SURVEY OF ILLINOIS LAW: ELDER LAW

Charles A. LeFebvre* and Martin W. Siemer**

I. INTRODUCTION

Each year, it seems that new cases and statutes of relevance to the Elder Law practitioner arrive in force. The year this article was written, 2008, is no different. There are cases of significance, statutory amendments (though very few for the year and none that will be discussed here), and general updates of interest.

Now, almost three years after the passage of the Deficit Reduction Act of 2005 (DRA), Illinois continues to be one of the minority of states that has not implemented the DRA. Illinois Elder Law practitioners are still left to wonder how to best plan for clients in the face of unknown rules coming down at an unknown time with unknown consequences. Time will tell whether the 2010 Survey of Illinois Law for Elder Law is to be devoted to Illinois' DRA implementation.

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* Executive Vice President, Trust & Wealth Management Division of First Mid-Illinois Bank & Trust, N.A., Mattoon, Illinois; former partner of the law firm of Thomas, Mamer & Haughey, LLP, Champaign, Illinois, graduated summa cum laude from the University of Illinois School of Law in 1998; received B.S. in mathematics from the University of Illinois at Urbana-Champaign in 1992; member, Order of the Coif, 1992; current chair of the Illinois State Bar Association Elder Law Section Council. This author would like to express thanks to all the current and former members of the Elder Law Section Council for their contributions to his knowledge of the field. Additional thanks to Lott Thomas of Champaign, Illinois, who inspired me to contribute to the greater community and our profession, and to my current employer for supporting and encouraging those contributions. Finally, Professor Richard A. Kaplan of the University of Illinois College of Law and the Illinois Institute for Continuing Legal Education deserve recognition for helping the legal community understand the growing importance of this field.

** Founding member of Resch Siemer Law Office, LLC, Effingham, Illinois; graduated summa cum laude and as class valedictorian from Saint Louis University School of Law in 1994; received B.S. in Secondary Education from the University of Illinois at Urbana-Champaign in 1991. Mr. Siemer concentrates his practice in the areas of Elder Law, Estate Planning, Probate and Trust Administration and civil appeals. He is a member of the National Academy of Elder Law Attorneys (NAELA), the Life Care Planning Law Firms Association, the Effingham County Bar Association, the Illinois State Bar Association and the Appellate Lawyers Association. He has served as a member of the Illinois State Bar Association's Elder Law Section Council since 2006, and has been a speaker for the Life Care Planning Law Firms Association annual conference, the IICLE Elder Law Short Course, and many local programs. He has been a member of the Board of Education for Teutopolis Community Unit School District No. 50 since 1997, currently serving as its president. The genesis of this article lies with material gathered and presented for a session of the 4th Annual Elder Law Short Course, a continuing legal education program presented by the Illinois Institute of Continuing Legal Education in Northbrook, Illinois, on December 8, 2008.

The materials here are organized with a desk reference of numbers and statistics for use in 2009 included in Section II. Published decisions handed down in 2008 are summarized in Section III.

II. ELDER LAW DESK REFERENCE

A. 2009 Medicare Figures[1]

Part A deductible per benefit period: $1,068

Part A daily coinsurance, days 61 through 90 (per benefit period): $267 per day

Part A daily coinsurance, 60 lifetime reserve days: $534 per day

Part A daily coinsurance, days 21 through 100 in skilled nursing facility (per benefit period): $133.50 per day

Part A reduced monthly premium:
$244 for voluntary enrollees with 30–39 quarters of coverage
$443 for voluntary enrollees with less than 30 quarters

Part B standard monthly premium: $96.40

Part B monthly premium for those filing individual tax returns:
$ 96.40 ($85,000 or less in AGI)
$134.90 ($85,001 to $107,000 in AGI)
$192.70 ($107,001 to $160,000 in AGI)
$250.50 ($160,001 to $213,000 in AGI)
$308.30 (over $213,000 in AGI)

Part B monthly premium for those filing joint tax returns:
$ 96.40 ($170,000 or less in AGI)
$134.90 ($170,001 to $214,000 in AGI)
$192.70 ($214,001 to $320,000 in AGI)
$250.50 ($320,001 to $426,000 in AGI)
$308.30 (over $426,000 in AGI)

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

Part B monthly premium for married filing separate tax returns:
$ 96.40 ($85,000 or less in AGI)
$250.50 ($85,001 to $128,000 in AGI)
$308.30 (over $128,000 in AGI)

Part B yearly deductible: $135

Part D enrollment period: November 15, 2008 through December 31, 2008

B. Federal Poverty Income Limits[2]

Persons in family unit	Poverty Limit
1	$10,830
2	$14,570
3	$18,310
4	$22,050
5	$25,790
6	$29,530
7	$33,270
8	$37,010

For family units with more than 8 persons, add $3,740 for each additional person.

Income limits vary for Alaska and Hawaii. Limits are effective July 1, 2008 through June 30, 2009.

C. Medicaid Limits[3]

Community Spouse Asset Allowance:
2008–$104,400
2009–$109,560

Community Spouse Maintenance Needs Allowance:
2008–$2,610
2009–$2,739

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2. Annual Update of the HSS Poverty Guidelines, 74 Fed. Reg. 14, 4200 (Jan. 23, 2009).
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.

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:
$5,219, effective September 1, 2007
$5,376, effective September 1, 2008

D. Maximum Deductions For Qualified Long Term Care Insurance Premiums[4]

Attained Age before the close of the tax year	Maximum Deduction
40 or less	$ 320
More than 40 but not more than 50	$ 600
More than 50 but not more than 60	$1,190
More than 60 but not more than 70	$3,180
More than 70	$3,980

E. Annual Gift Tax Exclusion[5]

Effective January 1, 2009, the annual gift tax exclusion increases to $13,000.

III. CASES

A. Mental Health and Developmental Disabilities Code

1. In re Alaka W.[6]

The trial court ordered Alaka W., a retired physician, committed to a hospital with the involuntary administration of psychotropic medication.[7] On appeal, this ruling was challenged on several grounds. The appellate court first held that the standard of appellate review in determining whether the respondent was examined by a psychiatrist, clinical social worker or clinical psychologist, as required by statute,[8]turns on whether there are disputed facts.[9] The court determined that the underlying testimony as to the nature of an

4. Rev. Proc. 2008–66, § 3.21.
5. Rev. Proc. 2008–66, § 3.30.
6. *In re* Alaka W., 379 Ill. App. 3d 251, 884 N.E.2d 241 (3d Dist. 2008).
7. *Id*. at 255, 258, 884 N.E.2d at 244, 246.
8. 405 ILL. COMP. STAT. 5/3–807.
9. *Id*. at 259, 884 N.E.2d at 247.

examination where the respondent refused to answer was not at issue; thus, review on that issue was de novo.[10] The court then determined that, under the circumstances presented, respondent's refusal to be interviewed by a psychiatrist did not preclude the finding of the required exam.[11]

The trial court ruling was reversed, though, because the state failed to establish, by clear and convincing evidence, that respondent lacked the capacity to make a reasoned decision concerning her treatment,[12] that respondent was unable to provide for her basic physical needs so as to guard herself from serious harm,[13] or that hospitalization was the least restrictive alternative.[14] Oral testimony presented was also insufficient to substitute for a dispositional report.[15]

Additionally, the State was required to produce evidence of the benefits of each drug sought to be administered, as well as the potential side effect of each drug, in order to establish that the benefits of the proposed course of treatment outweigh the potential risks.[16] The State failed in this regard.[17]

Pursuant to 405 ILCS 5/2–107.1, the hearing on involuntary administration must be held separate from the hearing on involuntary admission.[18] Even though respondent failed to object in the trial court, the requirement of separate hearings is subject to strict, as opposed to substantial, compliance.[19] While the trial court issued separate orders on the two petitions, evidence was presented in a single hearing.[20]

2. In re Andrew B.[21]

Andrew B. was voluntarily admitted to a treatment facility on March 26, 2007.[22] He asked to be discharged on May 7 of that year.[23] That request triggered the filing of a petition for involuntary admission on May 8.[24] That first petition was dismissed on June 12, and Andrew B. was ordered

