

SURVEY OF ILLINOIS LAW: ELDER LAW

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I. INTRODUCTION

What *is* Elder Law? There are many definitions, but Black's Law Dictionary defines Elder Law as the "field of law dealing with the elderly, including such issues as estate planning, retirement benefits, social security,

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age discrimination, and healthcare.”¹ Regardless of how Elder Law is defined, keeping up to date on the many cases, laws, regulations and policies, and on the changing shape of the rights and needs of the elderly and disabled, is essential.

The material here is organized with a desk reference of numbers and statistics for 2010 included in Section II. Cases of interest to the Elder Law practitioner are addressed in Section III, with a general summary of new Elder Law related cases. Under each topical heading, Illinois state cases are generally listed first, followed by cases from other states or federal courts. Legislative updates are presented in Section IV.

II. ELDER LAW DESK REFERENCE

A. 2010 Medicare Figures²

Part A deductible per benefit period: \$1,100

Part A daily coinsurance, days 61 through 90 (per benefit period): \$275 per day

Part A daily coinsurance, 60 lifetime reserve days: \$550 per day

Part A daily coinsurance, days 21 through 100 in skilled nursing facility (per benefit period): \$137.50 per day

Part A reduced monthly premium:

\$254 for voluntary enrollees with 30–39 quarters of coverage

\$461 for voluntary enrollees with less than 30 quarters

Part B standard monthly premium: \$110.50

Part B monthly premium for those filing individual tax returns:

\$110.50 (\$85,000 or less in AGI)

\$154.70 (\$85,001 to \$107,000 in AGI)

\$210.00 (\$107,001 to \$160,000 in AGI)

\$287.30 (\$160,001 to \$213,000 in AGI)

\$353.60 (over \$213,000 in AGI)

1. BLACK'S LAW DICTIONARY (9th ed. 2009).

2. The information regarding Medicare is summarized from the official Medicare website, <http://www.medicare.gov> (last visited May 12, 2010).

Part B monthly premium for those filing joint tax returns:

\$110.50 (\$170,000 or less in AGI)
\$154.70 (\$170,001 to \$214,000 in AGI)
\$210.00 (\$214,001 to \$320,000 in AGI)
\$287.30 (\$320,001 to \$426,000 in AGI)
\$353.60 (over \$426,000 in AGI)

Part B monthly premium for married filing separate tax returns:

\$110.50 (\$85,000 or less in AGI)
\$287.30 (\$85,001 to \$128,000 in AGI)
\$353.60 (over \$128,000 in AGI)

Part B yearly deductible: \$155

Part D enrollment period: November 15, 2009 through December 31, 2009

NOTE: Although the Medicare Part B premiums listed here reflect a 15% increase from the 2009 premium (which was the same as the 2008 premium), a hold-harmless provision in the Medicare laws prevents Part B premiums from rising more than the cost of living increase in Social Security benefits. For 2010, there will be no cost of living increase in Social Security benefits. Thus, the only Medicare beneficiaries who should see an increase in their Part B premiums should be those who do not have their Part B premium withheld from their Social Security checks, those who pay a premium surcharge based on high income, or those who are enrolled in Part B for the first time in 2010.³

3. See, e.g., Medicare Premiums and Coinsurance rates for 2010, at <http://www.medicare.gov>. (last visited May 12, 2010).

B. Federal Poverty Income Limits⁴

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 Limits⁵

Community Spouse Asset Allowance:

2009 – \$109,560

2010 – \$109,560

Community Spouse Maintenance Needs Allowance:

2009 – \$2,739

2010 – \$2,739

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:

\$5,376, effective September 1, 2008

\$5,537, effective September 1, 2009

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4. Annual Update on the HHS Poverty Guidelines, 75 Fed. Reg., 4200 (January 23, 2009). In accordance with Section 1012 of the Department of Defense Appropriations Act of 2010, the poverty guidelines originally published on January 23, 2009 will remain in effect until new guidelines are published in March 2010.
 5. Ill. Dept. of Human Serv., <http://www.dhs.state.il.us/page.aspx?item=13473>. (last visited May 12, 2010) (information summarized from the Illinois Medicaid Policy Manual).

NOTE: For the first time since the spousal impoverishment rules were enacted in 1989, there is no increase to the Community Spouse Asset Allowance or the Community Spouse Maintenance Needs Allowance.

D. Maximum Deductions For Qualified Long Term Care Insurance Premiums⁶

Attained Age before the close of the tax year	Maximum Deduction
40 or less	\$ 330
More than 40 but not more than 50	\$ 620
More than 50 but not more than 60	\$1,230
More than 60 but not more than 70	\$3,290
More than 70	\$4,110

III. CASES

A. Mental Health and Developmental Disabilities Code

1. *In re Alfred H.H.*⁷

Alfred, a 60 year old man with a criminal record and a history of mental illness, was involuntarily admitted to a mental health facility on May 11, 2007, following an incident where he was denied a loan and made threats involving 1000 gallons of propane.⁸ Eleven days later, he filed a timely notice of appeal from his commitment order. Alfred was discharged on June 19, 2007. Ten months later, his appeal was dismissed as moot.⁹ The Illinois Supreme Court affirmed.¹⁰

It was agreed by all parties before the Supreme Court that the underlying case was moot.¹¹ The Court reviewed several possible exceptions to the rule that courts in Illinois, as a general rule, do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided. The exceptions argued by Alfred included: (1) the Mental Health and Developmental Disabilities Code requires review; (2) the “public interest exception” applies; (3) the case is “capable of

6. Rev. Proc. 2009-50, §3.21, Nov. 9, 2009.

7. *In re Alfred H.H.*, 233 Ill. 2d 345, 910 N.E.2d 74 (2009).

8. *Id.* at 347–48, 910 N.E.2d at 76.

9. *Id.* at 350, 910 N.E.2d at 77.

10. *Id.* at 364, 910 N.E.2d at 85.

11. *Id.* at 350, 910 N.E.2d at 77.

repetition yet avoiding review”; (4) “collateral consequences” associated with mental health proceedings compels review; and (5) general policy considerations warrant review of involuntary mental health orders.¹²

While some of the exceptions argued were previously established and recognized in Illinois, Alfred also attempted to establish new exceptions. One example, brought forward as a general policy consideration, was that appellate review is important because it is “therapeutic to provide procedural justice to mental health respondents.” Denial of appeal rights, under this view of “therapeutic jurisprudence,” can produce feelings of worthlessness and loss of dignity while limiting the potential that hospitalization will have its desired beneficial effects, it was argued. The Supreme Court found the argument “very informative” but “not independently sufficient to warrant an exception to the well-established mootness doctrine.”¹³

The Supreme Court analyzed each of the possible exceptions propounded by Alfred, ultimately determining that none should prevail in this instance. The Court stressed, however, that evaluation of the established mootness exceptions must be conducted on a case-by-case basis, considering all the applicable exceptions in light of the relevant facts and legal claims raised in the appeal.¹⁴

B. Medicaid

1. *Biekert v. Maram*¹⁵

The plaintiff, who had cerebral palsy since birth, sought funding for community integrated living arrangement (“CILA”) services under the Illinois Medicaid home and community-based services for adults with developmental disabilities (“HCBS-DD”) waiver program. The Department of Healthcare and Family Services (“DHCFS”) determined that he was not eligible, as he was not in need of “active treatment.” On administrative review, the trial court reversed the DHCFS decision, finding that plaintiff was eligible for CILA placement and directing DHCFS to fund in-home CILA services appropriate for plaintiff’s needs.¹⁶

Plaintiff had applied for 10 hours per day of intermittent in-home services. Two separate pre-admission screening agents evaluated him and

12. *Id.* at 351, 910 N.E.2d at 78.

13. *Id.* at 363, 910 N.E.2d at 84–5.

14. *Id.* at 364, 910 N.E.2d at 85.

15. *Biekert v. Maram*, 388 Ill. App. 3d 1114, 905 N.E.2d 357 (5th Dist. 2009).

16. *Id.* at 1115, 905 N.E.2d at 359.

found him to be developmentally disabled, though the second agent found him ineligible for services because he did not require active treatment. At the administrative hearing, this agent testified that plaintiff's functioning was at an adaptive age of three years and one month. Plaintiff needed assistance in bathing, dressing, grooming, and hygiene. He was not ambulatory and needed life skills training in areas of activities of daily living and use of his limbs. The agent testified that plaintiff would not be able to live independently in the community by himself. The agent testified that, although plaintiff was physically unable to perform various tasks, he had the cognitive ability to know how to do so.¹⁷

Other testimony presented indicated that a need for "active treatment" involved "some kind of cognitive limitation."¹⁸ Since plaintiff had the capacity to make his own decisions, he did not need specialized programs to teach him. Only physical supports, equipment and training were needed. DHCFS denied CILA services for plaintiff.¹⁹

On appeal of the trial court's decision, the Fifth District first reviewed the issues relative to administrative review and summarized the background of the Medicaid program. A prior decision of an Illinois appellate court held that active treatment was not a requirement for CILA services, but the Fifth District disagreed. Thus, the relevant inquiry on appeal here was whether the evidence at the administrative hearing demonstrated that the plaintiff was in need of active treatment and eligible for services.²⁰

The court concluded that the evidence presented did demonstrate a need for active treatment. The administrative interpretation that led to denial of services was found to be inconsistent with federal and state regulations, which did not limit active treatment to treatment only for cognitive-related deficits. Illinois chose a waiver program, adopting a public policy that a broader category of persons than those with mental retardation would be funded.²¹

The appellate court agreed, however, with the DHCFS argument that the trial court exceeded its authority in directing it to fund CILA services for the plaintiff. Eligibility for services does not automatically entitle plaintiff to funding, due in part to a priority scheme for funding. The trial court exceeded its scope of review on that issue.²²

17. *Id.* at 1116, 905 N.E.2d at 360.

18. *Id.*

19. *Id.* at 1116–117, 905 N.E.2d at 360–61.

20. *Id.* at 1118–23, 905 N.E.2d at 362–66.

21. *Id.* at 1125–26, 905 N.E.2d at 368.

22. *Id.* at 1127, 905 N.E.2d at 369.

2. Vincent v. Department of Human Services²³

Mabel Vincent applied for long-term care benefits under the Medicaid program. The Illinois Department of Human Services (“IDHS”) determined that Mabel was required to spend down assets totaling \$138,119, held in the Fred and Mabel Vincent Trust (the “Trust”).²⁴

The Trust was created by Mabel and her husband, Fred, in 1991 and initially funded with \$333,391. The Trust was irrevocable and named Mabel and Fred as beneficiaries and their daughter, Janice, as trustee. The stated purpose of the trust was “to provide extra funds necessary for [Fred and Mabel’s] happiness over and above the essential, primary support services such as * * * medical care and support which [they] expect will be provided to [them] through federal, state and local governmental sources.”²⁵ The Trust stated that for purposes of determining eligibility for public aid, “no part of the principal or income of this Trust shall be considered owned by [him or her].”²⁶ “Trust assets [were] to be used only when governmental aid is not available.”²⁷

The Trust was also a discretionary trust, with the trustee granted “absolute discretion to determine if and when the [beneficiaries] need extra funds to supplement existing public or private funds and services” and to “pay out or withhold payment of Trust income or principal as she evaluates [their] needs.” The trustee was specifically restricted from using income or principal to provide goods or services Fred or Mabel might qualify to receive through any public assistance program. The trustee then had the power to terminate the trust and distribute remaining trust assets to her and her brother.²⁸

The trustee distributed approximately \$2,500 per month for the care of the beneficiaries. Fred died in 1992. In 2000, Janice began providing care for Mabel in Mabel’s home, though there was no evidence presented as to any agreement for Janice to be paid for these care services. In 2005, Mabel entered a long-term care facility, and Janice applied for Medicaid benefits. IDHS included the assets of the trust in assessing Mabel’s available assets. Janice, as agent for Mabel under a power of attorney, requested a formal hearing.²⁹

The day before the hearing, Mabel’s attorney faxed to IDHS an invoice he had prepared on behalf of Janice, billing Mabel \$141,960 for care received

23. Vincent v. Dep’t of Human Servs., 392 Ill. App. 3d 88, 910 N.E.2d 723 (3rd Dist. 2009).

24. *Id.* at 89, 910 N.E.2d at 725.

25. *Id.*

26. *Id.*

27. *Id.* at 89–90, 910 N.E.2d at 725–26.

28. *Id.* at 90, 910 N.E.2d at 726.

