SURVEY OF ILLINOIS LAW: ELDER LAW

Lee Beneze,[*] Charles A. LeFevre,[**] Heather McPherson,[***] Daniel M. Moore, Jr.[+] and Martin W. Siemer[++]

---

[*] Legal Services Developer in the Office of Elder Rights at the Illinois Department on Aging since December, 1988. In this position, Mr. Beneze works on senior legal issues, such as elder abuse and neglect, financial exploitation, nursing home resident rights, guardianship, and advance directives. He is currently the longest serving state Legal Services Developer in the United States. Mr. Beneze graduated from Western Illinois University in 1972 and Southern Illinois University Law School in 1985. While at Southern Illinois University Law School, he served as Research Editor of the Southern Illinois University Law Journal. Mr. Beneze is a founding member and is serving (2010-2011) as the Chair of the Elder Law Section Council of the Illinois State Bar Association..

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

[***] McPherson Law Offices, Freeport, Illinois; graduated from Beloit College, Beloit, Wisconsin, in 1998, with a B.A. in Economics and Management, and from Marquette University Law School, Milwaukee, Wisconsin, in 2001. Ms. McPherson's practice is concentrated in Elder Law, estate planning, probate, trust administration, estate and trust litigation, guardianships, and real estate. She is licensed in Illinois as well as Wisconsin. Ms. McPherson has been active in the Illinois State Bar Association since 2004, and is past chair of the Elder Law Section Council (2009–2010). She has been involved in several legislative projects through the Illinois State Bar Association. She served as Treasurer of the Stephenson County Bar Association from 2002 to 2003; as a member of the Board of Directors for Prairie State Legal Services from 2002 to 2006; as a Hearing Board Member for the Illinois Attorney Registration and Disciplinary Commission since 2008, and additionally serves on their Oversight Committee. She is extremely active in her local community, serving on several boards and participating in many volunteer projects.

[+] Of Counsel to the Decatur, Illinois law firm of Moore, Susler, McNutt & Wrigley, LLC; graduated from University of Illinois College of Law in 1953, A.B., Washington University (Saint Louis), 1949. Mr. Moore's law practice has been concentrated in Elder Law. He was a member of the National Academy of Elder Law Attorneys (NAELA) from 1989 till 2007. He was an appointed delegate to the 1995 White House Conference on Aging, a member of the Illinois Council on Aging (1996-2004) and is a charter and current member of the Elder Law Section Council of the Illinois State Bar Association, which he chaired in its second year. Mr. Moore was the 1996 recipient of the Illinois State Bar Association's Tradition of Excellence award and a 2002 Laureate of the Illinois Academy of Lawyers. In addition to the Illinois State Bar Association, he is a member of the Decatur Bar Association, of which he is a past president. Mr. Moore is author of "Helping Clients Make the Most of Health-Care and Property POAs", published in the January, 2003, Illinois Bar Journal, has contributed articles to the Elder Law Section Newsletter and has presented on Elder Law topics at several CLE courses as well as to numerous community groups.

[++] Founding member of Resch Siemer Law Office, LLC, Effingham, Illinois; graduated summa cum

I. INTRODUCTION

It is no surprise that the past year saw many changes and updates on issues relevant to the Elder Law practitioner. What might make the past year different and more surprising than others is the *significance* of those changes and updates. Change has arrived. The changes of the past year will impact those who assist clients with Medicaid planning. The changes will alter the way attorneys will help clients with basic estate planning documents. The changes will affect planning, probate, fees, and more.

The following material is organized with a desk reference of numbers and statistics for 2011 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. Legislative updates are presented in Section IV. Specific information on a revision of the Illinois Rule on Professional Conduct 1.14 follows in Sections V.

II. ELDER LAW DESK REFERENCE

A. 2011 Medicare Figures[1]

Part A deductible per benefit period: $1,132

Part A daily coinsurance, days 61 through 90 (per benefit period): $283 per day

Part A daily coinsurance, 60 lifetime reserve days: $566 per day

Part A daily coinsurance, days 21 through 100 in skilled nursing facility (per benefit period): $141.50 per day

Part A reduced monthly premium (for voluntary enrollees who have 30-39 quarters of coverage): $248

---

laude and as class valedictorian from Saint Louis University School of Law in 1994; received B.S. in Secondary Education from the University of Illinois at Urbana-Champaign in 1991. Mr. Siemer concentrates his practice in the areas of Elder Law, Estate Planning, Probate and Trust Administration and civil appeals. He is a member of the National Academy of Elder Law Attorneys (NAELA), the Life Care Planning Law Firms Association, the Effingham County Bar Association, the Illinois State Bar Association and the Appellate Lawyers Association. He has served as a member of the Illinois State Bar Association's Elder Law Section Council since 2006, and has been a speaker for the Life Care Planning Law Firms Association annual conference, the IICLE Elder Law Short Course, and many local programs. He has been a member of the Board of Education for Teutopolis Community Unit School District No. 50 since 1997, currently serving as its president.

1. The information regarding Medicare is summarized from the official Medicare website, http://www.medicare.gov (last visited April 12, 2011).

Part A reduced monthly premium (for voluntary enrollees who have 29 or fewer quarters of coverage): $450

Part B standard monthly premium: $115.40

Part B monthly premium for those filing individual tax returns:
$115.40 (up to $85,000 in AGI)
$161.50 ($85,001 to $107,000 in AGI)
$230.70 ($107,001 to $160,000 in AGI)
$299.90 ($160,001 to $214,000 in AGI)
$369.10 (over $214,000 in AGI)

Part B monthly premium for those filing joint tax returns:
$115.40 (up to $170,000 in AGI)
$161.50 ($170,001 to $214,000 in AGI)
$230.70 ($214,001 to $320,000 in AGI)
$299.90 ($320,001 to $428,000 in AGI)
$369.10 (over $428,000 in AGI)

Part B monthly premium for married filing separate tax returns:
$115.40 (up to $85,000 in AGI)
$299.90 ($85,001 to $129,000 in AGI)
$369.10 (over $129,000 in AGI)

Part B yearly deductible: $162

Part D enrollment period: November 15, 2010 through December 31, 2010

NOTE: 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 2011, 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 enrolled in Part B for the first time in 2011.[2]

---

2. *See, e.g.*, CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE & YOU 2011, 131–134 (2011), *available at* http://www.medicare.gov/publications/pubs/pdf/10050.pdf.

B. Federal Poverty Income Limits[3]

Persons in family unit	Poverty Limit
1	$10,890
2	$14,710
3	$18,530
4	$22,350
5	$26,170
6	$29,990
7	$33,810
8	$37,630

For family units with more than 8 persons, add $3,820 for each additional person. Income limits vary for Alaska and Hawaii.

C. Medicaid Limits[4]

Community Spouse Asset Allowance:

2010 – $109,560
2011 – $109,560

Community Spouse Maintenance Needs Allowance:

2010 – $2,739
2011 – $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:

$5,537, effective September 1, 2009
$5,703, effective September 1, 2010

3. 76 Fed. Reg. 13, 3637-38 (Jan. 20, 2011).
4. Ill. Dep't of Human Servs., *Illinois Medicaid Policy Manual*, http://www.dhs.state.il.us/page.aspx?item=13473 (last visited April 12, 2011) (this information has been summarized from the Illinois Medicaid Policy Manual).

