \$1 for each \$1 of benefit paid out under the individual’s long-term care partnership program certified insurance policy.”²³⁷

234. It should be noted that the statute states that the factors the court may consider “include but are not limited to” the enumerated factors. *Id.*

235. 215 ILL. COMP. STAT. 132/1, *et seq.* (West 2007).

236. *Id.* § 132/15.

237. *Id.*

The legislation sets forth the requirements for being considered a qualified long-term care insurance partnership policy. Among other requirements, the policy must be certified by the Director of the Division of Insurance of the Department of Financial and Professional Regulation as meeting the model regulations and requirements of DRA.²³⁸ Inflation protection of some level is generally required for policies purchased by those under age seventy-six.²³⁹

A separate program, the Partnership for Long Term Care, was repealed.²⁴⁰ This was an earlier attempt to implement similar provisions. Four states implemented issuance of policies when Congress authorized the Partnership for Long-Term Care.²⁴¹ However, Congress later reconsidered the policy behind the Partnership for Long-Term Care and, while allowing the four existing programs to continue, restricted expansion into additional states.²⁴² Illinois had enacted legislation under the Partnership but had not yet implemented its legislation at the time of the moratorium on expansion of the Partnership policies into additional states.²⁴³

It remains to be seen whether the new Program will reach the implementation stage and see qualifying policies sold in Illinois. If fully implemented, the Program and its subject long-term care insurance policies could provide another tool for the Elder Law practitioner. Concerns remain, however, as to the afford ability of the policies and whether Program policies will provide any practical planning assistance to those who have worked long and hard to accumulate modest savings.

VI. CONCLUSION

The Elder Law area continues to see significant changes in both law and application. It is essential that attorneys practicing in the Elder Law area stay abreast of this ever-changing landscape. In the months ahead, particular care should be taken to verify enactment of new rules implementing the Deficit Reduction Act of 2005.

238. *See*, 42 U.S.C. 1396p(b)(1)(C) (West 2007).

239. 215 ILL. COMP. STAT. 132/10 (West 2007).

240. 2007 Ill. Legis. Serv. Pub. Act 95-200 (West 2007).

241. *See*, "Long-Term Care Partnership Expansion: A New Opportunity for States," Robert Wood Johnson Foundation, May 2007. California, Connecticut, Indiana and New York are the four states that implemented the Partnership for Long-Term Care prior to the restrictions on further expansion of the Partnership. *Id.*

242. *Id.*

243. 320 ILL. COMP. STAT. 35/1, *et seq.* (2006) (repealed 2007).