29. *Id.*

from Janice.³⁰ After the hearing, a final administrative decision was issued, affirming the local office decision to approve Medicaid benefits subject to the spend down. It found that the trust assets were available assets under relevant regulations, and it found Janice's claim for retroactive payment for care services to be without merit.³¹ Mabel sought administrative review but died prior to hearing, with no motion for substitution of a proper party being made.³² The trial court eventually affirmed the administrative decision as to eligibility for benefits, but it reversed the administrative decision with respect to the payment for Janice's services.³³

Both Mabel and IDHS filed motions to reconsider. The trial court then issued a final order reversing the administrative decision on both issues, finding that the language of the trust specifically stated that "no amount is payable to the beneficiary if doing so would affect her eligibility for public assistance."³⁴ Janice then filed a motion to substitute herself in as trustee of the trust; though there was no indication that the motion was served on IDHS, the motion was granted. IDHS appealed.³⁵

Though IDHS first learned of Mabel's death at oral argument, and though the death of a party suspends the jurisdiction of the trial court pending a proper substitution, the appellate court can enter any judgment or make any order that should have been made.³⁶

The Third District began with a review of Medicaid laws and regulations, along with the history and background of "Medicaid Qualifying Trusts" (where an individual places assets in an irrevocable trust, with distributions at the discretion of a third-party trustee, so as to make the assets available to the individual yet create eligibility for public assistance).³⁷ 42 U.S.C. § 1396a(k) (later repealed and replaced as noted below) was enacted to prevent self-settled trusts from being a permissible means to shelter assets for purposes of Medicaid eligibility. Thus, the maximum amount of payments permitted under the terms of a trust to be distributed to the grantor would be deemed as available assets to the grantor. This would hold true regardless of whether the trust is irrevocable, whether it is established for reasons other than for

30. *Id.* at 91, 910 N.E.2d at 726.

31. *Id.*

32. *Id.* at 91, 910 N.E.2d at 727.

33. *Id.* at 91–92, 910 N.E.2d at 727.

34. *Id.* at 92, 910 N.E.2d at 727.

35. *Id.* at 92, 910 N.E.2d at 727–28.

36. *Id.* at 92, 910 N.E.2d at 728.

37. *Id.* at 93–96, 910 N.E.2d at 728–31.

Medicaid eligibility and whether the trustee's discretion is actually exercised.³⁸ IDHS regulations are consistent with the federal statute.³⁹

Though Janice argued that the restrictions on discretion when its exercise would impact Medicaid eligibility take the Trust outside of the scope of the statute and regulation, the appellate court agreed with the IDHS interpretation that the statute was to remove any "techniques" involving self-settled trusts that would allow affluent individuals to maintain access to assets while qualifying for public aid.⁴⁰ The court also noted that if the Trust had been created after 1993, a later statute, 42 U.S.C. 1396p(d)(2)(C), specifically provides that a self-settled trust would be considered an available asset, regardless of whether the trustee had any discretion. If any of the trust corpus could be used for the grantor's benefit, then the entire trust corpus is considered available. The court found the legislative intent clearly supported the IDHS position. The trial court was reversed on this issue, and the Trust assets were found to be available to Mabel.⁴¹

On the issue of payment to Janice for care services, the appellate court found that the IDHS decision to disregard the invoice for care services was not clearly erroneous.⁴² There was no evidence that any payment of the invoice would have been for fair market value, or that it would have been exclusively for a reason other than to qualify for assistance. Since the invoice was not even submitted until the day before the administrative hearing, IDHS findings were upheld and the trial court was reversed.⁴³

In a concurring opinion, a secondary argument in support of affirming the IDHS findings on the availability of trust assets was set forth.⁴⁴ Since Congress legislatively closed a loophole in the law applying to Medicaid Qualifying Trusts, when it passed 42 U.S.C. 1396p(d)(2)(C), Mabel implicitly argues that the courts cannot close that loophole judicially.⁴⁵ However, a strict reading of the pre-1993 law would produce absurd results and allow Mabel to accomplish that which the drafters of 42 U.S.C. 1396a(k) intended to prevent. Reversal of the trial court decision would be appropriate on this basis, as well.⁴⁶

38. *Id.* at 95, 910 N.E.2d at 730.

39. *Id.* at 93–94, 910 N.E.2d at 728–29.

40. *Id.* at 96, 910 N.E.2d at 730–31.

41. *Id.* at 96, 910 N.E.2d at 731.

42. *Id.*

43. *Id.* at 97, 910 N.E.2d at 731.

44. *Id.* at 97–99, 910 N.E.2d at 732–33.

45. *Id.* at 97–98, 910 N.E.2d at 732.

46. *Id.* at 99, 910 N.E.2d at 733.

This case clearly illustrates two important points in Medicaid planning. First, courts are likely to find any trust that attempts to make a Medicaid applicant's assets unavailable for Medicaid purposes, yet available for the applicant to use until he applies for Medicaid, to be available to pay for long term nursing home care. Assets in such a trust will disqualify an applicant for Medicaid benefits. Second, when a child is caring for a parent and there is expectation from the child that he or she should be paid for their services, this agreement must be reduced to writing. In this case, had there been a written agreement, it seems likely that the Court would have allowed payment for Janice's services, and Medicaid benefits could have been obtained.

3. Meyer v. Department of Public Aid⁴⁷

Rosalind Meyer inherited her mother's house. The Department of Public Aid ("Department") claimed a lien for \$13,072.39, as a result of providing Meyer's mother with public aid benefits during her lifetime. While the house was for sale on the market, Meyer paid \$2,732.04 to maintain the property, and she incurred closing costs of \$2,692.25 upon its sale. The purchaser of the property obtained a mortgage loan from Streator Home Building and Loan Association. Meyer claimed to have notified Streator of her intent to seek contribution from the Department for these expenses, and she requested Streator not disburse money pending resolution of that dispute. Streator paid the amount of the claimed lien to the Department, with the balance to Meyer, more than two months after closing. Meyer filed a complaint against the Department and Streator, alleging that the Department should partially reimburse her for her expenses in maintaining the property. She also alleged that Streator breached a fiduciary duty to her when it disbursed the funds held in escrow.⁴⁸

The Department and Streator each filed motions to dismiss. The Department argued that, since Meyer sought a money judgment, such claims must be brought in the Court of Claims; thus, there was no subject matter jurisdiction. Streator argued that the complaint failed to state a cause of action, as a lender in a real estate transaction could have no fiduciary duty to the seller. The trial court agreed, dismissing the complaint as to the Department with prejudice and as to Streator without prejudice (it was not ripe for adjudication, as it was dependent on the outcome of the dispute with the Department).⁴⁹

47. Meyer v. Dep't of Pub. Aid, 392 Ill. App. 3d 31, 912 N.E.2d 690 (3rd Dist. 2009).

48. *Id.* at 33, 912 N.E.2d at 692.

49. *Id.* at 34, 912 N.E.2d at 692.

Meyer filed a motion for leave to file the complaint against the Department as a class action.⁵⁰

The Third District agreed with the Department and held that Meyer sought a money judgment. The complaint against the Department was properly dismissed for lack of subject matter jurisdiction. Any such complaint must be filed in the Court of Claims. The appellate court determined that it could not then address Meyer's arguments for a class action on appeal.⁵¹

While the appellate court agreed with Meyer that the claim against Streator was ripe for adjudication and was not dependent on the outcome of the claim against the Department, the appellate court still found that the claim against Streator was properly dismissed on other grounds. Meyer essentially claimed that Streator converted funds. To establish a cause of action for conversion, Meyer must prove she had an absolute right to the converted property. She did not.⁵² 305 Illinois Compiled Statutes 5/3-10.5, a part of the Public Aid Code, permits, but does not require, the Department to expend money to preserve its lien. Even if it did, the Department would then be able to recover its payments, as the lien extends to payments made to preserve the lien. The amount of the lien would just have been increased by the amount of any contributions made by the Department. Streator did not convert Meyer's money, as Meyer had no right to it in the first place.⁵³ The court also pointed out that if Meyer's expenditures increased the value of the property, the increase in value was paid back to her anyway as a part of what she received after satisfaction of the lien.⁵⁴

The dissent argued that dismissal was not proper and that a cause of action for breach of a fiduciary duty had been stated.⁵⁵ The very reason for placing the funds in escrow was to allow time to negotiate with the Department, but Streator damaged Meyer's position in negotiations by paying over the funds.⁵⁶

50. *Id.* at 32, 912 N.E.2d at 691.

51. *Id.* at 35, 912 N.E.2d at 693.

52. *Id.* at 36, 912 N.E.2d at 694.

53. *Id.* at 36-37, 912 N.E.2d at 694.

54. *Id.* at 37, 912 N.E.2d at 695.

55. *Id.* at 37-38, 912 N.E.2d at 695.

56. *Id.* at 38, 912 N.E.2d at 696.

C. Guardianships

1. In re Estate of Wilson⁵⁷

This action arises from a claim of financial exploitation and physical neglect of Mary Ann Wilson.⁵⁸ Wilson's agent under a power of attorney, Karen Bailey, was accused of the exploitation and neglect. Her agency powers were suspended and a temporary guardian was appointed. Bailey's request for a temporary restraining order, preventing the guardian from acting, was denied. A petition to permanently revoke the agency powers and for an accounting followed. Bailey filed a motion for substitution of judge.⁵⁹ The trial judge found this motion deficient and denied it without transferring it to another judge for hearing. The trial judge also denied Bailey's request to dismiss the petitions for revocation and accounting and entered judgment against her for \$297,708.95. Bailey appealed these decisions.⁶⁰

On appeal, the First District, relying on the language of 735 Illinois Compiled Statutes 5/2-1001(a)(3)(iii), held it was reversible error for the judge named in Bailey's motion for substitution of judge to determine the motion instead of transferring it to another courtroom for hearing.⁶¹ This is true even if the determination is made on the basis that the motion was legally insufficient and not in proper form. While there was some authority for how the judge handled the motion, those cases were distinguishable because they did not involve allegations, as here, that the judge had assumed an advocacy role or had predetermined the outcome of the case.⁶² The orders entered by the judge after the improper denial of the motion for substitution of judge are void and were vacated accordingly.⁶³

The dissent written by Justice O'Malley raises some interesting points regarding 735 Illinois Compiled Statutes 5/2-1001(a)(3) as applied in this case. The dissent would hold that there must be a threshold showing of bias, and that a proper petition and affidavit in support of the petition must be filed before there will be a transfer to another judge for hearing a motion for substitution.⁶⁴

57. *In re Estate of Wilson*, 389 Ill. App. 3d 771, 905 N.E.2d 957 (1st Dist. 2009).

58. *Id.* at 772, 905 N.E.2d at 959.

59. *Id.* at 772, 905 N.E.2d at 959.

60. *Id.* at 773, 905 N.E.2d at 959-60.

61. *Id.* at 780-86, 905 N.E.2d at 965-70.

62. *Id.* at 786, 905 N.E.2d at 969-70.

63. *Id.* at 786, 905 N.E.2d at 970.

64. *Id.* at 787, 905 N.E.2d at 971.

The dissent found that the Bailey petition was insufficient on its face because it lacked an affidavit in support of the petition and was factually insufficient.⁶⁵ The dissent went on to further state that a hearing before a different judge is not automatic. The dissent stated that 735 Illinois Compiled Statutes 5/2-1001(a)(3) has two distinct sections that must be read as a whole. Subsection (ii) addresses the facial sufficiency of the petition, and (iii) the process for deciding the outcome of the petition.⁶⁶ The dissent stated that the allegedly biased judge should not rule on the merits of the petition, but that he or she can rule on the facial sufficiency of the petition.⁶⁷

Leave to appeal has been granted.⁶⁸

2. *In re Estate of Fallos*⁶⁹

Patrick Fallos was partially paralyzed in a serious car accident in 1984 and is confined to a wheelchair. He also suffered partial paralysis of his diaphragm, making it difficult for others to understand him when he speaks. He can still communicate through writing, and nothing in the record indicates a diminishment of his cognitive abilities. After the accident, Fallos lived at home for 20 years with assistance from care providers. He supported himself with monthly social security disability benefits.⁷⁰

In 2005, Fallos fell from his wheelchair and was not found for 3 days. Following the fall, he was hospitalized and suffered from delusions. The hospital psychologist recommended a guardianship for Fallos.⁷¹ A plenary guardian of the person was subsequently appointed in November 2005, with authority to place Fallos in a nursing home. Fallos initially did not object to the guardianship and nursing home placement, as he agreed that he needed to be in a licensed-care facility to recover.⁷²

On October 13, 2006, Fallos sent a note to the trial court, asking the court to note his improvement and his circumstances. The trial court then scheduled a status hearing pursuant to 755 Illinois Compiled Statutes 5/11a-20(b), which governs requests from a ward for termination, revocation or modification of a guardianship. A subsequent guardian ad litem (“GAL”) report stated that Fallos’ physical condition had not significantly improved, but no mental

65. *Id.* at 788–89, 905 N.E.2d at 971–72.

66. *Id.* at 789, 905 N.E.2d at 972; 735 ILL. COMP. STAT. ANN. 5/2-1001(a)(3) (West 2009).

67. *Wilson*, 389 Ill. App. 3d at 789, 905 N.E.2d at 972.

68. *In re Estate of Wilson*, 233 Ill. 2d 558, 919 N.E.3d 353 (2009).

69. *In re Estate of Fallos*, 386 Ill. App. 3d 831, 898 N.E.2d 793 (4th Dist. 2008).

70. *Id.* at 832, 898 N.E.2d at 794.

71. *Id.* at 832–33, 898 N.E.2d at 795.