D. Maximum Deductions For Qualified Long Term Care Insurance Premiums[5]

Attained Age before the close of the tax year	Maximum Deduction
40 or less	$ 340
More than 40 but not more than 50	$ 640
More than 50 but not more than 60	$1,270
More than 60 but not more than 70	$3,390
More than 70	$4,240

E. Medicare Part D Monthly Income-Related Adjustment[6]

Part D income-related adjustments for those filing individual tax returns:

$0.00 (up to $85,000 in AGI)
$12.00 ($85,001 to $107,000 in AGI)
$31.10 ($107,001 to $160,000 in AGI)
$50.10 ($160,001 to $214,000 in AGI)
$69.10 (over $214,000 in AGI)

Part D income-related adjustments for those filing joint tax returns:

$0.00 (up to $170,000 in AGI)
$12.00 ($170,001 to $214,000 in AGI)
$31.10 ($214,001 to $320,000 in AGI)
$50.10 ($320,001 to $428,000 in AGI)
$69.10 (over $428,000 in AGI)

Part D income-related adjustments for married filing separate tax returns:

$0.00 (up to $85,000 in AGI)
$50.10 ($85,001 to $129,000 in AGI)
$69.10 (over $129,000 in AGI)

NOTE: Part D enrollees must pay, in addition to their regular plan premium, a monthly amount to Medicare if income exceeds these prescribed limits.[7]

---

5. Rev. Proc. 2010-40, 2010-46 I.R.B. 3.13.
6. Memorandum from the Ctrs. for Medicare & Medicaid Servs. to All Part D Plan Sponsors (Dec. 10, 2010), *available at* http://www.neishloss.com/wp/wp-content/uploads/downloads/2011/01/01.24.11–CMS_Memo_on_High_Income_Part_D_Premiums.pdf.
7. 42 U.S.C. § 1395w-113(a) (2006).

III. CASES

A. Mental Health and Developmental Disabilities Code

In re *Andrew B.*[8]

Respondent voluntarily admitted himself into a mental health facility on March 26, 2007. By May 7, 2007, he was ready to leave. Before doing so, a petition for involuntary admission was filed under sections 3-403 and 3-404 of the Mental Health and Developmental Disabilities Code (the "Code").[9] That petition was voluntarily dismissed by the State and the trial court ordered respondent discharged. Respondent was not physically discharged before another petition for involuntary admission was filed pursuant to section 3-600 of the Code.[10] This petition was also dismissed and the respondent again ordered to be discharged. Prior to release, yet another petition for involuntary admission under section 3-600 was filed on June 20, 2007.[11]

Respondent filed a Motion to Dismiss the last petition for involuntary admission. The motion was denied, the petition was granted, and the respondent was ordered subject to involuntary admission for ninety days.[12]

On appeal, respondent argued for reversal on the basis that the petition for involuntary admission was untimely filed.[13] The Code requires that a petition for involuntary admission be filed within twenty-four hours of admission to a mental health facility.[14] Respondent argued that because he was never physically released from the facility, his admission was on March 26, 2007, and the June 20, 2007, petition was filed well beyond the twenty-four hour time limit. The respondent relied on two appellate court cases from 2003 that were directly in support of his position.[15]

The appellate court disagreed with these prior cases, holding that although respondent was not physically released from the facility, the order of discharge indicated that the facility no longer had authority over the respondent and he could no longer be considered a patient. The appellate court then found the petition for involuntary admission to be timely.[16]

---

8. *In re* Andrew B., 237 Ill.2d 340, 930 N.E.2d 934 (2010).
9. 405 ILL. COMP. STAT. 5/3-403-404 (2010).
10. 405 ILL. COMP. STAT. 5/3-600 (2010).
11. *In re* Andrew B., 237 Ill.2d at 343, 930 N.E.2d at 936.
12. *Id.*
13. *Id.* at 345, 930 N.E.2d at 937.
14. 405 ILL. COMP. STAT. 5/3-611 (2010).
15. *In re* Andrew B., 237 Ill.2d at 345, 930 N.E.2d at 937.
16. *Id.* at 346, 930 N.E.2d at 937–38.

The Illinois Supreme Court, after first finding an exception as to the mootness doctrine, engaged in a statutory analysis. Section 3-600 authorizes involuntary admission of a person eighteen years of age or older in need of immediate hospitalization. Section 3-611 requires the petition to be filed with the trial court within twenty-four hours after the individual is admitted to the facility. The court held that this statute refers to an admission under Article VI of the Code. The original voluntary admission of respondent was not under Article VI.[17]

The court also held that the term "admission" was not limited to physical entry into a facility. Other provisions of the Code clearly allow a patient already physically inside a mental health facility to be subjected to another admission when his condition warrants additional care or treatment. The Code refers to admission in a legal sense. When a discharge occurs but the patient's condition requires additional care and treatment, the twenty-four hour period of section 3-611 begins when a new petition for involuntary admission is filed with the trial court, not on the date of original physical entry. The petition, under this analysis, was found to be timely filed.[18]

The Illinois Supreme Court did express concern with the facts of the case. Referring to the multiple petitions and subsequent dismissals of those petitions, the court stated it was "still troubled by the potential that mental-health facilities could file repetitive petitions, resulting in the indefinite confinement of an individual without a court's examination of the matter."[19] The State conceded that a person could thus be deprived of his liberty. The Illinois Supreme Court reminded other courts to "be ever vigilant to protect against abuses of power and preserve the fundamental liberty interests of individuals subjected to involuntary-admission proceedings."[20] The Illinois Supreme Court also urged the Illinois General Assembly to address this and other issues leading to an increase in the number of involuntary admission cases being heard by the courts of this State.[21]

17. *Id.* at 346–48, 930 N.E.2d at 937–39.
18. *Id.* at 350–51, 930 N.E.2d at 940.
19. *Id.* at 354, 930 N.E.2d at 942.
20. *Id.* at 355, 930 N.E.2d at 942.
21. *Id.* at 354–55, 930 N.E.2d at 942.

B. Medicaid

1. Zander v. Adams[22]

Bette Zander began residing in a long-term care facility on June 10, 2003. She created the Zander Land Trust, an Illinois Land Trust, on December 4, 2003, and transferred three parcels of real estate to it. While Mrs. Zander's daughter served as trustee of the trust, Mrs. Zander retained 100% of the beneficial interest. As beneficiary, she had no right, title or interest in or to any portion of the real estate. On December 16, 2003, Mrs. Zander assigned her entire beneficial interest to her three daughters.[23]

On January 23, 2007, more than thirty-seven months after the assignment of the beneficial interest, Mrs. Zander filed an application for Medicaid benefits. The Department of Human Services (the "Department") declared her eligible but imposed a penalty period of ineligibility. The period of ineligibility was initially for more than 7½ years, but was later adjusted to about 4½ years. The penalty was imposed as a result of what the Department deemed an unpermitted transfer within sixty months of filing the application.[24]

Mrs. Zander requested and was granted a formal hearing on the issue of the imposition of the penalty period. It was her position at the hearing that the gift of the beneficial interest to her daughters was subject to the general thirty-six month look back period, as opposed to the sixty month look back period applicable to transfers to or from trusts. The trustee testified that she had neither collected any income nor distributed any real estate from the trust. The Department ruled that the land trust was a revocable trust, and the assignment of the beneficial interest constituted a payment from the trust subject to the sixty month look back period.[25]

The Department's decision was appealed to the Circuit Court of Cook County. That court agreed with the Department and confirmed the Department's decision. An appeal to the First District Appellate Court followed. The issue on appeal centered on whether the transfer of a beneficial interest in an Illinois land trust constitutes a transfer of personal property subject to the thirty-six month look back period or a payment (or transfer) from a revocable trust subject to the sixty month look back period.[26]

---

22. Zander v. Adams, 399 Ill. App. 3d 290, 928 N.E.2d 492 (1st Dist. 2010).
23. *Id.* at 291–92, 928 N.E.2d at 493.
24. *Id.* at 291–92, 928 N.E.2d at 494.
25. *Id.*
26. *Id.* at 292–93, 928 N.E.2d at 494.