10. *Id*. at 259, 884 N.E.2d at 247–48.
11. *Id*. at 261, 884 N.E.2d at 249.
12. *Id*. at 265, 884 N.E.2d at 252.
13. *Id*. at 267, 884 N.E.2d at 254.
14. *Id*. at 273, 884 N.E.2d at 259.
15. *Id*. at 270–71, 884 N.E.2d at 256–57.
16. *Id*. at 263, 884 N.E.2d at 250.
17. *Id*. at 264, 884 N.E.2d at 251.
18. *Id*. at 273, 884 N.E.2d at 259; 405 ILL. COMP. STAT. 5/2–107.1.
19. *Id*. at 274, 884 N.E.2d at 259.
20. *Id*. at 275, 884 N.E.2d at 260.
21. *In re* Andrew B., 386 Ill. App. 3d 337, 896 N.E.2d 1067 (2d Dist. 2008).
22. *Id*. at 338, 896 N.E.2d at 1068.
23. *Id*.
24. *Id*. at 338, 896 N.E.2d at 1069.

discharged from the facility.[25] Before he was discharged, a second petition for involuntary admission was filed the next day.[26] On June 19, the second petition was dismissed on the State's motion, and the court ordered that Andrew B. be discharged from the facility.[27] On June 20, prior to his discharge, a third petition for involuntary dismissal was filed.[28] This petition was granted, and Andrew B. was found subject to involuntary admission for up to ninety days.[29]

On appeal, respondent argued that because he had been continuously confined since before the filing of the first petition, the third petition did not comply with 405 ILCS 5/3–611.[30] This section of the Mental Health and Developmental Disabilities Code mandates that a petition for involuntary admission be filed within twenty-four hours of a respondent's admission to a treatment facility.[31] The third petition was filed on June 20, more than a month after the first petition was filed and more than a week after the first petition was dismissed.

The trial court's granting of the third petition was affirmed.[32] The court reasoned that when the first petition was denied and Andrew B. was ordered discharged, he ceased being a patient and was entitled to be treated as any other person in the community.[33] Just like any other member of the community, if he exhibited symptoms subjecting him to involuntary admission, he could be detained for a twenty-four hour period pending the filing of a new petition.[34] Since each subsequent petition was filed within twenty-four hours of an ordered discharge, the third petition was not untimely.[35]

3. In re Atul R.[36]

Respondent was found unfit to stand trial on criminal charges and was admitted to a treatment facility.[37] His psychiatrist filed a petition to

25. *Id*.
26. *Id*.
27. *Id*.
28. *Id*.
29. *Id*.
30. *Id*. at 340, 896 N.E.2d at 1070–71.
31. *Id*. 405 ILL. COMP. STAT. 5/3–611.
32. *Id*. at 347, 896 N.E.2d at 1076.
33. *Id*. at 342–43, 896 N.E.2d at 1072–73.
34. *Id*.
35. *Id*.
36. *In re* Atul R., 382 Ill. App. 3d 1164, 890 N.E.2d 695 (4th Dist. 2008).
37. *Id*. at 1165, 890 N.E.2d at 696.

involuntarily administer treatment to respondent.[38] This petition was granted and respondent appealed, claiming in part that his criminal defense attorney was entitled to notice of the petition.[39] Following Illinois Supreme Court authority, the appellate court found that 405 ILCS 5/2–107.1 requires that written notice be given to the attorney or agent of a respondent.[40] Respondent came to be in a treatment facility as a result of being found unfit to stand trial in criminal proceedings, and respondent was represented by an attorney in those proceedings.[41] At the very least, the attorney is an agent entitled to notice under this statute.[42] The trial court's granting of the petition was reversed.[43]

4. In re A.W.[44]

Following a hearing on the merits, respondent was found subject to involuntary treatment.[45] He appealed, arguing that the State failed to present him with written notice of the risks and benefits of the proposed treatment, as well as alternatives to the treatment.[46] Respondent further argued on appeal that the trial court's order authorized dosages of psychotropic medication were not supported by the evidence.[47]

The appellate court found that the written notice of risks, benefits and alternatives is required and is not subject to a harmless error analysis.[48] Clear and convincing evidence of the written notice must be presented.[49] Even though the notice was alleged in the petition, no testimony of the written notice was presented.[50] Thus, the trial court's order was against the manifest weight of the evidence and was reversed.[51]

Reversal was also warranted on separate grounds. 405 ILCS 5/2–107.1(a–5)(6) requires that the order of the court specify the medications and the anticipated range of doses that is authorized.[52] Again, testimony in

38. *Id*.
39. *Id*. at 1167, 890 N.E.2d at 697.
40. *Id*. at 1170, 890 N.E.2d at 700.
41. *Id*.
42. *Id*.
43. *Id*.
44. *In re* A.W., 381 Ill. App. 3d 950, 887 N.E.2d 831 (4th Dist. 2008).
45. *Id*. at 954, 887 N.E.2d at 835.
46. *Id*. at 956, 887 N.E.2d at 837.
47. *Id*. at 958, 887 N.E.2d at 839.
48. *Id*. at 957, 887 N.E.2d at 837–38.
49. *Id*. at 957, 887 N.E.2d at 837.
50. *Id*. at 957, 887 N.E.2d at 838.
51. *Id*.
52. *Id*. at 958, 887 N.E.2d at 839; 405 ILL. COMP. STAT. 5/2–107.1(a–5)(6).

support of the range allowed in the order was included in the petition but was not supported by the testimony presented at hearing.[53]

5. In re Charles G.[54]

Respondent, who is mildly retarded, voluntarily admitted himself into a treatment facility.[55] Upon requested discharge, a petition for involuntary admission was filed.[56] This petition alleged that respondent could be expected to inflict serious harm upon himself or others in the near future.[57]

At trial, the only witness to testify for the State was a licensed clinical social worker who was not directly involved in respondent's care and did not personally examine respondent.[58] The testimony provided no specific instances of aggression and only indicated that respondent "could be" a danger to himself or others.[59] This witness admitted that a development disabilities facility would be more appropriate than a mental health facility.[60]

The trial court entered an order finding that the respondent was mentally retarded and unable to meet his basic needs so as to avoid physical harm to himself.[61] Respondent appealed, and the appellate court found the case moot.[62] The Illinois Supreme Court denied a petition for leave to appeal but entered a supervisory order directing the appellate court to consider the appeal on its merits.[63]

On remand, the appellate court reversed.[64] Inability to meet basic needs is grounds for involuntary admission except when based upon mental retardation.[65] The only basis for involuntary admission then is a reasonable expectation of physical harm to respondent or another.[66] The trial court order did not base the involuntary admission on proper grounds.[67] Additionally, the witness at trial did not personally examine the respondent, contrary to statutory

53. *Id*. at 959, 887 N.E.2d at 839.
54. *In re* Charles G., 377 Ill. App. 3d 1127, 882 N.E.2d 597 (5th Dist. 2008).
55. *Id*. at 1128, 882 N.E.2d at 598.
56. *Id*.
57. *Id*.
58. *Id*. at 1129, 882 N.E.2d at 598.
59. *Id*. at 1129, 882 N.E.2d at 598–99.
60. *Id*. at 1129, 882 N.E.2d at 599.
61. *Id*.
62. *Id*. at 1128, 1129, 882 N.E.2d at 598, 599.
63. *Id*.
64. *Id*. at 1132, 882 N.E.2d at 601.
65. *Id*. at 1130, 882 N.E.2d at 599–600; 405 ILL. COMP. STAT. 5/4–500.
66. *Id*. at 1130, 882 N.E.2d at 600; 405 ILL. COMP. STAT. 5/4–500.
67. *Id*. at 1130–31, 882 N.E.2d at 600; 405 ILL. COMP. STAT. 5/4–607.

requirements.[68] Finally, the petition did not contain sufficient allegations in support of involuntary admission.[69]

6. In re C.S.[70]

The trial court granted a petition for involuntary administration of psychotropic medication.[71] The order authorized use of the drug Haldol, despite uncontradicted evidence that respondent had suffered severe side effects from a prior administration of Haldol.[72] Thus, the petition was not supported by clear and convincing evidence that the benefits of the treatment outweighed the risk, as required by 405 ILCS 5/107.1.[73]

The appellate court reversed and further held that, even if the trial court had wanted to selectively omit Haldol from the list of approved medications, it could not have done so.[74] Treatment with psychotropic medications often involves the use of multiple medications.[75] The legislature did not intend for treatment orders to authorize something less than what the treating physician prescribes.[76]

7. In re Denetra P.[77]

A psychiatrist treating respondent petitioned for authority to involuntarily administer psychotropic mediations to respondent.[78] The trial court granted this petition.[79] The petition made no allegation that the psychiatrist made a good faith effort to determine whether respondent had a valid power of attorney for health care or a declaration for mental health treatment.[80] The psychiatrist, in fact, testified that she did not make any effort to determine whether such documents exist, and she was unaware of whether anyone else made an effort to determine this.[81] Respondent testified that she did have a