72. *Id.* at 833, 898 N.E.2d at 795.

infirmity was observed. Fallos did not have any specific complaints about his care, other than not receiving adequate physical therapy. Fallos told the GAL that he sent the letter to the court in an effort to have an attorney appointed to help him apply for services through the Department of Rehabilitation Services (“DORS”), eventually seeking a less restrictive environment.⁷³ His previous DORS services were terminated prior to his fall, due to his allegedly making sexual advances toward DORS employees.⁷⁴

Fallos was not present for the status hearing, though the judge had earlier indicated that he would like Fallos to be present. The trial court found that Fallos was not asking that the guardianship be terminated or modified and maintained the status quo.⁷⁵ Subsequent letters from Fallos again followed, as did another status hearing.⁷⁶ An attorney was appointed for him, and a formal petition to terminate the guardianship was then filed. After a hearing with several witnesses, the trial court denied the petition due to “profound physical limitations.” The trial court noted Fallos had “an intact mind in a broken body” and the reasons for first establishing the guardianship were still present.⁷⁷

On appeal, the Fourth District reviewed the law of guardianships for physically disabled adults. The appellate court held that plenary guardianship is not appropriate where the respondent is capable of intelligently directing others to perform tasks for him. There must be a finding that the disabled adult is “totally without capacity.” If the disabled adult lacks some, but not all of his capacity, a limited guardian is to be appointed.⁷⁸ Inability to make or communicate decisions regarding care must be proven by clear and convincing evidence.⁷⁹

A ward seeking modification or termination of a guardianship has the burden of proof, again by clear and convincing evidence, that he now has the capacity to perform the tasks necessary for the care and management of his person and estate. This does not mean that he has to be able to do so himself, just that he be able to make and communicate his decisions. The record demonstrated, by clear and convincing evidence, that Fallos was not totally without capacity to direct others concerning his care. The court found that

73. *Id.* at 833–34, 898 N.E.2d at 795–96.

74. *Id.* at 832, 898 N.E.2d at 795.

75. *Id.* at 834, 898 N.E.2d at 796.

76. *Id.* at 835, 898 N.E.2d at 796–97.

77. *Id.* at 835–37, 898 N.E.2d at 797–98.

78. *Id.* at 839, 898 N.E.2d at 799–800.

79. *Id.* at 840–41, 898 N.E.2d at 801.

plenary guardianship was not appropriate, and the cause was remanded for consideration of whether a limited guardianship would be appropriate.⁸⁰

The appellate court also noted that it is “almost unfair” to place the burden on Fallos to demonstrate the need to terminate or modify the guardianship, as the guardianship was imposed at his lowest point of cognitive functioning.⁸¹

A dissent points out that 755 Illinois Compiled Statutes 5/11a-2 states that guardianship is proper for either mental or physical disability and argues Fallos did not meet his burden of proof by clear and convincing evidence.⁸²

3. *Struck v. Cook County Public Guardian*⁸³

James Struck filed a petition to be appointed successor guardian of the estate of Janie Struck, his mother. His brother sought leave to resign. The Cook County Public Guardian also filed a petition to be named successor guardian. The Guardian ad Litem filed a Motion to Dismiss James’ Petition. After a hearing, the circuit court granted the Guardian ad Litem’s Motion to Dismiss James’ Cross Petition for successor guardian and appointed the Public Guardian as Successor Plenary Guardian.⁸⁴

James then filed motions for visitation with his mother. The Public Guardian countered with a request to further suspend James’ visitation with his mother. The trial court, following a hearing, entered an order authorizing the Public Guardian to continue its restriction of visitation, with a further review scheduled. The trial court later entered an agreed order for supervised visitation. Following alleged violations by James of this agreed order, the Public Guardian again suspended visitation. The trial court held another hearing, vacated the agreed visitation, and prohibited James from visiting his mother for six months. Three notices of appeal were filed by James. All three appeals were then consolidated.⁸⁵

The First District found that James had standing to challenge the original order of guardianship and to petition for his mother’s restoration. 755 Illinois Compiled Statutes 5/11a-8(e) and 755 Illinois Compiled Statutes 5/11a-10(f) entitle him to notice as an interested person. 755 Illinois Compiled Statutes 5/11a-20(a) allows a petition to terminate the guardianship to be filed “on

80. *Id.* at 841–42, 898 N.E.2d at 801–02.

81. *Id.* at 842, 898 N.E.2d at 802.

82. *Id.* at 842–43, 898 N.E.2d at 802–03.

83. *Struck v. Cook County Public Guardian*, 387 Ill. App. 3d 867, 901 N.E.2d 946 (1st Dist. 2008).

84. *Id.* at 867–71, 901 N.E.2d at 946–49.

85. *Id.* at 871–74, 901 N.E.2d at 949–52.

behalf' of the ward. However, the appellate court determined that it lacked jurisdiction to consider the appeals as to these orders. The notices of appeal were not timely filed.⁸⁶

As to the orders of visitation, the appellate court found no authority in the Probate Act providing James with standing to assert a right to visit his mother and challenge the guardian's decisions as to visitation. There are no statutory provisions for visitation with a ward. James could not claim to be proceeding on his mother's behalf, as only the guardian has standing to appeal on behalf of the ward. To the extent James is alleging that the decisions of the Public Guardian are harming his mother, the circuit court has a duty to protect the ward. Once a person is declared to be disabled, that person remains under the jurisdiction of the court, even when a plenary guardian has been appointed. In fulfilling this duty, the circuit court is not limited by statutory language. While James could alert the court to a perceived danger, this does not confer standing on him.⁸⁷

James asserted a constitutionally protected right to a relationship with his mother. There is a split in decisions of the United States Courts of Appeal on this issue, and the United States Supreme Court has not addressed it. A majority of courts, however, have declined to find a protected interest. The appellate court here declined to do so as well. The appeal as to visitation was dismissed for lack of standing.⁸⁸

4. Williams v. Estate of Cole⁸⁹

Cathy Williams filed a petition for guardianship for her mother, Shirley Cole, seeking to have herself named as guardian of the person and Harris Bank named as guardian of the estate, as well as a motion for an independent medical examination. Shirley Cole filed a motion to dismiss. Cathy filed a petition to invalidate powers of attorney that Shirley signed naming another daughter, Lori, as agent. Lori filed a motion to dismiss the petition to invalidate the power of attorney. Cathy filed a motion to disqualify Lori's attorney from representing Lori in these proceedings. She also filed a motion for substitution of judge as of right and, when that was denied, another one for cause. The motion for substitution of judge for cause was denied by the trial judge without transferring it for hearing to another judge. The trial court dismissed Cathy's petition for guardianship and her motion for a medical

86. *Id.* at 876, 901 N.E.2d at 953–54.

87. *Id.* at 876–78, 901 N.E.2d at 954–55.

88. *Id.* at 878–79, 901 N.E.2d at 955–56.

89. *Williams v. Estate of Cole*, 393 Ill. App. 3d 771, 914 N.E.2d 234 (1st Dist. 2009).

examination. Lori's motion to dismiss the petition to invalidate was granted. Cathy appealed.⁹⁰

Cathy contended on appeal that the trial court erred in denying her motion for substitution of judge as of right. At the time of her motion, the trial judge had already denied the motion to disqualify Lori's attorney and had quashed subpoenas requested by Cathy. These rulings relied in part on medical reports. They went to the relevance and admissibility of evidence and gave Cathy an indication as to how the judge might rule on her guardianship petition. Since a motion for substitution of judge as of right must be brought prior to the judge ruling on a substantial issue in the case, the denial of the motion was proper.⁹¹

Cathy also contended that a substitution of judge for cause was appropriate and that the trial judge should have transferred the motion to another judge for ruling. The appellate court held that a motion for substitution of judge must first satisfy a threshold basis by alleging grounds that, if taken as true, support a granting of substitution for cause. The motion alleged bias and prejudice evident from a series of rulings adverse to Cathy. As the alleged bias must come from an extra judicial source, and judicial rulings rarely constitute that source, the motion was properly denied without transferring it first to another judge. The rulings here did not rise to the required level of bias.⁹²

The appellate court then held that Cathy's petition for guardianship was properly dismissed and was supported by medical reports indicating Shirley had no cognitive disabilities. Allegations that the physicians signing the medical reports were not qualified to do so under 755 Illinois Compiled Statutes 5/11a-9(a) were unfounded, too. Cathy also argued that the original petition was not accompanied by a medical report and, pursuant to 755 Illinois Compiled Statutes 5/11a-9(b), her motion for an independent medical examination should have been granted. The appellate court found such an order unnecessary when the respondent comes forward with statutorily sufficient reports. The medical reports filed by Shirley were sufficient.⁹³

A dissent was filed, on the basis that the majority misconstrued the substitution of judge provisions. The dissent would follow the majority in *In re Estate of Wilson*⁹⁴ and vacate the order denying the motion for substitution

90. *Id.* at 771-74, 914 N.E.2d at 234-37.

91. *Id.* at 775-76, 914 N.E.2d at 237-38.

92. *Id.* at 775-77, 914 N.E.2d at 238-39.

93. *Id.* at 777-80, 914 N.E.2d at 239-42.

94. *In re Estate of Wilson*, 389 Ill. App. 3d 771, 905 N.E.2d 957 (1st Dist. 2009).

of judge. There is no threshold requirement, it is argued, and the motion should have been transferred to another judge for ruling.⁹⁵

5. *In re Estate of Lieberman*⁹⁶

The co-guardian of two minors' estates, along with one of the now-adult minors, objected to the third and final account filed in each guardianship by the other co-guardian, Northern Trust Company.⁹⁷ It was alleged that Northern Trust Company failed to properly and prudently invest millions of the wards' dollars under the prudent investor rule. The trial court entered an order striking the objections.⁹⁸

More than \$15 million was received by Northern Trust Company. About one-half of these assets were placed in a taxable short-term investment fund that generated a 1% return after taxes and guardian fees. There was a slight redistribution of investments after a first accounting. Both a first and second accounting were approved.⁹⁹ The plaintiffs objected following the filing of the third accounting, and they sought judgment against Northern Trust Company for the losses resulting from excessive investment in a short-term fund rather than long-term investments for about a 1 year period.¹⁰⁰

On appeal, plaintiffs argued that the trial court applied an incorrect standard in evaluating their objections.¹⁰¹ Following a lengthy review of the applicable law and standards, the Second District concluded that plaintiffs stated a cause of action under the "prudent-person standard."¹⁰² Northern Trust Company knew that the wards did not need substantial sums of money to address their current needs. Instead, it invested funds in a manner that did not yield a higher return.¹⁰³ Viewing the allegations of the objections in the light most favorable to plaintiffs, the investment was not "vigilant, diligent, reasonable or prudent" and could be found a breach of fiduciary duty.¹⁰⁴ The cause was reversed and remanded back to the trial court for further proceedings.¹⁰⁵

95. *Williams*, 393 Ill. App. 3d at 781–82, 914 N.E.2d at 242–43.

96. *In re Estate of Lieberman*, 391 Ill. App. 3d 882, 909 N.E.2d 915 (2nd Dist. 2009).

97. *Id.* at 883–84, 909 N.E.2d at 917.

98. *Id.* at 884, 909 N.E.2d at 917.

99. *Id.*

100. *Id.* at 885, 909 N.E.2d at 918.

101. *Id.* at 883, 909 N.E.2d at 919.

102. *Id.* at 891, 909 N.E.2d at 923.

103. *Id.* at 891–92, 909 N.E.2d at 923.

104. *Id.* at 892, 909 N.E.2d at 923.

105. *Id.* at 894, 909 N.E.2d at 925.

6. *Bernstein v. Department of Human Services*¹⁰⁶

Plaintiff, guardian for her adult son, filed a complaint against the Department of Human Services (“DHS”), seeking an injunction requiring DHS to use contingent electric shock (“CES”) therapy to treat her son.¹⁰⁷ A group home was ultimately added as a party. She alleged that her son engages in episodes of self-injury and that the one treatment that had been successful in controlling this behavior was CES. DHS had objected to this treatment and threatened to withhold funding for the residential service provider. Previous litigation had addressed the withholding of funding, and yet additional litigation led to the use of CES. That use was stopped in 2006 without any notice to plaintiff, who claimed that DHS and the group home in which her son resided breached an agreement reached in settlement of the prior litigation.¹⁰⁸

After several procedural moves in the trial court, plaintiff’s amended complaint was dismissed. The trial court found that there was a “legal and constitutional” statutory prohibition against the use of CES. Further, while the ward has a right to receive adequate and humane care pursuant to an individualized service plan, that right does not include a right to a particular treatment such as CES.¹⁰⁹

Plaintiff appealed, claiming that her breach of contract claim was improperly dismissed. She conceded that performance of a contract cannot be compelled if it would violate a statute, but she claimed that there is an exception to the prohibition on the use of CES. She also claimed that the prohibition violates her son’s due process rights and would “impermissibly eviscerate” her son’s vested right to receive adequate treatment in the least restrictive environment.¹¹⁰ After a detailed statutory analysis and review of relevant caselaw, the appellate court found that the prohibition of CES was valid and that due process rights were not violated. The trial court order was affirmed.¹¹¹

106. *Bernstein v. Dep’t of Human Serv.*, 392 Ill. App. 3d 875, 910 N.E.2d 733 (1st Dist. 2009).

107. *Id.* at 877, 910 N.E.2d at 736.

108. *Id.* at 878–79, 910 N.E.2d at 736–37.

109. *Id.* at 879–83, 910 N.E.2d at 737–40.

110. *Id.* at 884, 910 N.E.2d at 740–41.

111. *Id.* at 896, 910 N.E.2d at 750.