After a general review of the complicated structure of federal and state Medicaid statutes, rules, and regulations, the appellate court turned to the State Medicaid Manual for direction on transfers of assets. That manual defines "payment" (the term used by the Department to describe the assignment) as "any disbursal from the corpus of the trust or from income generated by the trust which benefits the party receiving it."[27] A payment is also defined as covering cash or non-cash payments "such as the right to use and occupy real property."[28]

Regarding transfers of assets that can lead to imposition of a penalty period, Department regulations provide that the sixty month look back period applies "to payments from a revocable trust that are not treated as income."[29] As interpreted by the court, this regulation means that three elements trigger the sixty month look back period: (1) a transfer from a revocable trust; (2) the transfer from the trust is not an income payment; and (3) the transfer is a payment, other than an income payment.[30]

It was agreed on appeal that the land trust is a revocable trust and that the transfer of the beneficial interest was not an income payment, thus satisfying the first two elements. The point of contention, then, was whether the transfer of the beneficial interest constituted a payment (as defined by Medicaid Manual) other than an income payment.[31]

Mrs. Zander's primary contention on appeal was that Illinois law treats the beneficial interest in a land trust as a personal property interest and thus the transfer was one of personal property. As a personal property interest, it was argued, it never became a part of the trust corpus and its transfer could not then constitute a payment from the trust corpus. The appellate court, though, stated that the characterization of a beneficial interest as personal property does not control the Department's review. Federal Medicaid statutes provide that persons able to pay for their own care cannot avoid doing so by the "transfer of assets and treatment of certain trusts."[32] The appellate court also picked up on the characterization by Mrs. Zander in her appellate brief that land trusts are a "legal fiction" and found no reason that fiction should be carried over to Medicaid eligibility issues. The court rejected the focus on the personal property nature of the beneficial interest.[33]

---

27. *Id.* at 295, 928 N.E.2d at 496.
28. *Id.*
29. *Id.* at 296, 928 N.E.2d at 497 (citing ILL. ADMIN. CODE tit. 89, §120.387(e)(1)(A) (2010)).
30. *Id.*
31. *Id.*
32. Gilmore v. Ill. Dep't of Human Servs., 218 Ill.2d 302, 307, 843 N.E.2d 336, 339 (2006) (quoting 42 U.S.C. § 1396(a)(18) (2000)).
33. *Id.* at 298-99, 928 N.E.2d at 498–500.

The appellate court noted that if Mrs. Zander had retained her beneficial interest at the time of filing the Medicaid application, the Department would have treated the real estate as an available asset. There was thus no basis for the availability of the asset to disappear upon the transfer of the beneficial interest. The court was unpersuaded that the assignment could not be a payment from a trust "simply because the use of the term 'payment' is contrary to Mrs. Zander's notion of conveyance of personal property."[34]

In her appellate brief, Mrs. Zander argued that the Department's administrative decision contained no analysis as to why the assignment was treated as a payment from a revocable trust. The court responded by stating, "We offer the following analysis for the Department's decision specific to Mrs. Zander's circumstances."[35] The court then proceeded to offer ten paragraphs of analysis, similar to that previously provided in the court's opinion.[36]

The appellate court affirmed the department's decision, finding that the transfer of the beneficial interest was a "payment" from a revocable trust subject to the sixty month look back period. As the transfer occurred within sixty months of Mrs. Zander filing her Medicaid application, the penalty period was properly imposed.[37]

2. Arellano v. Department of Human Services[38]

Plaintiff, Elvira Arellano, was denied Medicaid benefits in connection with her hospitalization and treatment for pneumonia. Plaintiff was an undocumented alien not lawfully admitted for permanent United States residence. The issue presented on appeal of the denial was whether the medical services provided to plaintiff were the result of the "sudden onset" of an acute medical condition. If so, this would qualify her for Medicaid benefits.[39]

Under federal Medicaid statutes, benefits are generally not provided to an undocumented alien. An exception to this general rule exists for children and pregnant women, but plaintiff did not fit either of these categories. A second exception exists for "sudden onset" of certain medical conditions as defined by statute and regulations. In addition, the alien must otherwise qualify for assistance.[40]

---

34. *Id.*
35. *Id.* at 299, 928 N.E.2d at 500.
36. *Id.* at 302, 928 N.E.2d at 501.
37. *Id.* at 302–03, 928 N.E.2d at 501–02.
38. Arellano v. Dep't of Human Serv., 402 Ill. App. 3d 665, 943 N.E.2d 631 (2d Dist. 2010).
39. *Id.* at 666, 943 N.E.2d at 632.
40. *Id.* at 671, 943 N.E.2d at 636–37.

Following a detailed analysis of the meaning and intent of the phrase "sudden onset," the appellate court concluded that the sudden onset requirement improperly restricts and contravenes the Medicaid statute, rendering it unenforceable. The statute uses the term "emergency medical condition." The term "sudden onset" appears in federal and state regulations.[41]

The court found that since the "sudden onset" requirements were unenforceable, the Department employed an incorrect legal standard in rejecting plaintiff's claim for benefits on the basis of failing to meet the "sudden onset" requirement. The correct analysis is whether the plaintiff's condition qualified as an "emergency medical condition," and the Department's findings were not directed to that issue.[42]

The appellate court vacated the Department's decision and remanded the case for consideration under the correct legal standard.[43]

C. Guardianships

1. Perry v. Estate of Carpenter[44]

The guardian of the estate of Irene Carpenter entered into a contract to sell the ward's home. The contract was presented to the circuit court for approval. The guardian ad litem ("GAL") objected to the sale on the basis of an inadequate sale price of $80,000. The court initially approved the sale. The contract included a mortgage contingency.[45]

Following approval, the purchaser found another prospective buyer with the intention of assigning the contract or selling to the prospective buyer upon closing on the sale. The prospective buyer offered the purchaser $139,000.[46]

The purchaser requested an extension of the mortgage contingency deadline from the GAL. When the GAL refused the request, the purchaser faxed to the GAL, on the day of the deadline, a letter stating that he was waiving the contingency. The GAL responded by informing the purchaser that the contract was null and void due to the inability to provide a mortgage commitment. The purchaser filed an emergency motion with the circuit court to enforce the contract.[47]

---

41. *Id.* at 672–76, 943 N.E.2d at 638–40.
42. *Id.* at 680, 943 N.E.2d at 643.
43. *Id.* at 680, 943 N.E.2d at 644.
44. Perry v. Estate of Carpenter, 396 Ill. App. 3d 77, 918 N.E.2d 1156 (1st Dist. 2009).
45. *Id.* at 79, 918 N.E.2d at 1159.
46. *Id*. at 80, 918 N.E.2d at 1159.
47. *Id*. at 80, 918 N.E.2d at 1159–60.