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68. *Id*. at 1131, 882 N.E.2d at 600.
69. *Id*. at 1131–32, 882 N.E.2d at 601.
70. *In re* C.S., 383 Ill. App. 3d 449, 890 N.E.2d 1007 (1st Dist. 2008).
71. *Id*. at 449, 890 N.E.2d at 1008.
72. *Id*. at 451, 890 N.E.2d at 1010.
73. *Id*.
74. *Id*. at 452, 890 N.E.2d at 1011.
75. *Id*.
76. *Id*.
77. *In re* Denetra P., 382 Ill.App.3d 538, 2008 WL 2058256 (4th Dist. 2008).
78. *Id*. 904 N.E.2d at 44..
79. *Id*.
80. *Id*.
81. *Id*.

power of attorney with a named agent, but no document was presented as evidence in the trial court.[82]

On appeal, the Fourth District reversed.[83] 405 ILCS 5/2–107.1(a–5)(1) requires that a petition for involuntary administration include a statement that the petitioner has made a good faith effort to determine whether there is a power of attorney or declaration.[84] The Illinois Supreme Court has held that the trial court shall, if possible, apply the substituted judgment test, where a surrogate decision-maker attempts to establish what decision the respondent would have made, if able to decide.[85] A power of attorney would be extremely relevant to the application of the substituted judgment standard, and the court stated that this is in fact why many people execute powers of attorney.[86]

The record need only indicate that a power of attorney exists, even without "sufficient proof" of the document itself.[87] The burden is on the petitioner to make a good faith effort to ascertain whether the document exists and, if so, to obtain a copy of it.[88] Failure to do so warrants reversal.[89]

Justice Cook filed a dissent, finding harmless error and stating that respondent had ample opportunity to present the alleged power of attorney and had not done so.[90]

8. In re Jonathon P.[91]

A petition to involuntarily administer psychotropic medication was granted by the trial court.[92] Respondent appealed on the basis that the order did not name the persons authorized to administer the medication.[93] The State confessed the error, and the appellate court reversed.[94]

405 ILCS 5/2–107.1(a–5)(6) provides that an order authorizing the administration of psychotropic medication "shall designate the persons authorized to administer the authorized involuntary treatment."[95] This is

82. *Id*., 904 N.E.2d at 46.
83. *Id*., 904 N.E.2d at 49.
84. *Id*., 904 N.E.2d at 46; *See* 405 ILL. COMP. STAT. 5/2–107.1(a–5)(1).
85. *In re* Denetra P., 382 Ill. App. 3d 538, 904 N.E2d at 46
86. *Id*., 904 N.E.2d at 48.
87. *Id*., 904 N.E.2d at 48-9.
88. *Id*.
89. *Id*., 904 N.E.2d at 49.
90. *Id*., 904 N.E.2d at 50.
91. *In re* Jonathon P., 378 Ill. App. 3d 654, 882 N.E.2d 1054 (2d Dist. 2008).
92. *Id*. at 655, 882 N.E.2d at 1055–56.
93. *Id*. at 655, 882 N.E.2d at 1056.
94. *Id*.
95. *Id*. (citing 405 ILL. COMP. STAT. 5/2–107.1(a–5)(6)).

required so as to ensure the involvement of a "qualified professional familiar with the respondent's individual situation and health status."[96] The involuntary administration of medication invokes important liberty issues, so strict compliance with the statutory procedures is required.[97] Even if not raised in the trial court, the omission is plain error warranting reversal.[98] Review of the issue is de novo.[99]

9. In re Phillip E.[100]

Respondent had a long history of placements and aggressive behaviors.[101] He had been held at a mental health center since November 12, 2003.[102] A petition to maintain respondent on an involuntary commitment status was filed on August 2, 2007.[103] The trial court granted the petition and ordered respondent remain subject to involuntary admission.[104] Respondent appealed and the appellate court reversed.[105]

While respondent raised several grounds for reversal,[106] he ultimately succeeded on the argument that the State failed to present sufficient evidence in support of the petition.[107] The court agreed that the required certificates and the treatment plan attached to the petition presented ample evidence warranting respondent's continued hospitalization.[108] However, none of this evidence was presented at the hearing.[109] The only witness to testify had examined respondent only once, the day prior to the hearing.[110] Her testimony was brief and consisted largely of affirmative answers to leading questions and brief references to material contained in the certificates and treatment plan, but those documents were not admitted into evidence.[111] Explicit medical

96. *In re* Jonathon P., 378 Ill. App. 3d at 655–56, 882 N.E.2d at 1056.
97. *Id*. at 656, 882 N.E.2d at 1056.
98. *Id*.
99. *Id*. at 656, 882 N.E.2d at 1056.
100. *In re* Phillip E., 385 Ill. App. 3d 278, 895 N.E.2d 33 (5th Dist. 2008).
101. *Id*. at 278–79, 895 N.E.2d at 36.
102. *Id*. at 279, 895 N.E.2d at 37.
103. *Id*.
104. *Id*. at 281, 895 N.E.2d at 38.
105. *Id*. at 281, 286, 895 N.E.2d at 38, 42.
106. *Id*. at 281, 895 N.E.2d at 38.
107. *Id*. at 286, 895 N.E.2d at 42.
108. *Id*. at 284, 895 N.E.2d at 40.
109. *Id*.
110. *Id*. at 280, 895 N.E.2d at 38.
111. *Id*. at 284, 895 N.E.2d at 40.

evidence must be presented in support of an involuntary admission, and the evidence must be established by clear and convincing evidence.[112]

The court, in reversing, stated several times that it was not criticizing the examinations made or the contents of the certificates and treatment plan.[113] Rather, the "criticism is centered on the presentation made to the court and the court's reliance on less than full proof."[114]

10. In re Robin C.[115]

A Springfield police officer filed a petition for an emergency involuntary admission of respondent.[116] The petition alleged that respondent was found at a motel "throwing rocks at the building while naked," having "written all over herself" and "on her bathroom floor and walls."[117] The police officer stated respondent "was making crazy statements," including that she would "blow up a school."[118] "Respondent agreed to go to the hospital but only after taking off her clothes."[119]

Based on the testimony of an examining psychiatrist, the petition was granted.[120] Respondent appealed, and the appellate court reversed.[121]

Respondent first argued that the petition was defective for not naming her family members or stating that a diligent effort was made to locate them.[122] While that portion of the petition was left blank, the court found this to be harmless error.[123] The psychiatrist had spoken with respondent's mother, and an aunt was also mentioned in testimony.[124] Respondent also did not object at the hearing.[125] No prejudice was suffered.[126]

Respondent next argued that the State failed to present clear and convincing evidence warranting involuntary admission.[127] While the court found that sufficient evidence as to mental illness was presented, the evidence

112. *Id*. at 284, 895 N.E.2d at 41.
113. *Id*. at 286, 895 N.E.2d at 42.
114. *Id*.
115. *In re* Robin C., 385 Ill.App.3d 523, 898 N.E.2d 689 (4th Dist. 2008).
116. *Id*. at 525, 898 N.E.2d at 691.
117. *Id*.
118. *Id*.
119. *Id*.
120. *Id*. at 525–26, 898 N.E.2d at 691–92.
121. *Id*. at 526–30, 898 N.E.2d at 692–95.
122. *Id*. at 526, 898 N.E.2d at 692.
123. *Id*. at 527, 898 N.E.2d at 693.
124. *Id*. at 527–28, 898 N.E.2d at 963.
125. *Id*. at 527, 898 N.E.2d at 693.
126. *Id*. at 527–28, 898 N.E.2d at 693.
127. *Id*. at 528, 898 N.E.2d at 694.

of serious harm was lacking.[128] The court found that the testimony of the psychiatrist was based on the factual basis of the petition and was hearsay.[129] There was no evidence of anyone being in harm's way, and the only firsthand knowledge included in this testimony contradicted the allegations in the petition.[130]

B. Medicaid

1. Poindexter v. State, ex. rel. Department of Human Services[131]

Community spouses of nursing home residents 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.[132] 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).[133] It was argued by the community spouses that federal law (MCCA) preempts the ability of a state to seek this spousal support in that it does not distinguish between eligibility and post-eligibility support.[134] The State argued that preemption did not apply and, further, that the plaintiffs had failed to exhaust their administrative remedies.[135] The trial court found in favor of plaintiffs.[136] The State appealed.[137]

The appellate court held that because the issue is one of law only, it is not within the expertise of any administrative agency, and the plaintiffs were not required to exhaust administrative remedies.[138] It was further held that preemption did not apply.[139] The trial court was reversed.[140]

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128. *Id*. at 529, 898 N.E.2d at 694.
129. *Id*. at 529, 898 N.E.2d at 695.
130. *Id*. at 530, 898 N.E.2d at 695.
131. Poindexter v. State, *ex rel.* Dep't of Human Serv., 229 Ill. 2d 194, 890 N.E.2d 410 (2008).
132. *Id*. at 201–02, 890 N.E.2d at 416.
133. *Id*. at 200–01, 890 N.E.2d at 415.
134. *Id*. at 202, 890 N.E.2d at 416.
135. *Id*.
136. *Id*. at 204, 890 N.E.2d at 417.
137. *Id*.
138. *Id*.
139. *Id*. at 204, 890 N.E.2d at 417–18.
140. *Id*. at 204, 890 N.E.2d at 417.