D. Wills, Trusts and Estates

1. In re Estate of Feinberg¹¹²

Max and Erla Feinberg established trusts prior to their deaths in 1986 and 2003, respectively. They were survived by two children and five grandchildren.¹¹³ All five grandchildren were married, but only one was married to a person of the Jewish faith, by birth or conversion.¹¹⁴ 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."¹¹⁵

Max's trust also gave certain powers of appointment to Erla, who could exercise the powers only in favor of Max's descendants. The parties dispute whether they could be exercised in favor of those considered deceased under the "beneficiary restriction clause" (the clause noted above regarding marriage outside the Jewish faith).¹¹⁶

Erla exercised one of her powers of appointment in 1997, specifically keeping with Max's plan for use of the beneficiary restriction clause. However, in exercising this power of appointment, Erla revoked the original plan of distribution for a portion of the trust and replaced it with a plan that changed the ultimate distribution. While Erla retained the beneficiary restriction clause, Max's distribution provision never became operative.¹¹⁷

From 1990 to 2001, all of Max and Erla's five grandchildren married, and only one met the conditions of the beneficiary restriction clause. Erla died in 2003.¹¹⁸

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. The trial court ruled that the clause was invalid as against public policy. The appellate court considered the question on interlocutory appeal and affirmed. The trial court

112. *In re Estate of Feinberg*, 235 Ill. 2d 256, 919 N.E.2d 888 (2009).

113. *Id.* at 258, 919 N.E.2d at 891.

114. *Id.* at 259, 919 N.E.2d at 892.

115. *Id.* at 258, 919 N.E.2d at 891.

116. *Id.*

117. *Id.* at 258–59, 919 N.E.2d at 891–92.

118. *Id.* at 259, 919 N.E.2d at 892.

did not make a finding on the interpretation of Erla's powers of appointment, and the appellate court did not discuss that question.¹¹⁹

The Supreme Court first clarified the issue for review. Because Erla had exercised a power of appointment, the Court was not considering whether Max's original testamentary scheme was void as a matter of public policy. Rather, the Court considered whether "the holder of a power of appointment over the assets of a trust may, without violating the public policy of the state of Illinois, direct that the assets be distributed at the time of her death to then-living descendants of the settlor, deeming deceased any descendant who has married outside the settlor's religious tradition." Max's beneficiary restriction clause was to be considered in conjunction with Erla's directions for distribution.¹²⁰

The Court noted that the framing of the issue in this way eliminates many of the concerns raised with the beneficiary restriction clause. For example, it had been argued that, under that clause, a grandchild could begin to receive trust distributions, only to marry a non-Jewish woman who did not convert to Judaism within one year and forfeit further payments. Also, a concern had been raised that a grandchild could later remarry a person of the Jewish faith and be "resurrected" in the eyes of the beneficiary restriction clause. Neither concern had continuing validity because Erla, in her exercise of the power of appointment, fixed an amount that became distributable upon her death only to those grandchildren who met the requirements of the beneficiary restriction clause.¹²¹

The Court also addressed the standard of review, holding that a *de novo* standard of review applies to the question of whether a trust document or will is void as a matter of public policy, as public policy is necessarily a question of law. This holding was a matter of first impression.¹²²

The Court then addressed the issue for review. The Court noted that the case involves more than a grandfather's desire that his descendants continue to follow his religious tradition after he is gone; it also reveals a broader tension between the competing values of freedom of testation and resistance to "dead hand" control. Thus, the analysis included a review of public policy as to testamentary freedom and public policy as to testamentary or trust provisions concerning marriage.¹²³

119. *Id.*

120. *Id.*

121. *Id.* at 262, 919 N.E.2d at 892–93.

122. *Id.* at 262, 919 N.E.2d at 893.

123. *Id.* at 264, 919 N.E.2d at 894.

On the issue of testamentary freedom, neither the United States Constitution nor the Constitution of the State of Illinois speaks to the issue. The Court found that Illinois statutes “clearly reveal a public policy in support of testamentary freedom.¹²⁴ The Probate Act, the Trusts and Trustees Act, and miscellaneous other statutes all show broad testamentary freedom with few restrictions. It was acknowledged that Max could have influenced his grandchildren to marry within his religious tradition during his lifetime, and he could have specifically named (or not named) those grandchildren who married during his lifetime. The Court concluded that public policy is in favor of testamentary freedom.¹²⁵ The public policy on terms affecting marriage was then called into question.¹²⁶

After reviewing prior caselaw, especially that relied upon by the appellate court in affirming the trial court, the Supreme Court disagreed with the appellate court that three key cases were similar to the present case.¹²⁷ This was especially true in light of how the Supreme Court framed the issue. The beneficiary restriction clause, as given effect by Erla’s exercise of the power of appointment, did not implicate a provision encouraging divorce, for example. The clause instead now involves the decision to marry, as opposed to an incentive to divorce.¹²⁸ The Court proceeded to review cases considering the validity of restrictions affecting marriage.¹²⁹

In light of those cases, the Court did not disagree with the assertion that the beneficiary restriction clause is a reasonable and prudent restraint on marriage that does not operate as a complete restraint on marriage. More importantly, in the Court’s view, was the fact that, because of the power of appointment, the grandchildren had only an expectancy of an inheritance upon Max’s death, rather than a vested interest. The grandchildren were also not heirs at law. With no vested interest, the grandchildren were not entitled to notice of the beneficiary restriction clause. Thus, there was no violation of the recognized principle that a vested interest cannot be divested by a subsequent act of the beneficiary, absent notice of a condition subsequent.¹³⁰

While the appellate court relied on the Restatement (Third) of Trusts, the Supreme Court did not find it applicable. The validity of a trust provision was not at issue.¹³¹ The beneficiary restriction clause in Max’s trust was not at

124. *Id.* at 266, 919 N.E.2d at 895.

125. *Id.* at 268, 919 N.E.2d at 895–96.

126. *Id.* at 268, 919 N.E.2d at 896.

127. *Id.* at 273–74, 919 N.E.2d at 899.

128. *Id.*

129. *Id.* at 270, 919 N.E.2d at 897–99.

130. *Id.* at 279, 919 N.E.2d at 902.

131. *Id.*

issue, as it was effectively revoked when Erla exercised her power of appointment. This exercise was in the nature of a testamentary provision that took effect upon her death, as opposed to a trust provision that acted prospectively. Erla's exercise was either met or not met at her death, so that there was nothing the grandchildren could have done to make themselves eligible or ineligible for the distribution.¹³² Citing earlier caselaw, the Court noted that a condition precedent, even if a complete restraint on marriage, is operative. A condition subsequent is void and inoperative. With no vested interest due to the existence of the power of appointment, Erla's actions created a condition precedent that would be operative.¹³³ There is no "dead hand" control. Erla merely made a bequest to reward, at the time of her death, those grandchildren whose lives most embraced the values that she and her husband cherished.¹³⁴ The trial court and the appellate court were reversed on the public policy issue.¹³⁵

The Court also rejected arguments that a restraint on marriage provision is valid only if its dominant motive is to benefit the potential donee and that the beneficiary restriction clause interferes with the fundamental right of marriage as protected by the constitution.¹³⁶ As a testator or settlor of a trust is not a state actor, there are no constitutional implications.¹³⁷

The Court acknowledged that enforcement of the beneficiary restriction clause would favor the children of Max and Erla (as opposed to the grandchildren). Since the children were co-executors of their parents' estates, though, they were duty-bound to protect the estate plans.¹³⁸ Those plans were valid, as "Max and Erla were free to distribute their bounty as they saw fit and to favor grandchildren of whose life choices they approved over other grandchildren who made choices of which they approved, so long as they did not convey a vested interest that was subject to divestment by a condition subsequent that tended to unreasonably restrict marriage or encourage divorce."¹³⁹

It is notable that this was a unanimous opinion, with no dissent.

132. *Id.* at 280, 919 N.E.2d at 902–03.

133. *Id.* at 280, 919 N.E.2d at 903.

134. *Id.*

135. *Id.*

136. *Id.* at 281, 919 N.E.2d at 904.

137. *Id.* at 281, 919 N.E.2d at 904–05.

138. *Id.* at 282, 919 N.E.2d at 905.

139. *Id.*

2. Citizens National Bank of Paris v. Kids Hope United, Inc.¹⁴⁰

La Fern L. Blackman and Ettoile Davis each executed a trust that benefited the Edgar County Children's Home ("the Home") with the distribution of income until the Home "ceased to operate or exist" (according to the Blackman trust) or until the Home ceased to function in its "present capacity" (according to the Davis trust). In 2003, the Home merged with what is now Kids Hope United, Inc. The trustee bank filed a petition for instructions, seeking a determination that the gifts to the Home lapsed. Kids Hope argued that as the continuing entity following merger, it should continue to receive income from the trusts. Summary judgment was granted in favor of the bank.¹⁴¹

On appeal, the Fourth District interpreted the Blackman trusts' use of the phrase "cease to operate or exist" to mean that the charity is no longer suited to carry out the general purposes of the bequest. Common law around the time the trust was executed favored this interpretation. Merger documents between the Home and Kids Hope included an agreement that the mission of the Home would be continued. The phrase in the trust was found to not refer to the Home's corporate status.¹⁴²

With regard to the Davis trust, the appellate court found that nothing in the agreed statement of facts demonstrates that the functioning of the charity changed at the time of the merger in terms of the mission of the Home.¹⁴³ The closing of the original building for the Home also did not mean that the Home failed to function in its "present capacity". It would be improper to condition a bequest on maintenance of a particular building (especially one that was 100 years old).¹⁴⁴

The appellate court noted that summary judgment was improper and that cross motions for summary judgment with agreed facts would not necessarily mean that summary judgment had to be granted for one of the parties. Reasonable minds could draw differing inferences from the undisputed facts presented in the agreed statement of facts. The cause was reversed and remanded for further proceedings.¹⁴⁵

140. Citizens Nat'l Bank of Paris v. Kids Hope United, Inc., 235 Ill. 2d 565, 922 N.E.2d 1093 (2009); 386 Ill. App. 3d 1084, 898 N.E.2d 734 (4th Dist. 2008).

141. *Id.* at 1085, 898 N.E.2d at 736.

142. *Id.* at 1092, 898 N.E.2d at 742.

143. *Id.* at 1093, 898 N.E.2d at 742.

144. *Id.* at 1093-94, 898 N.E.2d at 742-43.

145. *Id.* at 1094-95, 898 N.E.2d at 743.

The dissent provides an interesting view contrasting with the majority opinion. With regard to the Blackman will, the dissent would have affirmed the trial court which found that the Home ceased to exist after the merger with Kids Hope. Although Kids Hope “may have acquired certain rights and responsibilities of the Home after the merger,” that cannot “trump Blackman’s will.” Blackman’s will contemplated the termination of the Home’s existence and provided for an alternate distribution which should apply, as was intended by the testator.¹⁴⁶

In regard to Davis’ will, the trial court found that the Home ceased to “function in its present capacity” when it dissolved and merged with Kids Hope and then when the original building was closed and sold. Davis’ will provided for an alternate distribution upon the Home ceasing to function in its “present capacity.” The dissent agreed with trial court’s finding.¹⁴⁷

The issue was then decided by the Illinois Supreme Court.¹⁴⁸ With a similar analysis, the decision of the appellate court was affirmed. While acknowledging that the separate corporate entity of the Home ceased to exist, Kids Hope was still suited to carry out the purpose of the Blackman bequest. The Home did not cease to operate as contemplated by the Blackman bequest.¹⁴⁹ With regard to the Davis will, there was no description in the agreed statement of facts as to the operation of the Home at the time of the will or as to the operation of Kids Hope currently. Thus, it is impossible to conclude whether their activities are materially the same.¹⁵⁰

Justice Karameier dissented, introducing his argument by stating, “It is often said that we live in a rootless society, but in rural Illinois counties and communities, “place” still matters. Justice Karameier argues that the intent of both Blackman and Davis was to benefit local charities and, while the majority purports to seek to effectuate the intent of the settlors, the focus is instead more on whether Kids Hope has the ability to give services to children of Edgar County.¹⁵¹ The settlors intent was to benefit local charities. Upon the mergers and sales of buildings, the charities as they intended ceased to exist, and the benefit to local charities, as intended, was gone.¹⁵²

146. *Id.* at 1095, 898 N.E.2d at 744.

147. *Id.*

148. *Citizen’s Nat’l Bank of Paris v. Kids Hope United, Inc.*, 235 Ill. 2d 565, 922 N.E.2d 1093 (2009).

149. *Id.* at 567, 922 N.E.2d at 1095.

150. *Id.* at 569, 922 N.E.2d at 1097.

151. *Id.* at 571, 922 N.E.2d at 1099.

152. *Id.* at 572, 922 N.E.2d at 1100.