The circuit court appointed an emergency GAL to provide the court assistance as an expert in real estate contracts. This emergency GAL informed the court that it was unlikely the mortgage contingency gave the GAL authority to void the contract, but that an earnest money clause in the contract might provide the court with a basis to void the contract. The circuit court ruled (1) the contract was null and void due to the mortgage contingency, and (2) due to equitable considerations, the contract was not in the best interests of the estate.[48]

The purchaser appealed.[49] Considering the mortgage contingency clause of the contract, the appellate court determined that the clause had been waived by the purchaser and "the contract retained its vitality."[50]

The guardian asserted that the earnest money provision provided a basis for voiding the contract. However, no citations to authority for this proposition were included in the guardian's appellate brief, so the appellate court considered the argument forfeited. Regardless, the facts relating to that provision led the court to find that the purchaser had not breached this provision.[51]

The appellate court stated, however, that equitable interests led to the conclusion that the court did not abuse its discretion in denying the purchaser's request to enforce the contract. A probate court may disapprove a sale and order a new sale if that will be in the best interest of the estate.[52] The probate court is vested with extensive and explicit powers over proceedings to sell or mortgage real estate of a ward, and probate courts may give relief of an equitable nature when justice so requires. The circuit court had found that it was "in the best interests of the alleged disabled person to net $130,000 as opposed to $80,000." Enforcement of the contract would be similar to conversion of $50,000 from the estate of a disabled person, and there were hints of fraud and unfairness on the part of the purchaser.[53]

The judgment of the circuit court denying the purchaser's emergency motion to enforce the contract was affirmed.[54]

---

48. *Id*. at 80, 918 N.E.2d at 1160.
49. *Id.*
50. *Id*. at 83, 918 N.E.2d at 1162.
51. *Id*. at 84, 918 N.E.2d at 1162–63.
52. *Id*. at 84, 918 N.E.2d at 1163.
53. *Id*. at 86–87, 918 N.E.2d at 1164–65.
54. *Id*. at 87, 918 N.E.2d at 1165.

2. In re Estate of Michalak[55]

Bozenna Michalak signed a revocable living trust in November 2006. Her home was the sole asset of the trust. She named Robert Kaleta as successor trustee, and she listed Robert and Jolanta Kaleta as beneficiaries of the trust upon her death. In January 2007, Michalak's niece, Jacqueline Zagorski, was notified by police of a potential financial exploitation of her aunt. Zagorski then accompanied Michalak to various banks to have her name put on accounts with Michalak.[56]

When Zagorski was notified of additional attempts of financial exploitation and when Kaleta attempted to assert authority during clean up at Michalak's house, Zagorski filed a petition for appointment of a guardian for Michalak. Zagorski was, as a result, appointed guardian. It was then upon receiving notice in this capacity of a change in assessment on the house that Zagorski learned the house had been transferred into the trust.[57]

Proceedings were pursued in the probate court to determine the propriety of the trust. The GAL was directed to investigate and filed a report advocating that the trust be terminated because of undue influence on the part of the Kaletas.[58]

Zagorski filed a petition to amend the trust based on Michalak's diminished capacity at the time she signed the trust. A five day bench trial was held. Testimony showed that the Kaletas provided Michalak with assistance as neighbors. There was conflicting testimony, though very little of it, as to Michalak's capacity on the date she signed her trust. The trial court held that capacity at the time of signing was not the issue; rather, the issue was the guardian's request to amend the trust.[59]

The Kaletas argued that 755 ILCS 5/11a-18(a-5)(11), the section of the Probate Act that allows a guardian to amend a ward's estate plan, is effective only for amendments necessitated by changes in tax laws. The trial court rejected that argument and granted Zagorski's petition to amend the trust. Further, a request to seek a reverse mortgage against the house was granted.[60]

On appeal, Zagorski first argued the Kaletas had no standing to challenge the probate court order. It was argued that the interest of the Kaletas was contingent, thus depriving them of standing. The court concluded their interest was vested, as a vested remainder is one ready to

55. *In re* Estate of Michalak, 404 Ill. App. 3d 75, 934 N.E.2d 697 (1st Dist. 2010).
56. *Id.* at 78, 934 N.E.2d at 702–03.
57. *Id*. 78–79, 934 N.E.2d at 703.
58. *Id*. at 79, 934 N.E.2d at 703.
59. *Id*. at 80–82, 934 N.E.2d at 704–05.
60. *Id*. at 82, 934 N.E.2d at 706.

come into possession upon the termination of the prior estate. The Katetas' interest was to come upon Michalak's death. There was no condition precedent, and they had standing.[61]

The Kaletas asserted on appeal that 755 ILCS 5/11a-18(a-5)(11) does not permit the amendment. The parties referred to legislative intent and referred to legislative debates. The court found the legislative history unnecessary as the statute is clear and unambiguous in allowing modifications to wills and trusts for reasons beyond taxes.[62] The Kaletas also relied on the language of 755 ILCS 5/11a-18(d), which states that a guardian of the estate has no authority to revoke a revocable trust.[63] The court held that this would not preclude the GAL from seeking to revoke a trust, and it would not preclude the guardian of the estate from seeking to amend the trust.[64]

The Kaletas also argued on appeal that the trial court erred in re-appointing the GAL to investigate and report on the circumstances of the signing of the trust, while also criticizing the GAL for the improper exercise of her office. The appellate court held that the Probate Act specifically authorized periodic reports from the GAL and gave broad authority for the appointment of a GAL.[65]

Several items relating to procedure and testimony were also addressed on appeal. Among these, the Kaletas argued that they did not have an opportunity to cross-examine the GAL on issues addressed in her report, including hearsay that was included in the report. The court found no merit to these arguments. The court also noted that in issues concerning the welfare and best interest of a ward, proceedings are not adversarial. The GAL is to serve as the eyes and ears of the court and is an officer of the court.[66]

The Kaletas persisted in their argument that the broad authority given the GAL does not exclude GAL testimony and reports from the rules of evidence otherwise applicable in civil proceedings. The appellate court agreed with the trial court in finding exceptions to hearsay.[67] Regardless, admission of hearsay statements alone is not grounds for reversal if other testimony supports the decision. Any error here was harmless.[68]

The Kaletas' argument that the findings of the trial court were against the manifest weight of the evidence was rejected, as was the call for

---

61. *Id*. at 83–84, 934 N.E.2d at 707.
62. *Id*. at 84, 934 N.E.2d at 708.
63. *Id*. at 85, 934 N.E.2d at 708.
64. *Id*. at 86–87, 934 N.E.2d at 709.
65. *Id*. at 86–87, 934 N.E.2d at 709–10.
66. *Id*. at 88–90, 934 N.E.2d at 710–12.
67. *Id*. at 91–92, 934 N.E.2d at 713–14.
68. *Id*. at 95, 934 N.E.2d at 716.

reversing permission to seek a reverse mortgage. The trial court was affirmed.[69]

D. Wills, Trusts and Estates

1. Citizens National Bank of Paris v. Kids Hope United Inc.[70]

La Fern L. Blackman died in 1967. Her sister, Ettoile Davis, died in 1971. Each created a trust that benefited the Edgar County Children's Home (the "Home") with the distribution of income from farm real estate until the Home "should cease 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). Upon those conditions being met, Blackman stated that the trustee bank should instead pay the income to "such charitable organization or organizations as it deems worthy of said money." Davis provided that the income should instead go to three specific charitable organizations.[71]

The Home was founded in 1898 to "establish an institution for the education of dependent children of Edgar County, Illinois, and for the custody and maintenance of such children." In 1980, the Home "amended its articles of incorporation to allow it to become a residential placement resource for children throughout Illinois and to receive state funding."[72] In 2003, the Home merged with what is now Kids Hope United, Inc. The facility operated by the Home was closed and, in 2006, sold.[73]

The trustee bank filed a petition for instructions, seeking a determination that the gifts to the Home lapsed and the income of the trust should be distributed under the cy pres doctrine, as to the Blackman trust, and to the named beneficiaries, as to the Davis trust. Kids Hope argued that as the continuing entity following merger, it should continue to receive income from the trusts.[74]

The parties submitted an agreed statement of facts and filed cross-motions for summary judgment. The circuit court granted the bank's motion and denied Kids Hope's motion. The bank was directed to proceed with distributions to successor beneficiaries as set forth under the terms of each trust.[75]

---

69. *Id*. at 99, 934 N.E.2d at 719.
70. Citizens Nat'l Bank of Paris v. Kids Hope United Inc., 235 Ill.2d 565, 922 N.E.2d 1093 (2009).
71. *Id*. at 569, 922 N.E.2d at 1094–95.
72. *Id*. at 569, 922 N.E.2d at 1095.
73. *Id*. at 570, 922 N.E.2d at 1095.
74. *Id*. at 570–71, 922 N.E.2d at 1095–96.
75. *Id*. at 571–72, 922 N.E.2d at 1096.