It is useful to also consider the appellate court decision.[141] In its analysis, the appellate court found that there is no express preemption.[142] There is 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.[143] Finally, it could not be said that it is 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.[144] 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.[145]

Leave to appeal was granted.[146] In its decision, the Illinois Supreme Court set forth an excellent summary of relevant federal Medicaid provisions.[147] The history and purpose of community spouse protections are detailed.[148] The Court then addressed defendants' argument that plaintiffs had failed to exhaust administrative remedies.[149] In reviewing the exhaustion doctrine, the Court held that a party challenging the validity of a statute on its face is not required to exhaust administrative remedies.[150] There were no allegations that the defendants misapplied the statute or regulation at issue or applied it in an arbitrary manner.[151] The complaint alleges Illinois' provisions conflict with federal law in violation of the United States Constitution.[152] The case falls squarely within an exception to the exhaustion requirement.[153]

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141. Poindexter v. State, *ex rel.* Dep't of Human Serv., 372 Ill. App. 3d 1021, 869 N.E.2d 139 (4th Dist. 2006).
142. *Id*. at 1027, 869 N.E.2d at 145.
143. *Id*. at 1027, 869 N.E.2d at 146.
144. *Id*.
145. *Id*. at 1028–35, 869 N.E.2d at 146–52.
146. *Id*. at 204, 890 N.E.2d at 418.
147. *Id*. at 196–201, 890 N.E.2d at 413–16.
148. *Id*.
149. *Id*. at 205, 890 N.E.2d at 418.
150. *Id*. at 207, 890 N.E.2d at 419.
151. *Id*. at 208, 890 N.E.2d at 419.
152. *Id*.
153. *Id*.

The Court next considered plaintiffs' arguments of preemption.[154] Under the supremacy clause of the United States Constitution, state law is preempted under three circumstances: (1) when the express language of a federal statute indicates an intent to preempt state law; (2) when the scope of a federal regulation is so pervasive that it implies an intent to occupy a field exclusively; and (3) when state law actually conflicts with federal law."[155] The Court did not seriously consider the first two circumstances, stating that plaintiffs addressed these issues in their brief with "little more than one sentence conclusions" when the court is entitled to have issues clearly defined with relevant authority cited.[156]

The Court focused on the argument that the state law actually conflicts with federal law.[157] Plaintiffs claimed that the relevant federal statute, 42 U.S.C. §1396r–5(b)(1), prohibits the collection of spousal support.[158] Defendants argued that this statute only applies to determinations of Medicaid eligibility, not to the collection of support from a community spouse.[159]

The Court found that the federal provisions on community spouse protections consistently refer to language of eligibility and circumstances of when the income of the community spouse falls below the minimum monthly maintenance needs allowance.[160] The Court concluded that the state law provisions were not preempted.[161] The appellate court decision was affirmed.[162]

C. Guardianships

1. In re Mark W.[163]

By the time the Illinois Supreme Court had issued its opinion in this matter, Mark W. had been a part of the juvenile court system for more than eight years.[164] Mark's mother, Delores, was the ward in a guardianship proceeding.[165] Delores' mother, Amy, was appointed her plenary guardian in

154. *Id*. at 209, 890 N.E.2d at 420.
155. *Id*. at 210, 890 N.E.2d at 421.
156. *Id*.
157. *Id*. at 211, 890 N.E.2d at 421.
158. *Id*.
159. *Id*.
160. *Id*. at 214, 890 N.E.2d at 423.
161. *Id*. at 216, 890 N.E.2d at 424.
162. *Id*. at 216–17, 890 N.E.2d at 424.
163. *In re* Mark W., 228 Ill. 2d 365, 888 N.E.2d 15 (2008).
164. *Id*. at 367–68, 888 N.E.2d at 16–17.
165. *Id*. at 367, 888 N.E.2d at 16.

1997.[166] Mark was born to Delores in 1998 and was taken into DCFS custody in 1999.[167] Following the filing of a petition for adjudication of wardship and various proceedings and delays, the petition came before the court for hearing in October 2000.[168] Responding to statements that Amy had been unable to retain private counsel for Delores, the trial court announced its intent to appoint attorney Ray Morrissey as both attorney and guardian ad litem for Delores.[169]

Morrissey interviewed Delores and Amy and then reported back to the court, indicating that upon telling Amy that there may be a conflict between what he felt was in Delores' best interest and what Amy felt was in her best interest, Amy stated she did not want Morrissey representing Delores.[170] The trial court proceeded to appoint Morrissey as GAL for Delores, granting additional time for Amy to hire an attorney for Delores.[171]

After various other proceedings and delays, an adjudicatory hearing was held in January 2003.[172] Mark was found abused and neglected.[173] After a dispositional hearing in March 2003, Mark was made a ward of the court and the DCFS guardian administrator was appointed as guardian for Mark.[174] In 2004, the state petitioned for appointment of a guardian with the right to consent to adoption.[175] At the termination hearing in November 2004, Morrissey informed the court that he felt it would be in Delores' best interests to have her parental rights terminated.[176] Parental rights were terminated by written order in July 2005.[177]

Amy, as plenary guardian, appealed.[178] She raised four issues on appeal.[179] The appellate court did not address any of these issues and instead raised, *sua sponte*, the issue of whether the appointment of Morrissey as GAL was appropriate.[180] The appellate court concluded that it was not, because Morrissey revealed confidential information from his initial conversation with

166. *Id*.
167. *Id*. at 367, 888 N.E.2d at 17.
168. *Id*. at 368, 888 N.E.2d at 17.
169. *Id*.
170. *Id*. at 369, 888 N.E.2d at 17.
171. *Id*.
172. *Id*. at 370, 888 N.E.2d at 18.
173. *Id*.
174. *Id*. at 370–71, 888 N.E.2d at 18.
175. *Id*. at 371, 888 N.E.2d at 18.
176. *Id*. at 371–72, 888 N.E.2d at 19.
177. *Id*. at 372, 888 N.E.2d at 19.
178. *Id*.
179. *Id*.
180. *Id*. at 373, 888 N.E.2d at 19.

Amy and Delores and because he had an actual conflict of interest.[181] Leave to appeal to the Supreme Court was granted.[182]

The Supreme Court addressed two issues: (1) whether the circuit courts have the authority to appoint a guardian ad litem for a mentally disabled parent during a termination of parental rights hearing, when the parent already has a plenary guardian of the person; and (2) whether the trial court order must be reversed because Morrissey revealed confidential information and was operating under a conflict of interest.[183]

As to the first issue, the Court concluded that while there was no direct statutory authority on the issue, it had "little difficulty concluding that the circuit court had the authority to appoint a guardian ad litem to make a recommendation to the court as to what was in Delores' best interests."[184] The ward remains under the jurisdiction of the court, even after a plenary guardian is appointed.[185] Since the court has a duty to step in if a guardian is about to do something of harm to a ward, the court's authority is not limited to express statutory authority.[186] Further, there was no need to first revoke the plenary guardian's letters of office.[187] Just because a court feels it necessary to appoint a GAL for a recommendation of a ward's best interests, it does not necessarily follow that the guardian is unfit or must be discharged.[188]

As to the second issue, the Court disagreed that Morrissey must necessarily have obtained protected information during his initial interview with Amy and Delores.[189] Further, Amy did not object to Morrissey's appointment in the circuit court.[190] He did not have an actual conflict, as he was never actually appointed as Delores' attorney.[191] With nothing in the record to establish an attorney-client relationship, there was no conflict.[192]

The Supreme reversed the decision of the appellate court, remanding to the appellate court to address the issues originally raised by Amy.[193]

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181. *Id*. at 373, 888 N.E.2d at 19–20.
182. *Id*. at 373, 888 N.E.2d at 20.
183. *Id*.
184. *Id*. at 375, 888 N.E.2d at 21.
185. *Id*.
186. *Id*.
187. *Id*. at 377, 888 N.E.2d at 22.
188. *Id*.
189. *Id*. at 379, 888 N.E.2d at 23.
190. *Id*.
191. *Id*. at 380, 888 N.E.2d at 24.
192. *Id*.
193. *Id*. at 381, 888 N.E.2d at 24.