3. In re Estate of Ellis¹⁵³

Grace Ellis died at age 86, leaving a multi-million dollar estate. A 1964 will named her now deceased parents as primary beneficiaries and her descendants and Shriners Hospital as contingent beneficiaries. She left no descendants. A 1999 will omitted the prior beneficiaries and named respondent, James Bauman, as sole beneficiary and executor. The 1999 will was admitted to probate.¹⁵⁴

Notice was given to two cousins of Ellis and 12 of the cousins' children and grandchildren. Two cousins sued but settled with the estate. Shriners first learned of the 1964 will after it was filed in connection with the court in response to the cousins' action. Shriners initiated a will contest almost three years after the will was admitted to probate. The will contest alleged, in relevant part, tortious interference with an expected inheritance. Bauman moved to dismiss the will contest as being time barred pursuant to the six month limitations period of section 8-1 of the Probate Act, 755 Illinois Compiled Statutes 5/8-1, and the motion was granted. Shriners appealed.¹⁵⁵

Shriners claimed on appeal that, as a tort, its claim was not barred as a will contest under section 8-1. 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. Regardless of how styled, Shriners' claim was at heart a will contest. The appellate court affirmed.¹⁵⁶

On appeal to the Illinois Supreme Court, the Court there interpreted 755 Illinois Compiled Statutes 5/8-1 of the Probate Act and applied that interpretation to the facts of this case. Section 8-1 states, in part, that a six month statute of limitations applies to a petition "to contest the validity of the will."¹⁵⁷ Under rules of statutory construction, the Court found that Section 8-1 applies only to will contests, not to a tort as alleged in this case. Among other distinctions, the will contest is a *quasi in rem* proceeding to set aside a will, while a tort is a personal action directed at an individual tortfeasor.¹⁵⁸

The Supreme Court acknowledged that Illinois courts have previously restricted the tort of intentional interference with an expected inheritance where "a plaintiff forgoes an opportunity to file a tort claim within the six-

153. *In re Estate of Ellis*, 236 Ill. 2d 45, 923 N.E.2d 237 (2009).

154. *Id.* at 46, 923 N.E.2d at 238.

155. *Id.*

156. *Id.* at 47, 923 N.E.2d at 239.

157. *Id.*; 755 ILL. COMP. STAT. ANN. 5/8-1 (West 2009).

158. *Ellis*, 236 Ill. 2d 923 N.E.2d at 240.

month period for a will contest.” The Court distinguished the present case from prior rulings on the basis that Shriners did not have the opportunity to challenge the will within the 6 month deadline for a will contest. A will contest also would not have granted full relief to Shriners, as the lifetime gifts to Bauman could not have been recovered against Bauman.¹⁵⁹

The Court made clear that the ruling applied to these particular parties under the circumstances of this case. The ruling would not apply to a plaintiff who had an opportunity to contest the will. The cause was reversed and remanded to the circuit court.¹⁶⁰

4. *In re Estate of Savio*¹⁶¹

The father and four siblings of decedent, Kathleen Savio, filed a petition to re-open her estate, remove the prior executor, and to appoint the father and one of the siblings as co-executors.¹⁶² Decedent was found dead in the bathtub of her home in 2004, and the death was originally ruled accidental.¹⁶³ At the time of Kathleen’s death, her marriage to Drew Peterson had been legally dissolved, though the property division was still pending.¹⁶⁴

It had initially been believed that Kathleen had died without a will and the public guardian was appointed as administrator of her estate.¹⁶⁵ A will was later produced.¹⁶⁶ The executor named in that will, James Carrol, was subsequently appointed.¹⁶⁷ Carrol proceeded to appear *pro se* on behalf of the estate in the divorce proceedings, after firing Kathleen’s divorce attorney.¹⁶⁸ Carrol allowed most assets to pass to Peterson in the property division. A trust fund in excess of \$1 million was also set up for the benefit of the children of Kathleen and Peterson.¹⁶⁹ Meanwhile, Carrol filed an inventory showing only items of tangible personal property as assets of the estate, and a final report was also filed. Assets were insufficient to pay all claims.¹⁷⁰ The estate was closed, and Carrol was discharged as executor of the estate.¹⁷¹

159. *Id.* at 50, 923 N.E.2d at 241.

160. *Id.* at 51, 923 N.E.2d at 242.

161. *In re Estate of Savio*, 388 Ill. App. 3d 242, 902 N.E.2d 1113 (3rd Dist. 2009).

162. *Id.* at 243, 902 N.E.2d at 1115.

163. *Id.*

164. *Id.* at 243, 902 N.E.2d at 1116.

165. *Id.* at 244, 902 N.E.2d at 1116.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 245, 902 N.E.2d at 1117.

Subsequent to the estate being closed, Kathleen's body was exhumed, with additional autopsies being performed.¹⁷² These autopsies concluded that Kathleen's death was probably a homicide.¹⁷³ The petition alleged that a wrongful death suit against Peterson was a newly discovered asset of the estate.¹⁷⁴ The petition also alleged that Carrol was an uncle to Peterson and was in a direct conflict of interest, may have committed waste by allowing everything to pass to Peterson in the divorce proceeding and had breached his duty of loyalty to the estate.¹⁷⁵ Removal of Carrol as executor was requested.¹⁷⁶ The will made no appointment of a successor executor.¹⁷⁷ The father and sibling alleged that they had statutory preference for appointment as executor.¹⁷⁸

At the hearing on the petition, no testimony was presented. After hearing arguments of counsel, the trial court granted the petition, entered an order re-opening the estate, removing Carrol as executor, and appointing the father and sibling as co-executors of the re-opened estate.¹⁷⁹

On appeal, Peterson and Carrol argued that an estate can only be re-opened if there is a newly discovered asset or an unsettled portion of the estate.¹⁸⁰ They argued that a wrongful death claim is not an asset of the estate and, further, is not newly discovered.¹⁸¹ They claimed that Kathleen's family had been accusing Peterson of causing her death since the initial coroner's report.¹⁸²

Without clear direction as to the appropriate standard of review, the appellate court concluded that the issue before the court did not involve an interpretation of the Probate Act but rather an application of that law to the facts of the case and a factual determination of whether the possible wrongful death claim is a newly discovered asset.¹⁸³ The court applied a manifest weight of the evidence standard of review.¹⁸⁴

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 246, 902, N.E.2d at 1118.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 246, 902 N.E.2d at 1117.

180. *Id.*

181. *Id.*

182. *Id.* at 246, 902 N.E.2d at 1117-18.

183. *Id.*

184. *Id.* at 246-47, 902 N.E.2d at 1118.

The court then turned to the issue of whether a wrongful death claim can be a newly discovered asset of the estate.¹⁸⁵ The Wrongful Death Act states that the claim must be brought in the name of the personal representative of the estate, though the legislative intent is that the claim is that of the individual beneficiaries.¹⁸⁶ Since the claim must be brought in the name of the personal representative, it is an asset of the estate.¹⁸⁷ Section 2.1 of the Wrongful Death Act, 740 Illinois Compiled Statutes 180/2.1, also specifically refers to the claim as an asset of the estate.¹⁸⁸ The wrongful death claim was found to be an asset of the estate for purposes of determining whether the estate could be re-opened.¹⁸⁹

The court's review of whether Carrol was properly removed as executor of the estate was complicated by the lack of evidence at the hearing.¹⁹⁰ The statutory procedures for removal of an executor also did not appear to have been followed.¹⁹¹ Since no objection was made in the trial court, any such objection was waived.¹⁹² As to the substance of the issue, Carrol's allowing all assets to be awarded to Peterson in the divorce proceedings was alone sufficient to justify removal.¹⁹³ The court could find no just or fair reason why Carrol, as executor, would relinquish all of Kathleen's interest in the marital property to Peterson.¹⁹⁴ Carrol was properly removed.¹⁹⁵

The trial court was also found justified in appointing the father and sibling. Carrol, on removal, lost any right to nominate a successor.¹⁹⁶ Under the circumstances, Peterson also had no right to nominate.¹⁹⁷ While there is some authority to allow the guardian of a decedent's minor children preference in nominating an executor, this case is distinguishable since the children's guardian, Peterson, is the potential defendant in the wrongful death claim.¹⁹⁸ The order of the trial court was affirmed.¹⁹⁹

This case presents some unusual circumstances that may have limited application, but the case does clearly state the standard of review to be applied

185. *Id.*

186. *Id.*

187. *Id.* at 248, 902 N.E.2d at 1119.

188. *Id.*; 740 ILL. COMP. STAT. ANN. 180/2.1 (West 2009).

189. *Savio*, 388 Ill. App. 3d 902 N.E.2d at 1119–20.

190. *Id.*

191. *Id.*

192. *Id.* at 250, 902 N.E.2d at 1121.

193. *Id.*

194. *Id.*

195. *Id.* at 250, 902 N.E.2d at 1121.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 250, 902 N.E.2d at 1121–22.

to a trial court's decision as to whether to reopen a probate estate of a decedent, when the only asset discovered after the estate has been closed is a possible wrongful death action. The standard of review to be applied in this circumstance is the manifest weight of the evidence. Therefore, a reviewing court would not reverse the trial court unless its ruling is "unreasonable, arbitrary and not based on evidence, or when the opposite conclusion is clearly evident from the record."²⁰⁰

5. *Brooker v. Madigan*²⁰¹

The Estate of Nancy Neumann Brooker was valued at more than \$68 million. The State of Illinois claimed more than \$3.5 million in state estate taxes.²⁰² This claim was based on 35 Illinois Compiled Statutes 405/2(a), which provides that the "State tax credit" at the time of decedent's death was "an amount equal to the full credit calculable under Section 2011 * * * of the Internal Revenue Code as the credit would have been computed and allowed under the Internal Revenue Code as in effect on December 31, 2001."²⁰³ The trial court agreed with the Estate's position that because it did not claim a credit on its federal estate tax return, no state estate tax (in the amount of the credit taken) is due.²⁰⁴

On appeal, the First District provided a detailed review of the interplay between the Illinois and federal estate systems. The discussion provided, while beyond the scope of this survey, is a worthwhile review for the practitioner.²⁰⁵

The defendant's claim that amendments to the statute at issue were intended to preserve the collection of the Illinois estate tax by locking in the 2001 rate. The relevant inquiry is how the credit would have been computed by the IRS in 2001, not what the IRS actually allows in any particular case. The estate had not claimed a state credit because earlier federal credits claimed on prior transfers far exceeded any credit for state death taxes. There would have been no economic benefit to claiming the state death tax credit on the federal return. Since no credit was claimed, the estate contended that the estate owes no state estate tax; no credit was "allowed" by the IRS.²⁰⁶

200. *Id.* at 247, 902 N.E.2d at 1118.

201. *Brooker v. Madigan*, 388 Ill. App. 3d 410, 902 N.E.2d 1246 (1st Dist. 2009).

202. *Id.* at 410, 902 N.E.2d at 1247.

203. *Id.* at 410-11, 902 N.E.2d at 1247.

204. *Id.* at 411, 902 N.E.2d at 1247.

205. *Id.* at 411-13, 902 N.E.2d at 1247-49.

206. *Id.* at 417, 902 N.E.2d at 1252.

The reviewing court concluded that an estate cannot avoid tax obligations by simply choosing not to claim a state tax credit on its federal return. Partial summary judgment in favor of the estate was reversed.²⁰⁷

Leave to appeal has been granted.²⁰⁸

6. In re Estate of Gagliardo²⁰⁹

Michael Gagliardo died in a racing car accident in 2001. His sister, Paulette, was named executor of his estate in his will. The law firm of Quinlan and Carroll (“Quinlan”) was hired to investigate a possible wrongful death claim. Paulette and Michael’s widow, Margaret, disagreed as to who hired Quinlan and was responsible for fees.²¹⁰

Paulette opened the estate and initially served as executor; Margaret was serving as administrator of the estate. She moved for a determination of attorney fees as to two other attorneys hired to handle the estate. Quinlan was served with notice as an interested party and filed a special appearance and motion for substitution of judge. The motion was granted. The court proceeded to rule on the fees for the other attorneys in an order that did not state it was final and appealable.²¹¹

Margaret appealed, claiming that the trial court lost jurisdiction when it granted Quinlan’s motion for substitution of judge. She claimed that the entire estate should have been transferred to a different judge, and all orders entered after that were void.²¹²

The reviewing court concluded that adopting Margaret’s interpretation of the substitution of judge statute would defeat, rather than protect, Quinlan’s rights.²¹³ Quinlan’s interest was collateral to the estate proceedings, being drawn in only after receiving notice of the other fee petitions. The court found no public policy ground for depriving the probate court of jurisdiction when it granted Quinlan’s motion as an intervening creditor.²¹⁴

The reviewing court also found that it lacked jurisdiction to review the order on the other attorney fees, as it was not final and appealable. Since Margaret’s argument was that the trial court lacked jurisdiction upon granting Quinlan’s motion, and the jurisdiction of the reviewing court is related to the

207. *Id.* at 421, 902 N.E.2d at 1255.

208. *Brooker v. Madigan*, 232 Ill. 2d 577, 910 N.E.2d 1126 (2009).

209. *In re Estate of Gagliardo*, 391 Ill. App. 3d 343, 908 N.E.2d 1056 (1st Dist. 2009).

210. *Id.* at 345, 908 N.E.2d at 1058.

211. *Id.* at 345–46, 908 N.E.2d at 1058.

212. *Id.* at 346, 908 N.E.2d at 1058.

213. *Id.* at 347, 908 N.E.2d at 1059.