On appeal, the Illinois Appellate Court for the Fourth District reversed the ruling of the trial court. The appellate court interpreted the Blackman trust's 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. The phrase in the trust was found to not refer to the Home's corporate status.[76]

With regard to the Davis trust, the appellate court found that nothing in the agreed statement of facts demonstrated that the charity ceased to function at the time of the merger in terms of the mission of the Home or upon the closing of the original building for the Home.[77]

On review, the Illinois Supreme Court found, for purposes of the Blackman trust, that while the Home ceased to exist as a corporate entity, the important issue to determine was the testator's intent. Therefore, the key question was whether the new corporation was no longer suited to carry out the purpose of the bequest.[78] The court concluded that the merger did not hinder Kids Hope's ability to carry out the purpose of Blackman's original bequest.[79] No conditions were imposed that the original facility operated by the Home must remain open, and no conditions were imposed that the Home serve only those in Edgar County. The Court noted the absence of such restrictions in the clause allowing the bank to select successor charities.[80]

While the Davis trust provided for income to the Home as long as it operated in its "present capacity," there was nothing in the agreed statement of facts to indicate anything about the operations of the Home at the time Davis signed her will that created the trust, or at the time of her death. The agreed statement of facts was thus insufficient to support the trial court's ruling that the Home had ceased to function in its "present capacity."[81]

Justice Karmeier dissented. The dissent begins, "It is often said that we live in a rootless society, but in rural Illinois counties and communities, 'place' still matters."[82] Going on to describe the culture of rural communities, especially at the time of Blackman and Davis, Karmeier concluded that they most surely intended to ensure local benefit. Kids Hope's mission goes beyond anything that Blackman and Davis would have imagined or intended.[83]

Lamenting that the phrases used in the trusts, "cease to operate or exist" and "cease to function in their present capacity" are no longer

---

76. *Id*. at 572, 922 N.E.2d at 1096.
77. *Id.* at 572–73, 922 N.E.2d at 1096–97.
78. *Id.* at 575, 922 N.E.2d at 1098.
79. *Id.* at 576, 922 N.E.2d at 1098.
80. *Id.* at 577, 922 N.E.2d at 1099.
81. *Id*. at 578–79, 922 N.E.2d at 1100.
82. *Id.* at 580, 922 N.E.2d at 1100 (Karmeier, J., dissenting).
83. *Id*. at 580, 922 N.E.2d at 1100–01 (Karmeier, J., dissenting).

phrases subject to their common understanding ("Now, when they do, they don't"), the dissent argued that the majority ignored the clearly discernable wishes of the sisters and substituted its judgment for theirs.[84]

2. In re Miller[85]

George and Eleanor Miller created living trusts in 1992. Upon George's death in 1995, the assets of his trust were distributed to Eleanor's trust. Upon Eleanor's death in 2002, her trust terminated.[86] Beneficiaries of the trust filed a complaint against the successor trustee alleging breach of fiduciary through waste and mismanagement. The beneficiaries asked for removal of the trustee and compensation from the trustee's share of the trust (the trustee was also a beneficiary). The trustee counterclaimed, seeking a declaratory judgment disinheriting the plaintiff beneficiaries pursuant to a no-contest clause in the trust.[87]

The trial court ruled in favor of the beneficiaries on the trustee's counterclaim and, for the most part, in favor of the trustee on the beneficiaries' claims. The cause was continued for trustee fee petitions and final accountings. After fee petitions were addressed and the final account was filed, the trial court granted the beneficiaries approximately thirty days to file exceptions to the account. Prior to this time expiring, the trustee filed a notice of appeal, and the beneficiaries filed a cross-appeal. The beneficiaries also responded to the final account, but the trial court found that it no longer had jurisdiction.[88]

The appellate court dismissed the appeals on motion of the beneficiaries. The trustee petitioned for re-hearing.[89] The appellate court concluded that to allow the trustee's appeal to proceed would be to encourage piecemeal litigation. There was no final judgment from which to appeal, with no applicable exceptions. The appeals were dismissed.[90]

3. Prignano v. Prignano[91]

George Prignano owned several businesses, including Sunrise Homes, with the defendant, his brother, Louis. George's wife, Nancy, alleged that George and Louis had an agreement that the survivor would, upon death,

---

84. *Id.* at 583, 922 N.E.2d at 1102 (Karmeier, J., dissenting).
85. *In re* Miller, 396 Ill. App. 3d 910, 920 N.E.2d 1123 (2d Dist. 2009).
86. *Id.* at 911, 920 N.E.2d at 1124.
87. *Id.* at 911–12, 920 N.E.2d at 1125.
88. *Id*. at 912–13, 920 N.E.2d at 1125.
89. *Id*. at 913, 920 N.E.2d at 1125–26.
90. *Id*. at 916, 920 N.E.2d at 1128–29.
91. Prignano v. Prignano, 405 Ill. App. 3d 801, 934 N.E.2d 89 (2d Dist. 2010).

buy the other's interest in the companies using proceeds of life insurance policies. George died in 2000, leaving a will that named Louis as his executor. Nancy claimed that Louis kept George's share of the businesses and the life insurance proceeds, contrary to these agreements. She filed a complaint against Louis on various legal theories. The trial court found in Nancy's favor and entered judgment against Louis for more than $615,000. Louis appealed.[92]

George's will left to Louis the "assets of" one of the businesses and any life insurance it may own. Nancy received fifty percent of the residue. George's children from a prior marriage shared twenty-five percent, and George's children with Nancy shared the other twenty-five percent.[93]

Testimony showed that there was no written buy-sell agreement signed while George was living. Louis and Nancy discussed using the life insurance proceeds to buy out George's share of the company, and Louis even prepared a buy-sell agreement after George's death, signed it, and had another person sign George's name to it. According to Nancy, she and Louis verbally agreed to the buy-sell arrangement. According to Louis, Nancy was also then to use proceeds paid to her to purchase back from the businesses a portion of her home property. George and Nancy had originally purchased the vacant lot from Sunrise Homes. Due to subdividing, a portion of their home property ended up still titled in the name of Sunrise Homes.[94]

While the insurance policies were purchased in the total amounts of $610,000, a dispute arose with the insurance company on one of the policies. As a result of a settlement made by Louis, the total paid out was $445,000. Louis did not tell Nancy that he received the proceeds.[95]

The estate was eventually closed with an accounting showing Louis received the businesses. Nancy did not object to the inventory of the estate or the final accounting. She believed that Louis had not yet received the insurance proceeds and that he would honor their verbal agreement. The home property was conveyed to her. When Nancy learned that Louis had received the insurance proceeds, she filed suit on her behalf and on behalf of her children. The case went to trial on theories of fraud, breach of fiduciary duty, breach of the oral contract between George and Louis, breach of the oral contract between Louis and Nancy, and unjust enrichment.[96]

---

92. *Id*. at 804, 934 N.E.2d at 95.
93. *Id*. at 806, 934 N.E.2d at 97.
94. *Id*. at 807, 934 N.E.2d at 97–98.
95. *Id*. at 807, 934 N.E.2d at 98.
96. *Id*. at 808, 934 N.E.2d at 98–99.