2. In re Mark W.[194]

On remand from the Illinois Supreme Court, the First District appellate court provided a comprehensive factual summary of the trial court proceedings[195] before concluding that the trial court's decision termination of Delores' parental rights was not against the manifest weight of the evidence.[196]

Amy also raised an issue that had not been previously raised.[197] Amy claimed that the trial court lacked jurisdiction to terminate Delores' parental rights because, as plenary guardian, it was she who had legal custody of Mark pursuant to section 11a–17 of the Probate Act.[198] The court declined to apply the waiver issue and instead addressed this new issue.[199]

The court rejected Amy's argument that she gained legal custody of Mark upon appointment as Delores' guardian.[200] Section 11a–17 begins with the phrase "to the extent ordered by the court" before stating that a guardian has legal custody of the ward's minor children.[201] As a rule of statutory construction, this language must be given its plain meaning and, because the trial court never entered an order granting Amy legal custody of Mark (the only custody order entered appointed the DCFS guardianship administrator), there is no basis to her claim that she was entitled to a temporary custody hearing.[202]

3. In re Estate of K.E.J.[203]

The guardian petitioned the court, seeking authority for an involuntary sterilization of her ward.[204] The guardian claimed that the ward was sexually active but unable to appreciate the risk and consequences of pregnancy.[205] With negative side effects from contraception injections, the guardian alleged that a tubal ligation was the best means to prevent a pregnancy.[206]

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194. *In re* Mark W., 383 Ill. App. 3d 572, 895 N.E.2d 925 (1st Dist. 2008).
195. *Id*. at 574–83, 895 N.E.2d at 927–34.
196. *Id*. at 583–87, 895 N.E.2d at 934–38.
197. *Id*. at 587–88, 895 N.E.2d at 938.
198. *Id*.; 755 ILL. COMP. STAT. 5/11a–17.
199. *Id*. at 588, 895 N.E.2d at 938.
200. *Id*. at 589, 895 N.E.2d at 939.
201. *Id*. at 588, 895 N.E.2d at 938–39.
202. *Id*. at 588–89, 895 N.E.2d at 939.
203. *In re* Estate of K.E.J., 382 Ill. App. 3d 401, 887 N.E.2d 704 (1st Dist. 2008).
204. *Id*. at 403, 887 N.E.2d at 708.
205. *Id*. at 404, 887 N.E.2d at 709.
206. *Id*.

Following an extensive hearing, the petition was denied.[207] The guardian appealed on the merits and as to various rulings on the award of attorney fees for both trial and appellate work.[208]

In a case of first impression in Illinois, the court emphasized the privacy rights at stake: the right to bear children and the right of personal inviolability.[209] These rights are not absolute, however.[210] Relying on cases from other states, section 11a–17(a) and (e) of the Probate Act, and prior Illinois case law on substituted judgment, the court set forth guidelines for determining whether a ward could be involuntarily sterilized.[211] The same guidelines are to apply whether the ward is male or female.[212]

The court is to first look for clear and convincing evidence of whether the ward, if competent, would have wished to be sterilized.[213] If such evidence exists, then those wishes control.[214] If there is no such evidence, then the court may grant the petition for involuntary sterilization only if it is proven by clear and convincing evidence that the sterilization is in the ward's best interest.[215]

In the present case, the court did not find sufficient evidence as to the ward's wishes, if competent.[216] Thus, the court turned to a review of the ward's best interests.[217] The court is to consider six factors in making a determination as to best interests: the possibility of psychological damage or trauma from either childbirth or sterilization; the ward's level of sexual activity; the ward's understanding of reproduction and contraception; the likelihood of improvement of the ward's cognitive condition; the ability of the ward to take care of a child; and the good faith of the petitioner.[218] The court did not find clear and convincing evidence that the sterilization was in the ward's best interests.[219] The trial court's decision was affirmed based on the presence of less intrusive and less psychologically harmful alternatives to a tubal ligation.[220]

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207. *Id*. at 405–10, 887 N.E.2d at 710–14.
208. *Id*. at 411, 887 N.E.2d at 714.
209. *Id*. at 411, 887 N.E.2d at 715.
210. *Id*. at 413, 887 N.E.2d at 716.
211. *Id*. at 415–17, 887 N.E.2d at 717–719; 755 ILL. COMP. STAT. 5/11a–17(a) and (e).
212. *Id*. at 418, 887 N.E.2d at 720.
213. *Id*. at 418–19, 887 N.E.2d at 720.
214. *Id*.
215. *Id*. at 419, 887 N.E.2d at 720–21.
216. *Id*. at 420–21, 887 N.E.2d at 722.
217. *Id*. at 421, 887 N.E.2d at 722.
218. *Id*. at 416–17, 421, 887 N.E.2d at 718–19, 722.
219. *Id*. at 422, 887 N.E.2d at 723.
220. *Id*.

The appellate court affirmed the trial court's denial of attorney fees on appeal and remanded on the issue of trial court attorney fees, directing the trial court to conduct a cost-benefit analysis.[221]

D. Wills, Trusts and Estates

1. In re Estate of Cage[222]

The decedent died in 2006, survived by three minor children.[223] The mother of the children and the decedent were never married.[224] Decedent's sister filed a petition seeking appointment as independent administrator of the estate and was subsequently appointed as administrator to collect.[225] The mother was then appointed as guardian for the children.[226] The mother was granted leave to file a cross-petition for appointment as administrator.[227] The sister objected, arguing that under section 9–3 of the Probate Act, the mother as guardian may have a preference to nominate an administrator on behalf of the children, but the person nominated must be on the preference list.[228] The court granted the guardian's cross-petition and appointed the guardian as administrator. The sister appealed.[229]

Section 9–3 lists categories of persons entitled to preference in obtaining appointment as administrator of an estate.[230] The third category in line is "the children or any person nominated by them."[231] The sixth category is "the brothers and sisters or any person nominated by them."[232] Section 9–3 then goes on to state that the guardian of a person "who is not qualified to act as administrator solely because of minority * * * may nominate on behalf of the minor * * * in accordance with the order of preference set forth in this Section."[233] The court concluded that the guardian, representing the minor children, was entitled to nominate an administrator, including herself.[234] There

221. *Id*. at 426, 887 N.E.2d at 726.
222. *In re* Cage, 381 Ill. App. 3d 110, 885 N.E.2d 477 (1st Dist. 2008).
223. *Id*. at 111, 885 N.E.2d at 477.
224. *Id*.
225. *Id*. at 111, 885 N.E.2d at 477–78.
226. *Id*. at 111, 885 N.E.2d at 478.
227. *Id*.
228. *Id*. at 112, 885 N.E.2d at 478; 755 ILL. COMP. STAT. 5/9–3.
229. *In re* Cage, 381 Ill. App. 3d at 112, 885 N.E.2d at 478.
230. *Id*. at 113, 885 N.E.2d at 479; 755 ILL. COMP. STAT. 5/9–3.
231. *In re* Cage, 381 Ill. App. 3d at 113, 885 N.E.2d at 479.
232. *Id*.
233. *Id*.
234. *Id*. at 113–14, 885 N.E.2d at 479–80.

was nothing in the plain language of the statute requiring that the person nominated fall within one of the categories of Section 9–3.[235]

The trial court was affirmed.[236]

2. In re Estate of Ellis[237]

Grace Ellis died at age eighty-six, leaving a multi-million dollar estate.[238] A 1964 will named her now deceased parents as primary beneficiaries and her descendants and Shriners Hospital as contingent beneficiaries.[239] She left no descendants.[240] A 1999 will omitted the prior beneficiaries and named respondent, James Bauman, as sole beneficiary and executor.[241] The 1999 will was admitted to probate.[242]

Notice was given to two cousins of Ellis and twelve of the cousins' children and grandchildren.[243] Two cousins sued but settled with the estate.[244] Shriners initiated a will contest almost three years after the will was admitted to probate.[245] The will contest alleged, in relevant part, tortious interference with an expected inheritance.[246] Bauman moved to dismiss that will contest as being time barred pursuant to the six month limitations period of section 8–1 of the Probate Act, and the motion was granted.[247] Shriners appealed.[248]