214. *Id.* at 347–48, 908 N.E.2d at 1060.

jurisdiction of the court below, it first had to address the issue raised on the substitution of judge motion. The appeal was dismissed.²¹⁵

7. Jaason v. Sullivan²¹⁶

Erik Jaason filed suit against Barbara J. Sullivan and her law firm for legal malpractice in the preparation of a will for Alexander Koepp. The complaint alleged that Sullivan was hired by Koepp to prepare a will that included a provision allowing Jaason to purchase certain real estate for \$150,000. Koepp died in 2006, but the real estate was owned in joint tenancy with his wife. The real estate was thus unavailable for purchase by Jaason. The complaint alleged malpractice in failing to recognize that the real estate was held in joint tenancy. On Sullivan's motion, the complaint was dismissed as time barred pursuant to 735 Illinois Compiled Statutes 5/13-214.3(d).²¹⁷

On appeal by Jaason, the court reviewed the applicability of the relevant statute of limitations. This provision applies in cases when the alleged injury caused by an attorney's act or omission does not occur until the death of the person for whom the professional services were rendered. If, as in the present case, letters of office were issued or the person's will was admitted to probate, the malpractice action must be brought within the time for filing claims against the estate or a petition contesting the validity of the deceased person's will (whichever is later).²¹⁸

Plaintiff's complaint was filed on December 4, 2007.²¹⁹ The six month period for contesting the will expired on August 22, 2007.²²⁰ The publication of the claim notice provided that claims against the estate must be filed on or before December 1, 2007.²²¹ The complaint was not timely filed based on these dates.²²²

However, notice to creditor forms were then provided to various creditors (by plaintiff, in his capacity as executor of the estate), with claims to be filed by May 9, 2008.²²³ Plaintiff alleged that this then became the relevant date of limitations.²²⁴ The reviewing court found that the Probate Act, 755 Illinois

215. *Id.* at 348–49, 908 N.E.2d at 1060–61.

216. *Jaason v. Sullivan*, 389 Ill. App. 3d 376, 906 N.E.2d 125 (1st Dist. 2009).

217. *Id.* at 377, 906 N.E.2d at 126.

218. *Id.* at 378, 906 N.E.2d at 126–27.

219. *Id.* at 378, 906 N.E.2d at 126.

220. *Id.* at 378, 906 N.E.2d at 127.

221. *Id.* at 379, 906 N.E.2d at 127.

222. *Id.* at 378, 906 N.E.2d at 127.

223. *Id.* at 379, 906 N.E.2d at 127.

224. *Id.*

Compiled Statutes 5/18-3(a), authorizes notice by publication to unknown creditors of the estate, but notice must be mailed to known creditors.²²⁵ The deadline for filing claims by known creditors can be different than the deadline for unknown creditors.²²⁶ Here, the later date for filing by known creditors became the relevant limitations date.²²⁷ There was no evidence that plaintiff, as executor, had acted fraudulently in providing the notice to known creditors.²²⁸

The order of the trial court dismissing the claims was reversed.²²⁹

8. *Vena v. Vena*²³⁰

Guy Vena, the trustee of a trust, filed a complaint for declaratory judgment, asking the trial court to rule that approval of his accounts by a majority of the income beneficiaries of the trust would have the same effect as approval by the court.²³¹ One beneficiary claimed that Guy had breached his duties as trustee.²³² Summary judgment was entered in favor of Guy.²³³

The trust provision at issue states that a majority in interest of the beneficiaries may approve the trustee's accounts with the same effect as if a court with jurisdiction had approved the accounts.²³⁴ Of the 19 income beneficiaries, 18 had, at various times, signed a "Receipt and Release" acknowledging partial distributions and agreeing to return money if necessary to pay claims and expenses of the trust.²³⁵ Guy claimed to have provided financial statements periodically.²³⁶ The approval alleged in the complaint appeared to have been the Receipts signed by the 18 beneficiaries.²³⁷

The reviewing court found that the provision of the trust relied upon by Guy is contrary to public policy because of the limitations that it places on redress for serious trustee misconduct.²³⁸ The court stated that the provision "too thoroughly deprives an individual beneficiary of the ability to enforce his

225. 755 ILL. COMP. STAT. ANN. 5/18-3(a) (West 1989).

226. *Jaason*, at 379, 906 N.E.2d at 128.

227. *Id.*

228. *Id.* at 378–80, 906 N.E.2d at 127–28.

229. *Id.* at 380, 906 N.E.2d at 128.

230. *Vena v. Vena*, 387 Ill. App. 3d 389, 899 N.E.2d 522 (2nd Dist. 2008).

231. *Id.* at 390, 899 N.E.2d at 524.

232. *Id.*

233. *Id.*

234. *Id.* at 391, 899 N.E.2d at 524.

235. *Id.*

236. *Id.* at 391, 899 N.E.2d at 525.

237. *Id.* at 391, 899 N.E.2d at 524–25.

238. *Id.* at 394, 899 N.E.2d at 526.

or her rights and too thoroughly insulates the trustee from accounting to a court.”²³⁹ 760 Illinois Compiled Statutes 5/11(a) and (b) contemplates that beneficiaries will be furnished with an account that becomes binding unless an action is instituted against the trustee within three years.²⁴⁰ For Guy to say that the approval of the beneficiaries has the same effect as a court with jurisdiction thus has no clear meaning.²⁴¹

The provision could also leave a minority beneficiary without recourse for a real harm. Trust provisions that exculpate a trustee of serious misconduct raise public policy concerns and are not enforceable as to breaches of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary.²⁴² While a retroactive exculpation (as opposed to a prospective one) weakens the public policy concerns, it does not sufficiently alleviate it.²⁴³ 760 Illinois Compiled Statutes 5/3(1), which states that a person establishing a trust may specify the rights, powers, duties, limitations and immunities of the trustee, beneficiary and others, is not enough to save the provision at issue.²⁴⁴

The trial court’s grant of summary judgment was reversed.²⁴⁵

9. In re Estate of Bitoy²⁴⁶

Attorney Rollin J. Soskin filed a petition for attorney fees and related costs for work performed on behalf of Rudolf Bitoy, administrator of the Estate of Earl Eugene Bitoy.²⁴⁷ Earl Bitoy had 21 estate beneficiaries.²⁴⁸ He had also been a lottery winner, with eight installments of \$866,000 each still to be paid to a partnership he had created.²⁴⁹ The fee petition sought payment of \$252,084.75 in fees and \$3,838.09 in costs.²⁵⁰ The petition alleged that Soskin expended 1,055.6 hours in representing the estate, for an hourly rate of \$238.80. As the litigation on the issue proceeded, Soskin filed a second fee petition requesting fees of \$88,513.75 and costs of \$1,522.78.²⁵¹ The trial

239. *Id.* at 395, 899 N.E.2d at 528.

240. 760 ILL. COMP. STAT. ANN. 5/11(a) and (b) (West 2001).

241. *Vena*, 387 Ill. App. 3d at 394–96, 899 N.E.2d at 526–28.

242. *Id.* at 399, 899 N.E.2d at 530.

243. *Id.* at 400, 899 N.E.2d at 532.

244. *Id.* at 397–400, 899 N. E.2d at 529–32.

245. *Id.* at 400, 899 N.E.2d at 532.

246. *In re Estate of Bitoy*, 395 Ill. App. 3d 262, 917 N.E.2d 74 (1st Dist. 2009).

247. *Id.* at 265, 917 N.E.2d at 76.

248. *Id.* at 266, 917 N.E.2d at 77.

249. *Id.*

250. *Id.*

251. *Id.* at 267, 917 N.E.2d at 78.

court awarded some, but not all, of the requested fees. Fees on the first petition were awarded in the amount of \$182,000 plus costs of \$3,278.61. Fees on the second petition were awarded in the amount of \$55,000 plus costs of \$727.18.²⁵²

On appeal, the First District affirmed, finding no abuse of discretion in the award of attorney fees and costs. The cause was remanded for the trial court to clarify that it did not disallow fees spent in connection with pleadings filed by another party.²⁵³

The decision in this case is a good read for any attorney who handles estates. The appellate court held, among other things, that (1) the trial court properly required Soskin to present detailed records supporting his petitions;²⁵⁴ (2) a retainer agreement between the attorney and the administrator is irrelevant to the determination of a reasonable fee and reasonable costs;²⁵⁵ (3) Soskin was entitled to compensation for time spent responding to frivolous petitions filed by a co-administrator;²⁵⁶ (4) an attorney is not entitled to compensation for objecting to fee petitions filed by other attorneys;²⁵⁷ and (5) Soskin was entitled to fees for time his legal assistant spent in court.²⁵⁸ The various factors used in determining the reasonableness of a fee include the size of the estate, work done and the skill with which it was performed, the time required, and the advantages gained or sought by the services or litigation.²⁵⁹

E. Miscellaneous

1. *Applebaum v. Rush University Medical Center*²⁶⁰

Decedent's son and sole heir, Michael, was appointed special administrator and filed a complaint for medical malpractice on December 1, 2005.²⁶¹ 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

252. *Id.* at 272, 917 N.E.2d at 82.

253. *Id.* at 284–85, 917 N.E.2d at 91–92.

254. *Id.* at 273–76, 917 N.E.2d at 82–85.

255. *Id.* at 278, 917 N.E.2d at 87.

256. *Id.* at 279–80, 917 N.E.2d at 88.

257. *Id.* at 281, 917 N.E.2d at 89.

258. *Id.* at 284, 917 N.E.2d at 91.

259. *Id.* at 272, 917 N.E.2d at 82 (citing *In re Estate of Marks*, 74 Ill. App. 3d 599, 604, 393 N.E.2d 538, 541–42 (1st Dist. 1979)).

260. *Applebaum v. Rush Univ. Med. Ctr.*, 231 Ill. 2d 429, 899 N.E.2d 262 (2008).

261. *Id.* at 431–32, 899 N.E.2d at 264.

Law.”²⁶² An amended complaint was endorsed “Plaintiff Pro Se.” After the filing of the amended complaint, Michael’s active status was restored.²⁶³

Defendant moved to dismiss the complaint as a nullity, arguing that Michael, though not licensed to practice law, filed the suit in a representative 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.²⁶⁴

The First District, recognizing the harshness of the nullity rule and that exceptions exist under unique circumstances, still found the nullity rule applicable.²⁶⁵

The Illinois Supreme Court stated in its review of the issue that the nullity rule “should be invoked only where it fulfills its purposes of protecting both the public and the integrity of the court system from the actions of the unlicensed, and where no other alternative remedy is possible.”²⁶⁶ The Court then, after an extensive review of Supreme Court Rule 756 and the meaning of “inactive attorney status,” concluded that an attorney who is no longer “eligible” to practice law while on inactive status is not equivalent to a person who is “unlicensed” to practice law.²⁶⁷ Being voluntarily placed on inactive status is not the same as stripping the attorney of his or her license to practice law.²⁶⁸ The change is one in registration status and does not bear on that person’s skill, fitness or competency to practice law.²⁶⁹ Significantly, the Court noted, an attorney returns to active status upon request and upon paying the required fee.²⁷⁰ The Court cautioned the other courts of this state to use terms relating to licensing and eligibility to practice with careful precision.²⁷¹

The Supreme Court acknowledged that, because Michael was on inactive status on the date the Complaint was filed, he did not comply with the technical provisions of Rule 756.²⁷² This technical violation did not, under the circumstances, though, warrant the imposition of the harsh nullity rule. Rule 756 authorizes attorneys on inactive status to provide certain pro bono services. Providing representation in a family situation combined with the fact that the technical defect was corrected prior to the first hearing on the Motion

262. *Id.* at 432, 899 N.E.2d at 264.

263. *Id.* at 432–33, 899 N.E.2d at 264–65.

264. *Id.* at 433, 899 N.E.2d at 265.

265. *Id.* at 434–35, 899 N.E.2d at 265–66.

266. *Id.* at 435, 899 N.E.2d at 266.

267. *Id.* at 436–41, 899 N.E.2d at 266–69.

268. *Id.* at 441, 899 N.E.2d at 269.

269. *Id.* at 441, 899 N.E.2d at 269–70.

270. *Id.* at 440–41, 899 N.E.2d at 269.

271. *Id.* at 446, 899 N.E.2d at 272.

272. *Id.* at 447, 899 N.E.2d at 272–73.

to Dismiss, led the Court to its conclusion that the appellate court decision should be reversed.²⁷³

The Illinois Supreme Court prevented a harsh result by their ruling in this case, but did not necessarily tighten the rule of nullity. The Court only reaffirmed their earlier rulings and carved out an exception because Michael had graduated from law school, satisfied the court's character and fitness requirements, passed the bar examination, and obtained a license to practice law. The Court's ruling seems to be limited to an attorney who is on "inactive" status and would not apply to a more broad set of facts.

IV. LEGISLATIVE UPDATES

A. Introduction

The Illinois 96th General Assembly began in January of 2009, and ran until December of 2010.²⁷⁴ The first month of the session was dominated by the impeachment of Governor Rod Blagojevich, which culminated in the Governor's conviction and removal from office on January 29, 2009.²⁷⁵ The 2009 legislative session, the first year of the 96th General Assembly, produced several significant pieces of legislation concerning elder law, and also addressed other issues that were eventually either held in committee or dropped, but which have the potential to arise again in future sessions.

The 2009 session was dominated by the serious (and increasingly desperate) financial situation of the State of Illinois.²⁷⁶ Some might believe that when overwhelming issues such as huge state revenue shortfalls and significant state service cuts dominate the legislative agenda, that other, perhaps less momentous, legislation will be pushed aside.