The trial court found in favor of Nancy on all claims except the fraud claim. Judgment was entered in favor of Nancy for $300,000 and in favor of two children in the amount of $75,000 each (one child had died and the award was to that child's estate). Nancy then sought pre-judgment interest, seeking leave to file an amended complaint. This request was granted, with interest of $162,431.50 being awarded.[97]

On appeal, Louis argued that the trial court erred in finding the brothers had an oral agreement and in finding the language of the will did not absolve him of duties regarding the insurance proceeds. The appellate court held that the evidence of an oral agreement was sufficient.[98] The court also held that while the will left the "assets of" one of the business to Louis, it did not leave him George's stock in that business. The stock of this and the other businesses were thus part of the residue of the estate going 50% to Nancy and 25% to her children. Louis listed the stock of one business on the final account as going to him and failed to list the others at all. In doing so, he breached his fiduciary duties to the beneficiaries of the estate.[99]

The appellate court also rejected Louis' argument that because Nancy did not object to the final account she waived her right to seek recovery of the insurance proceeds. His argument was based on the false premise that Nancy's only rights were under the will. This was a false premise because the appellate court also found that Louis breached fiduciary duties and the oral contract with Nancy. Even if the insurance proceeds were to pass to Louis under the will, he did not list them on the final account. There was thus no evidence that Nancy intentionally relinquished her right to the insurance proceeds.[100]

Louis claimed he should be entitled to a set-off for conveying the home property to Nancy. The appellate court agreed with the trial court that this transfer constituted a gift.[101]

The trial court was reversed on the unjust enrichment count. Since an oral agreement was found to exist, that was the source of Nancy's recovery. The award of prejudgment interest was affirmed.[102]

The judgment of the trial court was affirmed in all respects except as to the unjust enrichment count.[103]

---

97. *Id*. at 809, 934 N.E.2d at 99.
98. *Id*. at 809, 934 N.E.2d at 99–100.
99. *Id*. at 811, 934 N.E.2d at 100–01.
100. *Id*. at 819, 934 N.E.2d at 107.
101. *Id*. at 819, 934 N.E.2d at 107–08.
102. *Id*. at 819–20, 934 N.E.2d at 108.
103. *Id*. at 823, 934 N.E.2d at 110.

4. Dunn v. Patterson[104]

Attorney Lawrence Patterson prepared several estate planning documents for Charles and Charlotte Dunn, including a joint revocable trust, living wills and powers of attorney. Each document was dated June 12, 2006.[105] Each document included a provision that the documents could only be amended or revoked with Patterson's written consent or by order of the court. Patterson testified that he often included this type of provision in order to prevent elder abuse.[106]

On November 14, 2006, Patterson received a letter from another attorney informing him that the other attorney had been retained by the Dunns to modify the estate plan prepared by Patterson. The letter stated that they no longer wanted to include the provision requiring Patterson's consent to amend or revoke. Patterson responded by saying that the Dunns would need to meet with him so that he could determine whether the changes were consistent with their interests, or they could petition the court.[107]

On April 27, 2007, the Dunns brought suit against Patterson seeking a declaratory judgment that they had an absolute right to revoke or amend their estate planning documents and that Rule 1.2(a) of the Rules of Professional Conduct required Patterson to abide by their decisions. Patterson answered the complaint and filed an affirmative defense relying on the provision of the documents at issue.[108]

Patterson also responded in part by relying on Rules 1.14(a) and (b) of the Rules of Professional Conduct. He claimed he was concerned that Mrs. Patterson may have been impaired in her ability to make adequately considered decisions. He invoked the responsibility under Rule 1.14 to maintain a normal lawyer-client relationship and take protective action on her behalf.[109]

The trial court granted plaintiffs' motion for judgment on the pleadings, finding the revocation provisions to be contrary to public policy. Additionally, a motion for sanctions was granted against Patterson, with an award of $5,393.75 for attorney fees and costs.[110]

While the parties agreed that third party revocation consent provisions are generally valid, the plaintiffs argued that they are not valid when the attorney drafting the estate plan is named as the third party who can

---

104. Dunn v. Patterson, 395 Ill. App. 3d 914, 919 N.E.2d 404 (3d Dist. 2009).
105. *Id*. at 915, 919 N.E.2d at 406.
106. *Id*. at 916, 919 N.E.2d at 406–07.
107. *Id*. at 916–17, 919 N.E.2d at 407.
108. *Id*. at 917, 919 N.E.2d at 407.
109. *Id*. at 918, 919 N.E.2d at 408.
110. *Id*. at 918–19, 919 N.E.2d at 408–09.

consent. Patterson argued that an attorney may appropriately serve in this capacity and that this designation is consistent with the broad fiduciary duties owed to a client. The appellate court agreed, provided the attorney has no financial stake under the will. The provision does not violate public policy, and the trial court was reversed on this issue and on the issue of sanctions.[111]

The appellate court did note, however, that it felt Patterson "put himself in a tough and expensive position here."[112] He risked liability in just consenting without a meeting or verification, and he risked expense in obtaining a meeting or verification.[113]

5. A.B.A.T.E. of Illinois, Inc. v. Giannoulias[114]

Members of ABATE filed a class action suit against the governor, treasurer and comptroller of the State of Illinois, seeking to bar the transfer of funds from the Cycle Rider Safety Training (the "CRST") fund to the state's General Revenue Fund. The trial court granted summary judgment to the defendants and ABATE appealed.[115]

Among the arguments presented, plaintiff argued that general rules of trusts applied to the CRST fund. Plaintiff argued that the legislature was without the power to transfer funds under the general rule that the settler of a trust cannot modify or revoke a trust unless the power to do so is reserved in the trust agreement. The General Assembly did not reserve such powers in the legislation creating the fund.[116] While no Illinois courts had addressed this issue, the courts of two other states had rejected the argument set forth by plaintiff.[117]

In Illinois, the legislature is the sole authority for appropriation of funds of the state, and the transfer of money from one fund to the general revenue fund is generally within the province of the legislature as well. Since one legislature cannot bind a future legislature, the power to amend a trust is implicitly retained for future legislatures even when not specifically stated. Accordingly, the legislation creating the CRST fund did not create an irrevocable trust.[118]

---

111. *Id*. at 920–21, 919 N.E.2d at 409–10.
112. *Id.* at 923, 919 N.E.2d at 412.
113. *Id*.
114. A.B.A.T.E. of Ill., Inc. v. Giannoulias, 401 Ill. App. 3d 326, 929 N.E.2d 1188 (4th Dist. 2010).
115. *Id*. at 329–30, 919 N.E.2d at 1191–92.
116. *Id*. at 333, 919 N.E.2d at 1194.
117. *Id*.
118. *Id*. at 334, 919 N.E.2d at 1196.