Shriners claimed on appeal that, as a tort, its claim was not barred as a will contest under section 8–1.[249] The appellate court disagreed, finding no basis to bar a claim that could be brought as a will contest while allowing it if framed as a tort.[250] Regardless of how styled, Shriners' claim was at heart a will contest.[251]

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235. *Id*. at 114, 885 N.E.2d at 480.
236. *Id*. at 115, 885 N.E.2d at 480.
237. *In re* Estate of Ellis, 381 Ill. App. 3d 427, 887 N.E.2d 467 (1st Dist. 2008).
238. *Id*. at 428, 887 N.E.2d at 468.
239. *Id*.
240. *Id*.
241. *Id*.
242. *Id*. at 428–29, 887 N.E.2d at 468.
243. *Id*. at 429, 887 N.E.2d at 468.
244. *Id*.
245. *Id*.
246. *Id*. at 429, 887 N.E.2d at 468–69.
247. *Id*. at 429, 887 N.E.2d at 469; 755 ILL. COMP. STAT. 5/8–1.
248. *In re* Estate of Ellis, 381 Ill. App. 3d 427, 429, 887 N.E.2d 467, 469 (1st Dist. 2008).
249. *Id*. at 430, 887 N.E.2d at 470.
250. *Id*. at 431, 887 N.E.2d at 470–71.
251. *Id*. at 435, 887 N.E.2d at 473.

3. In re Estate of Feinberg[252]

Max and Erla Feinberg established trusts prior to their deaths in 1986 and 2003, respectively.[253] They were survived by two children and five grandchildren.[254] All five grandchildren were married, but only one was married to a person of the Jewish faith, by birth or conversion.[255] Max's trust stated that a "descendant of mine other than a child of mine who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of the marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased for all purposes of this instrument as of the date of such marriage."[256]

Multiple cases involving the trusts and Max and Erla's estates were consolidated in the trial court, and during the course of the litigation, the validity of the marriage clause was called into question.[257] The trial court ruled that the clause was invalid as against public policy.[258] The appellate court considered the question on interlocutory appeal.[259]

The appellate court noted that Illinois courts have repeatedly affirmed the principle that testamentary provisions that discourage marriage or encourage divorce are invalid.[260] After reviewing several of these prior cases and the similarities with the present case, the court then observed that other states are not uniform in invalidating these provisions.[261] With the Restatement Third of Trusts and significant Illinois authority behind it, though, the appellate court affirmed the ruling of the trial court.[262]

Justice Quinn specially concurred, pointing out the age of cases allowing "partial restraint" of marriages, the more recent authority of the Restatement, and the practical issues that could result from enforcing such marriage clauses.[263] Acknowledging that a majority of jurisdictions allow partial restraint of marriage if reasonable, the concurring opinion seems concerned with where that slippery slope might lead.[264]

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252. *In re* Estate of Feinberg, 383 Ill. App. 3d 992, 891 N.E.2d 549 (1st Dist. 2008).
253. *Id*. at 993, 891 N.E.2d at 549.
254. *Id*. at 993, 891 N.E.2d at 549–50.
255. *Id*. at 994, 891 N.E.2d at 550.
256. *Id*.
257. *Id*.
258. *Id*.
259. *Id*.
260. *Id*. at 994–95, 891 N.E.2d at 550–51.
261. *Id*. at 995–96, 891 N.E.2d at 551–52.
262. *Id*. at 996–97, 891 N.E.2d at 552.
263. *Id*. at 997–98, 891 N.E.2d at 553 (Quinn J., specially concurring).
264. *Id*. at 997–1000, 891 N.E.2d at 553–55.

Justice Greiman dissented.[265] Seeing the marriage clause as a way of preserving a 4,000 year old heritage, the dissent criticizes the majority for relying on Illinois cases where descendants would be disinherited if remaining married to their current spouse (thereby encouraging divorce).[266] After reviewing cases from other jurisdictions, the dissent concludes that "the great weight of authority as to cases which have considered this subject have held such provisions as it appears in the case at bar to be reasonable and not contrary to the state's public policy."[267]

The Illinois Supreme has granted a Petition for Leave to Appeal in this case, so further developments can be expected.[268]

4. In re Estate of Hale[269]

Claimants filed a statutory custodial claim for $200,000 against Hale's estate, pursuant to 755 ILCS 5/18–1.1.[270] Following a hearing, the trial court awarded claimants, the daughter and son-in-law of decedent, $100,000 less $50,000 paid to claimants during decedent's life as guardian fees.[271]

On appeal, claimants contend that the trial court erred in only considering three years of care provided to Hale.[272] Testimony indicated that claimants cared for Hale for 9½ years.[273] 755 ILCS 5/18–1.1 provides minimum awards (based on the percentage of decedent's disability) when a defined family member lives with and personally cares for the decedent for at least three years.[274] The amount of the claim award is based on the nature and extent of disability and is in addition to any other claims, including claims for nursing care.[275] The trial court misinterpreted the statute in considering only three years of the care provided in making the award.[276] This is not in the nature of a statute of limitations but is just a minimum prerequisite to eligibility for the award.[277]

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265. *Id*. at 1000; 891 N.E.2d at 555 (Greiman, J., dissenting).
266. *Id*.
267. *Id*. at 1004, 891 N.E.2d at 558.
268. *In re* Estate of Feinberg, 229 Ill. 2d 667, 900 N.E.2d 1118 (2008) (cert. granted).
269. *In re* Estate of Hale, 383 Ill. App. 3d 559, 890 N.E.2d 1244 (1st Dist. 2008).
270. *Id*. at 560, 890 N.E.2d at 1245.
271. *Id*. at 561, 890 N.E.2d at 1245.
272. *Id*.
273. *Id*. at 560–61, 890 N.E.2d at 1244–45.
274. *Id*. at 562, 890 N.E.2d at 1246–47; 755 ILL. COMP. STAT. 5/18–1.1.
275. *Hale*, 383 Ill. App. 3d at 562, 890 N.E.2d at 1246–47.
276. *Id*. at 563–64, 890 N.E.2d at 1247–48.
277. *Id*.

As the statute specifically states that the statutory custodial claim is in addition to all other claims, it was also error to offset the award by the amount of fees received as guardians.[278] The trial court was reversed and remanded.[279]

5. In re Estate of Hoch[280]

Charles Ray Hoch died in New Orleans, survived by his mother and several siblings.[281] His brother, Michael, was appointed independent administrator of Charles' estate based on a petition filed in Louisiana that acknowledged the existence of a purported will but claimed it was not valid.[282] The purported will left Charles' estate to his companion, Michelle Girardin. Girardin subsequently filed a petition for letters testamentary in Champaign County, Illinois.[283] The purported will was admitted to probate and Girardin was appointed as executor.[284] The Louisiana proceedings were not referenced in the petition.[285]

Michael filed for a temporary restraining order and preliminary injunction, for revocation of Girardin's letters of office, and for the vacating of the order admitting the will to probate.[286] The trial court granted the motions, sua sponte relying on 735 ILCS 5/2–619(a)(3) to dismiss the order admitting the will and revoke the letters of office.[287] On appeal, Girardin claims that the sua sponte dismissal deprived her of her due process rights to notice and an opportunity to present her case.[288]

The appellate court affirmed, relying on Section 2–619(a)(3) of the Code of Civil Procedure.[289] This provision allows dismissal of a cause if there is another action pending between the same parties for the same cause.[290] To avoid duplicative litigation, the court is to consider factors such as comity, the prevention of multiplicity, vexation, and harassment, the likelihood of

278. *Id*. at 564–65, 890 N.E.2d at 1248.
279. *Id*.
280. *In re* Estate of Hoch, 382 Ill. App. 3d 866, 892 N.E.2d 30 (4th Dist. 2008).
281. *Id*. at 867, 892 N.E.2d at 32.
282. *Id*.
283. *Id*.
284. *Id*. at 868, 892 N.E.2d at 32–33.
285. *Id*. at 868, 892 N.E.2d at 32.
286. *Id*. at 868, 892 N.E.2d at 33.
287. *Id*.
288. *Id*.
289. *Id*. at 869–71, 892 N.E.2d at 34–35; 735 ILL. COMP. STAT. 5/2–619(a)(3).
290. *In re* Estate of Hoch, 382 Ill. App. 3d 866, 869, 892 N.E.2d 30, 33 (4th Dist. 2008).