In fact, even as the most politically powerful legislators battled over taxes and budgets, the committee chairs, members, and staffs, and the regular legislators of the Illinois General Assembly, continued to function largely as they do any other year. The Governor and the legislative leaders may have been focused on budgets and politically unpopular tax increases, but the

273. *Id.* at 447–48, 899 N.E.2d at 273.

274. The 96th Illinois General Assembly convened on January 14, 2009 with a Senate of 37 Democrats and 22 Republicans and a House of Representatives with 70 Democrats and 48 Republicans. Illinois General Assembly, <http://www.ilga.gov> (last visited Apr. 1, 2010) (hereinafter ILGA).

275. www.chicagotribune.com/news/local/chi-09126-impeachment-photogallery (available with subscription to Chicago Tribune).

276. See, e.g., Daniel W. Hynes, *Illinois State Comptroller, Comptroller's Quarterly Report State Finances Grim, and Getting Worse* (Oct. 6, 2009), <http://www.ioc.state.il.us/news/Printpdf.cfm?ID=2070837258>.

business of the legislature concerning issues ranging from guardianship to nursing home regulation to elder abuse continues.²⁷⁷

B. Guardianship and Power of Attorney Legislation

House Bill 0759 was the Uniform Adult Guardianship and Protective Procedures Jurisdiction Act. The bill was a “Uniform Act,” drafted by a national task force of experts, members of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). It was introduced in a number of legislatures around the country. In Illinois, it was introduced in the House as House Bill 0759 and in the Senate as Senate Bill 1930.²⁷⁸ This Act will not substantively change current guardianship procedures in state law, but it does create a comprehensive body of procedures for guardianship actions involving several states.

It allows courts in one state to take into account judicial findings and rulings from other states, and creates a process for determining which state’s ruling takes precedence.²⁷⁹ This Uniform Act was intended to be passed by a majority of states, so that those different states would share comparable and complementary procedures.

Currently, the Uniform Act has been adopted in over a dozen states.²⁸⁰ The Act has a number of provisions designed to address the problems and issues inherent in having a guardianship case which involves multiple jurisdictions.²⁸¹ The Act provides jurisdictional tests to be used to determine jurisdiction.²⁸² The objective of the Act is to center jurisdiction of the guardianship case, to the extent possible, in only one state. The Act also

277. The Illinois General Assembly website shows that 4,973 bills were submitted in the House of Representatives and 2,575 bills were introduced in the Senate, a total of 7,548 bills, in the first year of the session. As of January 12, 2010, the Governor had signed 859 bills into law. This information was compiled by the author by using data on the Illinois General Assembly website at www.ilga.gov.

278. Legislative histories of House Bill 0759 and Senate Bill 1930.

279. 755 ILL. COMP. STAT. ANN. 8/101 *et seq.* (West 2009) (effective Jan. 1, 2010), established by Pub. Act 096-0177.

280. 13 states, including Illinois, have approved this Uniform Act, and at least 10 states considered it in the 2009 legislation sessions. The National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), <http://www.nccusl.org/update> (follow “Final Acts & Legislation” hyperlink; then select “Adult Guardianship and Protective Proceedings Jurisdiction Act” in drop down menu) (last visited Apr. 1, 2010).

281. 755 ILL. COMP. STAT. ANN. 8/101 *et seq.* (West 2009) (effective Jan. 1, 2010), established by Pub. Act 096-0177.

282. *Id.*

provides procedures for transferring cases between states.²⁸³ This House bill was passed and signed into law as Public Act 96-0177.²⁸⁴

House Bill 3886, known as the Uniform Power of Attorney Act and House Bill 4136, known as Amendments to the Power of Attorney Act are two bills which effectively make comprehensive revisions to the Power of Attorney Act and both were introduced in 2009. One was drafted and supported by the Illinois State Bar Association; the other was a Uniform Act which was being actively supported by the American Bar Association, national AARP, and was actively pushed by the Illinois AARP.

When the two bills reached committee, there was an agreement to hold both bills without further advancements until language incorporating parts of each bill could be negotiated throughout the summer. The hope is that a broadly supported compromised Power of Attorney Act reform bill will emerge and be moved forward during the 2010 legislative session.²⁸⁵

House Bill 2539 amended the Probate Act by adding two new provisions to the section on public guardians. The governor appoints public guardians, and there is currently one guardian appointed in each county who serves as the guardian for persons without friends or family who could otherwise serve as their guardian.²⁸⁶

The new legislation allows the Governor to appoint the same person to serve as a Public Guardian for more than one county.²⁸⁷ This may be particularly useful in small, rural counties.

The Act also requires each person appointed or reappointed as a Public Guardian to be certified by a specific national organization that has developed a certification process.²⁸⁸ The certification requirement must be fulfilled within six months after appointment.²⁸⁹ The bill was enacted into law as Public Act 96-0752.²⁹⁰

283. 755 ILL. COMP. STAT. ANN. 8/301 (West 2009) (effective Jan. 1, 2010), established by Pub. Act 096-0177. For a summary of the bill see Susan Dawson-Tibbits, *Legislative Updates*, ELDER LAW NEWSLETTER (Elder Law Section Council, Illinois State Bar Association) Dec. 2009, at 1, 1-2.

284. 755 ILL. COMP. STAT. ANN. 8/101 (West 2009) (effective Jan. 1, 2010).

285. Charles LeFebvre, chief negotiator on the bill for the Elder Law Section Council of the Illinois State Bar Association, address at the Elder Law Section Council meeting in Chicago, Illinois (Feb. 12, 2010).

286. 755 ILL. COMP. STAT. ANN. 5/13-5 (West 2009).

287. 755 ILL. COMP. STAT. ANN. 5/13-1 (West 2009) (effective Jan. 1, 2010), amended by Pub. Act 96-0752.

288. 755 ILL. COMP. STAT. ANN. 5/13-1.2 (West 2009) (effective Jan. 1, 2010), amended by Pub. Act. 96-0752.

289. *Id.*

290. 755 ILL. COMP. STAT. ANN. 5/13-1, -1.2, -3.1, and -5 (West 2009) (effective Jan. 1, 2010).

C. Long Term Care Legislation

House Bill 0748 contained amendments to the Nursing Home Care Act²⁹¹ and the Health Care Surrogate Act.²⁹² This bill was amended in House committee and in the final version, the bill provides that 30 days after admission to a nursing home, new residents without a guardian or health care agent will be provided written notice of their right to indicate their preference as to a health care surrogate.²⁹³ The resident's preference is then recorded in his or her medical record.²⁹⁴

Elder law attorneys considered this to be potentially confusing because it calls for the resident to suggest a surrogate under the Health Care Surrogate Act rather than a health care agent under the Power of Attorney Act.²⁹⁵ The new Act then states that the resident's preference is for informational purposes only. Since the Health Care Surrogate Act clearly states the order of succession for surrogates, it is not clear how the resident's preference would be considered. The amended bill was signed into law as Public Act 96-0448.²⁹⁶

House Bill 0957 would have amended the Illinois Act on Aging, and required the Illinois Department on Aging, in cooperation with certain agencies, to determine whether any person who suffers from Alzheimer's Disease or a related disorder, or who is deemed blind and disabled under the Social Security Act is in need of long term care and might be satisfactorily cared for in their homes.²⁹⁷ The bill would have vested the responsibility for pre-screening in case coordination units or any agency designated by the Illinois Department of Human Services.²⁹⁸ The bill would have required all persons who are admitted and remain in a nursing facility for 90 days or more to be re-screened at the end of the 90 day period to assess their continuing

291. 210 ILL. COMP. STAT. ANN. 45/2-101 *et seq.* (West 2009) (effective Jan. 1, 2010), amended by Pub. Act 96-0448.

292. 755 ILL. COMP. STAT. ANN. 40/1 *et seq.* (West. 2009) (effective Jan. 1, 2010), amended by Pub. Act. 96-0448.

293. 210 ILL. COMP. STAT. ANN. 45/2-104.2 (West 2009) (effective Jan. 1, 2010), amended by Pub. Act 96-0448.

294. *Id.*

295. Health Care Surrogate Act, 755 ILL. COMP. STAT. ANN. 40/1 (West 2009); and the Power of Attorney Act, 210 ILL. COMP. STAT. ANN. 45/1-1 (West 2009).

296. 210 ILL. COMP. STAT. ANN. 45/2-104.2 (West 2009) (effective Jan. 1, 2010); 755 ILL. COMP. STAT. ANN. 40/15 (West 2009) (effective Jan. 1, 2010).

297. H.B. 0957, 2009 Leg., 96th Sess. (Ill. 2009).

298. *Id.*

need for nursing facility care.²⁹⁹ However, this bill was not enacted as it died upon re-referral to the House Rules Committee.³⁰⁰

House Bill 0416 originally amended the Illinois Public Aid Code and provided that the Illinois Department of Healthcare and Family Services ensures that certain long term care facilities licensed by the Department of Public Health under the Nursing Home Care Act receive the next regular payment due for services provided by the facility to medical assistance recipients no later than 35 days after the effective date of the legislation.³⁰¹

The bill was subsequently amended to remove the original language and instead provided that state payment cycles of longer than 60 days should be one factor which the Director of the Department of Public Health should take into account when the long term care facilities fail to pay penalty assessments.³⁰² The bill, as amended, was signed into law as Public Act 96-0444.³⁰³

House Bill 0752 amended the Older Adult Services Act, with provisions concerning the development of a plan to restructure the State's service delivery system for older adults.³⁰⁴ The bill instructed the Department of Aging, the Department of Healthcare and Family Services, and the Department of Public Health to develop the plan no later than September 30, 2010.³⁰⁵

The bill further provided that the plan would protect the rights of all older Illinoisans to services based on the health circumstances and functioning level, regardless of whether they receive their care in their homes, in a community setting, or in a residential facility.³⁰⁶ The bill provided that the financing for older adult services should take into account personal preferences, but should not jeopardize the health, safety, or level of care of nursing home residents.³⁰⁷ The bill was signed into law as Public Act 96-0248.³⁰⁸

House Bill 1188 would have amended the Illinois Health Facilities Planning Act and provided that if a nursing home received a nursing home

299. *Id.*

300. ILGA, www.ilga.gov/ (follow "Bills & Resolutions" hyperlink; then select "0901-1000" under House – Bills; then select "HB0957") (last visited Apr. 2, 2010).

301. ILGA, www.ilga.gov/ (follow "Bills & Resolutions" hyperlink; then select "0401-0500" under House – Bills; then select "HB0416") (last visited Apr. 2, 2010).

302. 305 ILL. COMP. STAT. ANN. 5/5B-4 (West 2009) (effective Aug. 14, 2009), amended by Pub. Act 96-0444.

303. 305 ILL. COMP. STAT. ANN. 5/5B-4 (West 2009) (effective Aug. 14, 2009).

304. 320 ILL. COMP. STAT. ANN. 42/25 (West 2009) (effective Aug. 11, 2009), amended by Pub. Act. 96-0248.

305. *Id.*

306. *Id.*

307. *Id.*

308. 320 ILL. COMP. STAT. ANN. 42/25 (West 2009) (effective Aug. 11, 2009).

conversion grant under the Older Adult Services Act, it would retain the Certificate of Need for its nursing and sheltered care beds that were converted for fifteen years, as provided in the Act.³⁰⁹ The bill was amended several times, which substantially changed its content to unrelated matters, and was subsequently passed and signed into law as Public Act 96-0863.³¹⁰

Senate Bill 0321 would have amended the Nursing Home Care Act to authorize the Department of Public Health, if it were determined that it would be in the best interests of the residents of a nursing home to do so, to allow the nursing home to use the amount of any penalty assessed under the Act for the purpose of implementing a directed plan of correction, rather than pay the amount of the penalty to the Department of Public Health for deposit into the Long Term Care Monitor/Receiver Fund.³¹¹ The bill further provided that if the Director of the Department of Public Health required a facility to use the amount of a penalty for the purpose of implementing a directed plan of correction, the Department of Public Health was responsible to ensure that the facility in fact used the amount of the penalty for that purpose.³¹² While in session, Senate Bill 0321 was amended and was incorporated, in somewhat revised form, into Senate Bill 0314, which was signed into law as Public Act 96-0758.³¹³

Senate Bill 1838 would have amended the Department of Veterans Affairs Act (IDVA) and the Nursing Home Care Act (NHCA), providing that if there was a conflict between the provisions of the IDVA and the provisions of the NHCA concerning any state veterans home operated by the state Department of Veterans Affairs, then the provision of the IDVA would apply.³¹⁴ The bill further provided that such a state veterans home licensed under NHCA and operated by the Illinois Department of Veterans Affairs would be exempt from certain provisions of the NHCA, including provisions concerning license fees, licensing by municipalities, facility plan review, annual financial statements, violations and penalties, and actions by residents for injunctive and declaratory relief.³¹⁵

Under the legislation, a veteran's home would also be exempt from provisions of the NHCA standards for facilities, if the home met the standards

309. ILGA, www.ilga.gov/ (follow "Bills & Resolutions" hyperlink; then select "1101-1200" under House - Bills; then select "HB1188") (last visited Apr. 2, 2010).

310. Pub. Act 96-0863 (effective Jan. 21, 2010).

311. S.B. 0321, 2009 Leg., 96th Sess. (Ill. 2009).

312. *Id.*

313. 210 ILL. COMP. STAT. ANN. 45/3-308 (West 2009) (effective Aug. 25, 2009), amended, in relevant part, by Pub. Act. 96-0758.