The judgment of the trial court was affirmed.[119] A dissent was filed by Justice Appleton. The dissent argued that the legislation created an express trust in which all Illinois drivers have a beneficial interest. The State cannot take that interest without violating the takings clause of the Illinois Constitution. The transfer of CRST funds to the general revenue fund, it was argued, violated the takings clause. The dissent reviewed the elements necessary for creation of an express trust and found all to be present with the CRST fund.[120]

6. Dougherty v. Cole[121]

Jane Ann Cole died in 2008, at the hands of her son, Jack Cole, who had a severe manic episode. Jack's sister, Alycia, who was Jane's only other heir, was appointed administrator of Jane's estate. Jack was charged with murder in his mother's death but was found not guilty by reason of insanity.[122]

Alycia filed a complaint pursuant to the "Slayer Statute,"[123] seeking to bar Jack from taking one-half of Jane's assets. Jack's one-half would be approximately $114,000. Alycia also included a count for wrongful death, and another count for attachment of Jack's property. Alycia's position was that, in order to succeed on her complaint, the court need only find that Jack intentionally and unjustifiably caused Jane's death. Jack argued that the Slayer Statute does not apply to a criminally insane person and that no public policy would be furthered in barring him from inheriting. The trial court ruled in favor of Alycia on each count.[124]

The appellate court compared the current version of the Slayer Statute, enacted in 1983, with the original version that had been enacted in 1939. The original version barred a person convicted of murder from receiving an inheritance or legacy from the decedent. The 1983 version significantly broadened the statute in stating that anyone who intentionally and unjustifiably causes the death of the decedent shall not receive any property as a result of the decedent's death. The newer statute is broader in that it doesn't require a conviction and it covers any transfer of property as a result of decedent's death.[125]

The appellate court agreed with the ruling and reasoning of the trial court. Jack was cognizant of his acts and the consequences thereof. Jack

---

119. *Id*. at 336, 919 N.E.2d at 1197.
120. *Id*. at 336–40, 919 N.E.2d at 1197–1200.
121. Dougherty v. Cole, 401 Ill. App. 3d 341, 934 N.E.2d 16 (4th Dist. 2010).
122. *Id*. at 342, 934 N.E.2d at 18.
123. 755 ILL. COMP. STAT. 5/2-6 (2010).
124. *Dougherty*, 401 Ill. App. 3d at 342–43, 934 N.E.2d at 18.
125. *Id*. at 344–45, 934 N.E.2d at 19–20.

lacked the criminal intent, but there is no exception in the statute for mental illness. The appellate court held that Jack was barred by the Slayer Statute.[126] The court also held to existing law and affirmed the award under the Wrongful Death statute. The order of the trial court was affirmed.[127]

E. Miscellaneous

1. Carter v. SSC Odin Operating Co., LLC[128]

The special administrator of decedent's estate filed suit against defendant nursing home alleging violations of the Nursing Home Care Act and accompanying regulations. The complaint also alleged, in a wrongful death action, that the nursing home was negligent in causing decedent's death. Defendant answered the complaint and filed several affirmative defenses, including that the complaint was precluded by arbitration agreements signed by decedent and by plaintiff (then as decedent's legal representative). A motion to compel arbitration was also filed.[129]

The trial court denied the motion to compel, rendering its decision without an evidentiary hearing. The appellate court affirmed on a single issue, on the basis that the public policy in the Nursing Home Care Act was a state law contract defense applicable to all contracts and beyond the preemptive effect of the Federal Arbitration Act. This defense could void the arbitration agreements.[130]

Following a detailed analysis, the Illinois Supreme Court held that the public policy behind the anti-waiver provisions of the Nursing Home Care Act was not a generally applicable contract defense negating the preemption provisions of the Federal Arbitration Act.[131]

The Illinois Supreme Court reversed the judgment of the appellate court on the issue it addressed. The cause was remanded back to the appellate court so that it could review and decide issues not addressed in its first opinion.[132]

126. *Id*. at 347–48, 934 N.E.2d at 21–22.
127. *Id*. at 348–49, 934 N.E.2d at 22–23.
128. Carter v. SSC Odin Operating Co., 237 Ill.2d 30, 927 N.E.2d 1207 (2010).
129. *Id*. at 34–35, 927 N.E.2d at 1211–12.
130. *Id*. at 36–37, 927 N.E.2d at 1212–13.
131. *Id*. at 50–51, 927 N.E.2d at 1220.
132. *Id*. at 51, 927 N.E.2d at 1220.

2. Cwik v. Giannoulias[133]

A class action suit was filed against the Illinois State Treasurer and other state officials seeking recovery of interest earned by the state on property held by the state pursuant to the Uniform Disposition of Unclaimed Property Act.[134] The trial court denied defendants' motion to dismiss the complaint and then certified dispositive questions to the appellate court pursuant to Rule 308, including whether the retention of income is a taking for which just compensation is constitutionally due.[135] The appellate court determined that the retention of interest by the state "may" be a "taking" under section 15 of the Illinois Constitution of 1970 and the Fifth and Fourteenth amendments of the United States Constitution. The appellate court, however, determined that this was not a taking for which compensation would be allowed. An appeal to the Illinois Supreme Court followed.[136]

The Uniform Disposition of Unclaimed Property Act[137] was enacted in 1961 and created a presumption of abandonment as to certain neglected or unclaimed property. After owners of property left with various financial organizations, insurance companies, governmental authorities and others fail to claim or show an interest in the property for a statutorily prescribed period of time, the property must be remitted to the state treasurer. The treasurer must publish notice in a newspaper in an attempt to locate the owner. By statute, the owner is not then entitled to receive income or interest, other than income accruing on unliquidated stock and mutual funds.[138]

The majority of cases in other jurisdictions have found there to be no taking under similar statutes. The appellate court distinguished these decisions because those statutes treat the property as abandoned. The Illinois statute merely creates a presumption of abandonment with the state treasurer then holding the property for the owner, not taking title to it. The appellate court, however, also found no allegations in the pleadings that the funds at issue were earning interest at the time the state took custody of them. While the appellate court found a taking, no compensation was allowed on the basis of the lack of allegations.[139]

---

133. Cwik v. Giannoulias, 237 Ill.2d 409, 930 N.E.2d 990 (2010).
134. 765 ILL. COMP. STAT. 1025/1-30 (2010).
135. *Cwik*, 237 Ill.2d at 413–14, 930 N.E.2d at 992–93.
136. *Id.* at 414–16, 930 N.E.2d at 993–94.
137. 765 ILL. COMP. STAT. 1025/1-30 (2010).
138. *Cwik*, 237 Ill.2d at 411–13, 930 N.E.2d at 991–92; 765 ILL. COMP. STAT. 1025/11 (2010).
139. *Cwik*, 237 Ill.2d at 414–16, 930 N.E.2d at 993–94.

Relying on authority from other jurisdictions and prior Illinois cases, the Illinois Supreme Court found there to be no taking.[140] The turning over of property under the Act differs from those cases where property is "wrested from a vigilant and reluctant property owner, who was actively involved with its oversight or management, and who disputed the appropriation at the time of the alleged taking."[141] While the decision of the supreme court was not entirely consistent with the opinion of the appellate court, the supreme court may affirm on any basis supported by the record. The judgment of the appellate court was affirmed.[142]

3. Carlton at the Lake, Inc. v. Barber[143]

Suit was filed by the plaintiff, a long-term care facility, against a husband and wife for services provided to the husband during a stay at the facility. Plaintiff alleged a claim against the husband for breach of contract, against the wife for a claim pursuant to the Illinois Rights of Married Persons Act, and against both for quantum meruit. Defendants sought dismissal of the complaint. The trial court dismissed all counts against defendants. Plaintiff appealed.[144]

With regard to the breach of contract claim, wife was given a copy of the contract outlining costs and services, but the contract was never signed. Plaintiff argued that the contract was accepted upon admitting the husband to the facility, accepting services, and signing several other admission forms. The appellate court agreed that there was no contract in compliance with the Nursing Home Care Act. The Nursing Home Care Act represents public policy on the issue and a private agreement contrary to public policy cannot be enforced. The actual contract that would have complied with the Nursing Home Care Act was not signed. There was no enforceable contract and thus no breach of contract.[145]

Under the Illinois Rights of Married Persons Act, spouses are jointly liable for medical expenses of the other as family expenses. Under this Act, however, the liability of the wife for the expenses incurred by the husband while at the facility was dependent on the husband's underlying liability. Because the husband was not liable for breach of contract, the wife was likewise not liable.[146]

---

140. *Id*. at 416–24, 930 N.E.2d at 994–98.
141. *Id*. at 422–23, 930 N.E.2d at 998.
142. *Id*. at 424, 930 N.E.2d at 998.
143. Carlton at the Lake, Inc. v. Barber, 401 Ill. App. 3d 528, 928 N.E.2d 1266 (1st Dist. 2010).
144. *Id*. at 529, 928 N.E.2d at 1268–69.
145. *Id*. at 531–33, 928 N.E.2d at 1270–71.
146. *Id*. at 533, 928 N.E.2d at 1272.