obtaining complete relief in a foreign jurisdiction, and the res judicata effect of a foreign judgment in the local forum. These factors favored dismissal.[291]

Girardin argued that Section 2–619 should not override the provisions of the Probate Act concerning the place of probate and administration of estates.[292] The court found that application of the Probate Act was not mandated under the circumstances presented here.[293] In part due to the fact that Michael's Louisiana action was filed first, the Illinois proceedings were properly dismissed.[294]

6. In re Estate of Hudson[295]

Petitioner, the mother of decedent's two minor children, filed for child's awards pursuant to the Probate Act,[296] and for unpaid and future child support pursuant to the Marriage and Dissolution of Marriage Act.[297] The trial court allowed the child's awards in the minimum amount required of $20,000 ($10,000 for each child).[298] The trial court found that decedent owed $3,299 in past due child support as of date of death, and that future support of $19,656 would be due through emancipation.[299] The court then held that the respective provisions of the Probate Act and the Marriage and Dissolution of Marriage Act are to be applied "without duplication," effectively allowing an offset for the child's award against the future support.[300]

The appellate court reversed.[301] While the trial court apparently found the two statutory provisions to be duplicative and conflicting, the use of the term "support" in the child's award statute is not the same as "child support" under the Marriage and Dissolution of Marriage Act.[302] The child's award is completely independent of any dissolution of marriage or lifetime award of support, and an offset is not required under these statutes.[303]

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291. *Id*.
292. *Id*. at 870, 892 N.E.2d at 34.
293. *Id*.
294. *Id*. at 870–71, 892 N.E.2d at 35.
295. *In re* Estate of Hudson, 385 Ill. App. 3d 1112, 896 N.E.2d 1123 (5th Dist. 2008).
296. *Id*. at 1113, 896 N.E.2d at 1124; 755 ILL. COMP. STAT. 5/15–2(b).
297. *Hudson*, 385 Ill. App. 3d at 1113, 896 N.E.2d at 1124; 750 ILL. COMP. STAT. 5/510(d).
298. *Hudson*, 385 Ill. App. 3d at 1114, 896 N.E.2d at 1125.
299. *Id*.
300. *Id*.
301. *Id*. at 1117, 896 N.E.2d at 1127.
302. *Id*. at 1115–16, 896 N.E.2d at 1126.
303. *Id*. at 1116, 896 N.E.2d at 1126.

The record before the appellate court was incomplete, however, in determining whether equity might call for an offset.[304] The cause was remanded to the trial court to determine whether to enforce, modify, revoke, or commute child support as equity may require.[305]

7. Landheer v. Landheer[306]

Herbert Landheer died in 2003, survived by his three sons, Warren, Mark and Arlyn.[307] Herbert and his spouse had signed a joint revocable trust in 1996 which would distribute 320 acres of real estate to Warren upon his payment to his brothers of two-thirds of the appraised value of the farm.[308] Shortly before Herbert's death, after a discussion between Herbert and Warren, a purported trust amendment was prepared and typed by Warren and his wife.[309] The document, entitled a "Last Will and Testament," set a purchase price for the real estate and named Warren as sole executor.[310]

Testimony from Warren indicated that he prepared this document at his father's request, though he admitted that his father had not requested the appointment of Warren as sole executor.[311] Warren stated that this was intended as an amendment to the trust, but he just did not know what to call the document.[312]

Cross-petitions for declaratory judgment were filed, with Mark and Arlyn as plaintiffs and Warren as defendant.[313] Plaintiffs moved for dismissal of defendant's cross-petition on the basis that the purported amendment violated section 2BB of the Consumer Fraud and Deceptive Business Practices Act.[314] The trial court granted this motion.[315]

Section 2BB provides that the "assembly, drafting, execution, and funding of a living trust document or any of those acts by a corporation or a nonlawyer is an unlawful practice within the meaning of this Act."[316] Warren argued that this did not apply to an amendment of a living trust, but the

304. *Id*. at 1117, 896 N.E.2d at 1127.
305. *Id*.
306. Landheer v. Landheer, 383 Ill. App. 3d 317, 891 N.E.2d 975 (3d Dist. 2008).
307. *Id*. at 318–19, 891 N.E.2d at 976–77.
308. *Id*. at 318, 891 N.E.2d at 977.
309. *Id*. at 318–19, 891 N.E.2d at 977.
310. *Id*.
311. *Id*. at 319–20, 891 N.E.2d at 977–78.
312. *Id*. at 319, 891 N.E.2d at 978.
313. *Id*. at 318, 891 N.E.2d at 976.
314. *Id*.; 815 ILL. COMP. STAT. 505/2BB.
315. *Landheer*, 383 Ill. App. 3d at 318, 891 N.E.2d at 976.
316. *Id*. at 321, 891 N.E.2d at 978; 815 ILL. COMP. STAT. 505/2BB.

appellate court disagreed; the plain language of the statute applies to amendments.[317]

Warren also argued that he was just serving as a scrivener for his father.[318] Since the prohibitions of section 2BB do not prohibit someone from drafting their own living trust documents (a proposition with which the appellate court agreed), and since he was just following his father's directions, Warren argued, the preparation of the amendment did not fall within the prohibitions of section 2BB.[319] The appellate court disagreed, as Warren admitted his father had never mentioned the provisions of section 2BB, and he did more than just act as a scrivener.[320] The trial court's dismissal was affirmed.[321]

8. In re Estate of Light[322]

Decedent bequeathed to Donald and Virginia Wolland her two residences "and the contents thereof," including all "personal and chattel property."[323] The executor sought instructions from the court regarding what should be done about stock certificates found in one of decedent's homes, as well as payment of the 2005 and 2006 real estate taxes on the residences.[324] The trial court ruled that the proceeds from the stock certificates would not go to the Wollands and that the Wollands were responsible for paying the real estate taxes.[325]

While no Illinois court has construed the phrase "personal and chattel property," these terms have been individually and consistently construed to refer to tangible property only.[326] This is especially true when the property is described by location, as was done here.[327] Based on the plain language of this bequest, then, the trial court was correct in its ruling as to the stock certificates.[328]

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317. *Landheer*, 383 Ill. App. 3d at 321–22, 891 N.E.2d at 978–79.
318. *Id*. at 322, 891 N.E.2d at 979–80.
319. *Id*.
320. *Id*.
321. *Id*. at 322, 891 N.E.2d at 980.
322. *In re* Estate of Light, 385 Ill. App. 3d 196, 895 N.E.2d 43 (3d Dist. 2008).
323. *Id*. at 197, 895 N.E.2d at 44.
324. *Id*.
325. *Id*. at 198, 895 N.E.2d at 45.
326. *Id*. at 199, 895 N.E.2d at 46.
327. *Id*. at 200, 895 N.E.2d at 46.
328. *Id*. at 200, 895 N.E.2d at 47.

Decedent's will also directed that "all taxes assessed or imposed against my estate or against a beneficiary of my estate" be paid by the executor.[329] Real estate taxes are assessed against the real estate, not against the estate or a beneficiary.[330] Thus, the trial court correctly held that the Wollands were responsible for the real estate taxes assessed against the residences they received.[331]

9. Polly v. Estate of Polly[332]

Wife filed suit against decedent husband's estate for breach of contract and an accounting, all related to terms of a pre-nuptial agreement deeming the husband's lifetime earnings as joint funds.[333] The estate moved for dismissal based on a two year statute of limitations.[334] The trial court granted the motion.[335]

The Illinois Probate Act imposes a two year statute of limitations on claims against a decedent's estate.[336] The wife argued that her suit was not a claim against the estate as a creditor but merely a suit seeking enforcement of rights granted under the will.[337] Thus, she argued, the statute of limitations did not apply.[338] However, the Probate Act defines a claim to include any cause of action.[339] Since the wife's complaint stated a cause of action (for breach of contract and for accounting), the limitations period was applicable.[340] The wife argued that she was just seeking to enforce rights under the will (which incorporated the pre-nuptial agreement by reference).[341] However, she did not frame her complaint as a claim under the will.[342] Further, a letter directed to the attorney for the estate prior to the expiration of the statute of limitations, threatening to file a claim, did not meet the requirements for the filing of a claim.[343]

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329. *Id.* at 201, 895 N.E.2d at 47.
330. *Id*.
331. *Id*.
332. Polly v. Estate of Polly, 385 Ill. App. 3d 300, 896 N.E.2d 350 (1st Dist. 2008).
333. *Id*. at 300–01, 896 N.E.2d at 351–52.
334. *Id*. at 301, 896 N.E.2d at 352.
335. *Id*.
336. *Id*.; 755 ILL. COMP. STAT. 5/18–12.
337. *Polly*, 385 Ill. App. 3d at 302, 896 N.E.2d at 352.
338. *Id*.
339. *Id*.; 755 ILL. COMP. STAT. 5/1–2.05.
340. *Polly*, 385 Ill. App. 3d at 303, 896 N.E.2d at 353.
341. *Id*.
342. *Id*.
343. *Id*. at 304, 896 N.E.2d at 354.