314. S.B. 1838, 2009 Leg., 96th Sess. (Ill. 2009).

315. *Id.*

for similar provisions required or regulated by the federal Department of Veterans Affairs.³¹⁶ The bill was pulled from the floor of the Senate and died in committee.³¹⁷ House Bill 2285 amended the Mental Health and Developmental Disabilities Administrative Act,³¹⁸ the University of Illinois Hospital Act,³¹⁹ the Nursing Home Care Act,³²⁰ and the Hospital Licensing Act.³²¹ The bill requires that a hospital or nursing home must adopt a policy to identify, assess, and develop strategies to control risk of injury to residents or patients and nurses and other health care workers associated with the lifting, transferring, repositioning, or movement of a resident or patient.³²²

The legislation describes the matters which must be included in the policy, including: 1) analysis of the risk of injury to residents or patients, and nurses and other health care workers, taking into account the resident or patient handling needs of the resident or patient populations served by the facility and the physical environment in which the resident or patient handling and movement occurs; 2) education of nurses in the identification, assessment, and control of risks of injury to residents or patients and nurses and other health care workers during resident or patient handling; and 3) evaluation of alternative ways to reduce risks associated with resident or patient handling, including evaluation of equipment and the environment.³²³ State mental health and developmental disabilities centers operated by the Illinois Department of Human Services and the University of Illinois Hospital must comply with these provisions.³²⁴ The bill was signed into law as Public Act 96-0389.³²⁵

316. *Id.*

317. ILGA, www.ilga.gov/ (follow "Bills & Resolutions" hyperlink; then select "1801-1900" under Senate – Bills; then select "SB1838") (last visited Apr. 2, 2010).

318. 20 ILL. COMP. STAT. ANN. 1705/1 (West 2009).

319. 110 ILL. COMP. STAT. ANN. 330/1 (West 2009).

320. 210 ILL. COMP. STAT. ANN. 45/3 (West 2009).

321. 210 ILL. COMP. STAT. ANN. 85/1 (West 2009).

322. 210 ILL. COMP. STAT. ANN. 45/3-206.05 (West 2009) (effective Jan. 1, 2010), amended by Pub. Act. 96-0839 and 210 ILL. COMP. STAT. ANN. 85/6.25 (West 2009) (effective Jan. 1, 2010), amended by Pub. Act. 96-0839.

323. *Id.*

324. 20 ILL. COMP. STAT. ANN. 1705/4 (West 2009) (effective Jan. 1, 2010), amended by Pub. Act 96-0389 and 110 ILL. COMP. STAT. ANN. 330/8 (West 2009) (effective Jan. 1, 2010), amended by Pub. Act 96-0389.

325. 20 ILL. COMP. STAT. ANN. 1705/4 (West 2009) (effective Jan. 1, 2010), amended by Pub. Act 96-0389; 110 ILL. COMP. STAT. ANN. 45/3.206.05 (West 2009) (effective Jan. 1, 2010), amended by Pub. Act 96-0389; 110 ILL. COMP. STAT. ANN. 330/8 (West 2009) (effective Jan. 1, 2010), amended by Pub. Act 96-0389; and 210 ILL. COMP. STAT. ANN. 85/6.25 (West 2009) (effective Jan. 1, 2010), amended by Pub. Act 96-0389.

D. Elder Abuse Legislation

House Bill 3967 provided for an amendment to the Elder Abuse and Neglect Act, and included several important provisions.³²⁶ The most important part of this bill was the specific authority of elder abuse program service provider agencies to share the names of clients of the Elder Abuse and Neglect Program who are at imminent risk.³²⁷ These names would be sent, pursuant to a written agreement, to the local coroner's office, thus allowing the coroner to be alert should any such client die.³²⁸ Another provision of the bill provides a statutory basis to allow the executor or the administrator of the deceased client's estate the right to control releases of the client's files under Section 8 of the Act.³²⁹ The bill passed and was signed into law by Public Act 96-0526.³³⁰

House Bill 2388 also amended the Elder Abuse and Neglect Act³³¹ by adding language relating to "hoarding."³³² The bill added a definition of "hoarding" and mandated a service response by elder abuse program service provider agencies.³³³ This new language, and the existing language dealing with self-neglect, would not take effect until, and unless, there were sufficient appropriations to implement the self-neglect mandate statewide. This bill was signed by the Governor into law as Public Act 96-0572.³³⁴

House Bill 813 was an amendment to the Illinois Optometric Practice Act which was sought by the professional optometrists' state association.³³⁵ Under the Elder Abuse and Neglect Act, optometrists were mandated reporters.³³⁶ In 2009, the Illinois Optometrists Association initiated this bill to add the failure to report either child or elder abuse, which is already required by law, as a

326. H.B. 3967, 2009 Leg., 96th Sess. (Ill. 2009).

327. 320 ILL. COMP. STAT. ANN. 20/8 (West 2009) (effective Jan. 1, 2010), amended by Pub. Act. 96-0526.

328. *Id.* at 20/8-8.5.

329. *Id.* at 20/8-4.5.

330. 320 ILL. COMP. STAT. ANN. 20/2, 20/3, 20/4, 20/8, 20/9, and 20/13 (West 2009) (effective Jan. 1, 2010).

331. 320 ILL. COMP. STAT. ANN. 20/1 *et seq.* (West 2009) (effective Jan. 1, 2010).

332. H.B. 2388, 2009 Leg., 96th Sess. (Ill. 2009).

333. 320 ILL. COMP. STAT. ANN. 20/2(i-5) and 20/3(a) (West 2009) (effective Jan. 1, 2010), amended by Pub. Act 96-0572.

334. 320 ILL. COMP. STAT. ANN. 20/2 and 20/3 (West 2009) (effective Jan. 1, 2010).

335. H.B. 0813, 2009 Leg. 96th Sess. (Ill. 2009).

336. 320 ILL. COMP. STAT. ANN. 45/2 (West 2009).

ground for professional disciplinary action.³³⁷ This bill was signed into law by the Governor as Public Act 96-0378.³³⁸

E. Other State Legislation

House Bill 1349 was the Uniform Anatomical Gift Act (“UAGA”), which was another product of the NCCUSL.³³⁹ The purpose of the UAGA was to harmonize state laws in the area of anatomical gifts. The proposed UAGA contained a number of significant provisions.

The Act would have strengthened the language which established that a donor’s decisions as to the donation of his organs should be honored and should not be subject to change by anyone, including close relatives.³⁴⁰ The Act expressly barred family members from amending or revoking donations made by donors during their lifetime.³⁴¹ Conversely, the Act also would have permitted a person to sign a declaration that would prohibit others from making a gift of that person’s organs.³⁴² The Act also addressed anatomical donor registries, allowing a donor to file his consent to donation on a state registry.³⁴³ The bill, however, did not get signed into law as it died in committee in the House in April of 2009.³⁴⁴

House Bill 2558 would have created the Deeds Effective on Death Act. This bill would have created deeds effective on death.³⁴⁵ It stirred considerable controversy amongst probate and trust attorneys, but, it too, died in the House Rules Committee.³⁴⁶

Senate Bill 0229 created the Banking Convenience Account for Depositors Act.³⁴⁷ This Act would allow a bank to open “convenience accounts.” On these accounts, the primary account owner would be labeled the “depositor,” and the secondary account owner would be designated as the “convenience depositor.” Each would be able to make deposits and withdraw

337. 225 ILL. COMP. STAT. ANN. 80/24 (West 2009) (effective Jan. 1, 2010); 320 ILL. COMP. STAT. ANN. 20/4 (West 2009) (effective Jan. 1, 2010).

338. 225 ILL. COMP. STAT. ANN. 80/24 (West 2009) (effective Jan. 1, 2010); 320 ILL. COMP. STAT. ANN. 20/4 (West 2009) (effective Jan. 1, 2010).

339. H.B. 1349, 2009 Leg. 96th Sess. (Ill. 2009).

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. ILGA, www.ilga.gov/ (follow “Bills & Resolutions” hyperlink; then select “1301-1400” under House – Bills; then select “HB1349”) (last visited Apr. 2, 2010).

345. H.B. 2558, 2009 Leg. 96th Sess. (Ill. 2009).

346. ILGA, www.ilga.gov/ (follow “Bills & Resolutions” hyperlink; then select “2501-2600” under House – Bills; then select “HB2558”) (last visited Apr. 2, 2010).

347. S.B. 0229, 2009 Leg. 96th Sess. (Ill. 2009).

sums from the account.³⁴⁸ The Act specifically states that there is no presumption of gifting by the primary account owner to the secondary account owner.³⁴⁹ The Act does not give the “convenience depositor” the right of survivorship to the accounts.³⁵⁰ Many seniors may find this type of account very useful in placing a child’s or a grandchild’s name on the account, with access to the funds while the primary account owner is alive, but without creating confusion as to the disposition of the funds in the account upon the death of the primary account owner. The Act has protections from liability in the release of funds from the accounts to the convenience depositor. The bill was signed into law as Public Act 96-0123, but will expire in five years.³⁵¹

F. Legislation Pending in Congress

S.718, better known as the Civil Access to Justice Act of 2009 is sponsored by Senator Tom Harkins of Iowa, and would, among other things, remove some of the current restrictions on Legal Service Corporation (LSC) funded offices (i.e., legal aid offices) that were imposed by Congress in the 1990’s. This bill has been assigned to the Senate Committee on Health, Education, Labor and Pensions but, to date, no hearings have been scheduled.³⁵² H.R. 2006 and S. 795, better known as the Elder Justice Act, has again been introduced in Congress, with separate, but very similar, bills in the House and the Senate. The chief House sponsor is Representative Peter King of New York and the chief Senate sponsor is Orrin Hatch of Utah. The Senate version of this bill has now been added to the Senate version of the health care reform bill (H.R. 3590) as Subtitle H.³⁵³

Whether or not this part of the health care reform act will remain in the final legislation is unclear. To date, both the Senate and the House have passed differing versions of the legislation. The House and Senate leadership, and the White House, are trying to negotiate a single common bill, which would be passed by both chambers and signed into law by the President.

348. 205 ILL. COMP. STAT. ANN. 720/10 *et seq.* (West 2009) (effective Jan. 1, 2010), amended by Pub. Act. 96-0123.

349. 205 ILL. COMP. STAT. ANN. 720/10(b) (West 2009) (effective Jan. 1, 2010), amended by Pub. Act. 96-0123.

350. *Id.*

351. 205 ILL. COMP. STAT. ANN. 720/1 *et seq.* (West 2009) (effective Jan. 1, 2010).

352. The Library of Congress, Summary of Bill, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s:00718>. The Library of Congress maintains an excellent, comprehensive and readily accessible website, named after our third President, for tracking federal legislation.

353. The Senate version of H.R. 3590, which included the Elder Justice Act, passed the Senate on Dec. 24, 2009.

These negotiations will determine whether the Elder Justice Act will remain legislation and possibly become law in the near future.³⁵⁴

H.R.448, more commonly known as the Elder Abuse Victims Act of 2009, is another bill dealing with elder abuse, and was passed out of the House of Representatives on February 11, 2009.³⁵⁵ Sponsored by Representative Joe Sestak of Pennsylvania, it would establish federal elder abuse specialized prosecution, prosecutorial training and research programs. This bill is presently in the Senate Judiciary Committee.³⁵⁶

H.R. 1237 and S.512, each better known as the Fairness in Nursing Home Arbitration Act of 2009, would provide that pre-dispute arbitration agreements between a long term care facility and a resident (or a person acting on behalf of a resident) would be neither valid nor specifically enforceable. These bills have been assigned to the Judiciary Committees in each chamber.³⁵⁷

G. State Regulations

Finally, it should be noted that the long anticipated state regulations for the implementation of the federal Deficit Reduction Act of 2005³⁵⁸ (“the DRA”) have yet to emerge from the Illinois Department of Healthcare and Family Services. The changes mandated by the DRA would have a significant impact on the “look back” periods and penalties for the transfer of assets as related to Medicaid eligibility.³⁵⁹

V. CONCLUSION

The field of Elder Law continues to see expansive changes in the law and the way the law is interpreted. Elder Law practitioners must keep abreast of the changes that occur from year to year, as legislators are constantly updating and amending the law. Elder Law continues to be a focus of state and federal governments, and as a result, many more changes are likely to occur in the field of elder law.

354. These negotiations have been extensively covered by “The Roll Call,” a Capitol Hill newsletter, which can be found at www.rollcall.com or at www.congress.org.

355. The Library of Congress, Summary of Bill, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.00448>.

356. *Id.*

357. H.R. 1237 was assigned to the House Judiciary Committee on Feb. 26, 2009, and S.512 was assigned to the Senate Judiciary Committee on March 3, 2009. The Library of Congress, Summary of Bill.

358. Deficit Reduction Act of 2005, Pub.L.109-171, 120 Stat. 4, enacted Feb. 8, 2006.

359. *See* THE HENRY J. KAISER FAMILY FOUNDATION, THE KAISER COMMISSION ON MEDICAID AND THE UNINSURED—DEFICIT REDUCTION ACT OF 2005: IMPLICATIONS FOR MEDICAID 4 (Feb. 2006), <http://www.kff.org/medicaid/upload/7465.pdf>.