10. Ranger v. Ranger[344]

William and Dolores Ranger executed a joint trust prior to William's death.[345] Dolores, as trustee, sought declaratory relief in interpreting the trust.[346] At issue was a "special directive" of the trust that primarily addressed William's business.[347] The business, with various conditions or restrictions, was to pass to one of William's sons.[348] That son contended the distribution was to take place immediately, while Dolores proposed that the business interest be held in trust, and through the trust she would receive the income of the business.[349] The trial court granted a motion for summary judgment filed by the son.[350]

The appellate court construed the language of the trust and concluded that the relevant provisions do not take effect until Dolores' death as surviving settlor.[351] The matter was reversed and remanded.[352]

11. In re Estate of Trevino[353]

Pamela and Edward had two children prior to their divorce.[354] Their marital settlement agreement required each of them to maintain their children as beneficiaries of all retirement plans, pension plans and death benefits.[355] Pamela died in 2006, leaving her entire estate in trust for her children.[356] She was also insured under a life insurance policy that still named Edward as beneficiary.[357] The policy paid $100,000 as what the policy termed a death benefit.[358] Pamela's executor sought a constructive trust on the proceeds in favor of the children.[359]

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344. Ranger v. Ranger, 379 Ill. App. 3d 752, 883 N.E.2d 750 (4th Dist. 2008).
345. *Id*. at 754, 883 N.E.2d at 751.
346. *Id*. at 752, 883 N.E.2d at 751.
347. *Id*.
348. *Id*. at 755, 883 N.E.2d at 753.
349. *Id*. at 754–55, 883 N.E.2d at 752–53.
350. *Id*. at 755, 883 N.E.2d at 753.
351. *Id*. at 758–59, 883 N.E.2d at 755–56.
352. *Id*. at 759, 883 N.E.2d at 756.
353. *In re* Estate of Trevino, 381 Ill. App. 3d 553, 886 N.E.2d 530 (2d Dist. 2008).
354. *Id*. at 554, 886 N.E.2d at 532.
355. *Id*. at 554–55, 886 N.E.2d at 532.
356. *Id*. at 555, 886 N.E.2d at 532.
357. *Id*.
358. *Id*.
359. *Id*.

The trial court ruled that the proceeds constituted a "death benefit" covered by the marital settlement agreement provision.[360] The insurer was ordered to pay the proceeds to the guardian of the children.[361] Edward appealed.[362]

While the imposition of a constructive trust is normally within the discretion of the trial court, the controlling issue was one of interpreting the marital settlement agreement; that issue was reviewed de novo.[363] The appellate court concluded that the language of the agreement unambiguously required the parties to name their children as beneficiaries of their life insurance policies, as the term "death benefit" is commonly understood to apply to the proceeds of life insurance policies and the agreement referred to "any and all" death benefits.[364] The decision of the trial court was affirmed.[365]

12. In re Estate of Yucis[366]

Ward was convicted of theft and ordered to pay restitution to the estate in the amount of $320,000.[367] The estate brought a citation proceeding against Ward's former fiancé, seeking to recover property he held of Ward's, since Ward was in turn indebted to the estate.[368] The record did not clearly reflect whether the citation proceedings were brought pursuant to section 2–1402 of the Code of Civil Procedure[369] or section 16–1 of the Probate Act.[370] The trial court ordered the property turned over to the sheriff for sale.[371]

On appeal, the court concluded that, regardless of which section governed the citation proceedings filed, the trial court order was in error.[372] If proceeding under section 2–1402, the underlying judgment must be enforceable.[373] Here, the restitution order was not enforceable because it did not specify a time for repayment as required.[374]

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360. *Id*. at 555–56, 886 N.E.2d at 532–33.
361. *Id*.
362. *Id*.
363. *Id*. at 556, 886 N.E.2d at 533.
364. *Id*. at 556–57, 886 N.E.2d at 533–34.
365. *Id*. at 557, 886 N.E.2d at 534.
366. *In re* Estate of Yucis, 382 Ill. App. 3d 1062, 890 N.E.2d 964 (2d Dist. 2008).
367. *Id*. at 1063, 890 N.E.2d at 966.
368. *Id*. at 1063–64, 890 N.E.2d at 966.
369. *Id*. at 1064, 890 N.E.2d at 966; 735 ILCS 5/2–1402.
370. *Id*.; 755 ILL. COMP. STAT. 5/16–1.
371. *In re Estate of Yucis*, 382 Ill. App. 3d at 1064, 890 N.E.2d at 966.
372. *Id*. at 1069, 890 N.E.2d at 970.
373. *Id*. at 1067, 890 N.E.2d at 968.
374. *Id*. at 1067, 890 N.E.2d at 968–69.

Section 16–1 of the Probate Act also was not a proper proceeding, as these proceedings for recovery of assets are not a general collection tool for the estate.[375] A debt to the estate does not make the debtor's property the estate's property, and citation proceedings under section 16–1 are not appropriate.[376] The trial court order was vacated and remanded with instructions.[377]

In addressing section 16–1, this court urged caution in relying on cases suggesting that the citation proceedings can still be used to recover assets held by a fiduciary or obtained by a person while acting in a fiduciary capacity.[378] This court hinted that this fiduciary exception still does not apply to the collection of a debt.[379]

E. Grandparent Visitation

13. In re Pfalzgraf[380]

The parents of the grandchild were married but divorced.[381] The mother was granted custody.[382] Paternal grandparents filed a petition for grandparent visitation pursuant to the Illinois Marriage and Dissolution of Marriage Act.[383] The parties agreed to allow visitation, but there was disagreement as to when it should occur.[384] Paternal grandparents wanted it to occur during the mother's custodial time, so as not to diminish the father's visitation.[385] Relying on 750 ILCS 5/607(a–5)(1)(B), which states that grandparent visitation must not reduce the visitation of the parent who is not related to the grandparent, the trial court ordered visitation during the father's visitation times.[386]

The grandparents argued on appeal that the use of the term "visitation" in section 607(a–5)(1)(B), as opposed to "custody", indicates the intent that grandparent visitation not impose on the visitation rights of a non-custodial

375. *Id*. at 1068, 890 N.E.2d at 969.
376. *Id*.
377. *Id*. at 1072, 890 N.E.2d at 972.
378. *Id*. at 1068 n.1, 890 N.E.2d at 969 n.1.
379. *Id*.
380. *In re* Pfalzgraf, 378 Ill. App. 3d 1107, 882 N.E.2d 719 (5th Dist. 2008).
381. *Id*. at 1108, 882 N.E.2d at 720.
382. *Id*.
383. *Id*.; 750 ILL. COMP. STAT. 5/607(a–5).
384. *In re Pfalzgraf*, 378 Ill. App. 3d at 1108, 882 N.E.2d at 720.
385. *Id*.
386. *Id*. at 1108–09, 882 N.E.2d at 720; 750 ILL. COMP. STAT. 5/607(a–5)(1)(B).

parent.[387] The mother argued that this statute means that the parent who is not related to the grandparent should not be forced to give up their time with the grandchild.[388]

The appellate court disagreed with both interpretations, as each would require the court to read into the statute words that are not there.[389] Instead, the court relied on the presumption of section 607(a–5)(3) that a fit parent's decisions regarding grandparent visitation are not harmful to the grandchild (and thus are in that grandchild's best interests).[390] The paternal grandparents did not overcome this presumption, and the trial court decision was affirmed on this basis.[391]

387. *Pfalzgraf*, 378 Ill. App. 3d at 1109, 882 N.E.2d at 720; 750 ILL. COMP. STAT. 5/607(a–5)(1)(B).
388. *Pfalzgraf*, 378 Ill. App. 3d at 1109, 882 N.E.2d at 720.
389. *Id*. at 1109–10, 882 N.E.2d at 721.
390. *Id*. at 1110, 882 N.E.2d at 721.
391. *Id*. at 1110–11, 882 N.E.2d at 722.