No prior Illinois appellate court has addressed what impact, if any, a violation of the Nursing Home Care Act has on the rights of a nursing home to recover in equity pursuant to a quantum meruit theory. Relying on prior cases for a general proposition, the trial court found that quantum meruit is not available when the underlying contract is unenforceable on the basis of public policy. Plaintiff agreed that when the subject matter of the contract is against public policy, this general rule applies. Plaintiff argued, however, that quantum meruit is an available remedy when the contract is unenforceable due to public policy on an issue of formation or execution of the contract.[147]

The appellate court held that common law rights, such as quantum meruit, are in full force unless specifically repealed by the legislature or modified by decisions of the courts. The Nursing Home Care Act does not clearly express a legislative intent to limit a nursing home's right to recover under common law theories, and allowing the quantum meruit claim to proceed will not defeat the purposes of the Act. Further, allowing the claim to proceed will not subject the defendants to unnecessarily harsh contract terms; recovery is only allowed to the extent necessary to prevent an unjust enrichment.[148]

The trial court was affirmed as to the issues of breach of contract and liability under the Illinois Rights of Married Persons Act. The trial court was reversed as to its ruling on the quantum meruit theory of recover.[149]

IV. LEGISLATIVE UPDATES

This section summarizes and describes the new legislation impacting the Elder Law practitioner from the information provided at the official website of the Illinois General Assembly. For further information or for the exact language of the legislation, visit www.ilga.gov.[150]

Public Act 96-0968: Surviving Spouse Award

This legislation amended the Probate Act of 1975, at 755 ILCS 5/15-1, 15-2, and 25-1. It provides that the minimum surviving spouse award is now $20,000 (increased from $10,000) with an additional minimum award of $10,000 (increased from $5,000) for a surviving minor child or an adult

147. *Id*. at 534, 928 N.E.2d at 1272–73.
148. *Id*. at 534–36, 928 N.E.2d at 1273–74.
149. *Id*. at 536, 928 N.E.2d at 1274.
150. Ill. Gen. Assembly, http://www.ilga.gov (click "Public Acts"; click "Public Acts/Leg. From Previous General Assemblies"; select "96 (2009-2010)" General Assembly; click "Go!") (last visited April 12, 2011) (the summaries, text and procedural history of individual public acts at the Illinois General Assembly).

dependent child. It also makes corresponding changes to the small estate affidavit provisions.

The act became effective on July 2, 2010.

Public Act 96-0980: Trusts and Trustees Act

This legislation amended the Trusts and Trustees Act by adding a new section at 755 ILCS 5/16.2. It provides that a trust beneficiary may not be considered a settlor or to have made a transfer to the trust only on the basis of a lapse, release, or waiver of his or her power of withdrawal, to the extent the value of the affected property does not exceed amounts specified in the Internal Revenue Code.

The new act took effect on July 2, 2010.

Public Act 96-0981: Probate Act Attorney Fees

This legislation amended the Probate Act of 1975, at 755 ILCS 5/27-2. It provides that an attorney for a representative is entitled to reasonable compensation for the attorney's services and that an attorney who withdraws from representing a representative must file a petition for fees and costs within thirty days after the court approves the attorney's withdrawal from representation. The statute previously stated that an attorney for a representative is entitled to reasonable compensation for the attorney's services.

If, within thirty days after the court approves the withdrawal of an attorney from representing a representative, a motion is filed for an extension of time for the filing of a petition for fees and costs, the court may grant additional time for the filing of that petition.

The act became effective July 2, 2010.

Public Act 96-1052: Guardianship Fees

This legislation amended the Probate Act of 1975, at 755 ILCS 5/11a-10. In cases where the Department of Human Services' Office of Inspector General is the petitioner in a guardianship action, consistent with provisions of the Abuse of Adults with Disabilities Intervention Act, no guardian ad litem or legal fees shall be assessed against the Department of Human Services' Office of Inspector General.

The act became effective July 14, 2010.

Public Act 96-1103: Elder Financial Exploitation

This legislation amended the Elder Abuse and Neglect Act by adding new language to 320 ILCS 20/3.5. The legislation, which originally started as a mandatory elder abuse reporting requirement for bank employees, was amended to become a mandate for training on financial exploitation for bank employees. It made the Department on Aging responsible for working with the Department of Financial and Professional Regulation to develop joint rulemaking for minimum training standards which would be used by financial institutions for their current and new employees with direct customer contact.

In addition, the Department of Financial and Professional Regulation is required to provide bi-annual reports to the Department on Aging on the implementation of the required training programs.

The act became effective July 19, 2010. As of the time of this writing, the rulemaking is being developed.[151]

Public Act 96-1145: Real Property

This legislation amended the Code of Civil Procedure, at 735 ILCS 5/12-112. The new legislation provides that any real property, any beneficial interest in a land trust, or any interest in real property held in a revocable inter vivos trust created for estate planning purposes, held in tenancy by the entirety, shall not be liable to be sold upon judgment.

This legislation also amended the Joint Tenancy Act, at 765 ILCS 1005/1c, to provide that the resultant estate created is deemed to be a tenancy by the entirety where the homestead is held in the name or names of a trustee or trustees of a revocable inter vivos trust, or of revocable inter vivos trusts made by the settlors of the trust or trusts who are husband and wife, and the husband and wife are the primary beneficiaries of one or both of the trusts, when the deed or deeds conveying title to the homestead to the trustee or trustees of the trust or trusts specifically state that the interests of the husband and wife to the homestead property are to be held as tenants by the entirety.

The new act became effective January 1, 2011.

---

151. Financial Exploitation Training by Financial Institutions, 35 Ill. Reg. 324 (Jan. 7, 2011) (to be codified at ILL. ADMIN. CODE tit. 89, § 271 (2010)).

Public Act 96-1195: Power of Attorney Act

This new act makes significant changes to the Illinois Power of Attorney Act.[152] The legislation was the culmination of a project initiated by the Elder Law Section Council of the Illinois State Bar Association, after working closely with the Trusts and Estates Section Council of the Illinois State Bar Association, the AARP, and other groups. The revisions were designed to clarify existing ambiguities and create better protections from neglect and financial exploitation by incompetent or malicious agents.

The new act incorporates a number of changes, both substantive and stylistic, to the Power of Attorney Act and the included statutory forms. The new act creates a form to be used for the agent's certification and acceptance of authority. There are also provisions relating to co-agents and successor agents. The act sets forth requirements, including acknowledgement of the principal's signature, for non-statutory forms.

An explanatory notice page is now part of the statutory form. The act provides for a "Notice to Agent" form that describes the agent's duties. To clarify and update the current statutory language, the act defines "incurable or irreversible medical condition," "permanent unconsciousness," and "terminal condition." The legislation also adds provisions relating to the agent's power to authorize an autopsy, direct the disposition of remains, and make anatomical gifts; those decisions are made binding.

The act provides that signing the power of attorney authorizes physicians, health care providers, insurance companies, and others to disclose the principal's confidential health care information to the designated agent, and supersedes any contrary agreement with the health care provider. The act grants the agent power to use and disclose individually identifiable health information and confidential medical records covered by HIPAA and other confidentiality statutes. It provides that the agent's powers to obtain, use, and disclose that confidential information takes effect upon signing the form, even before the agency itself takes effect, and does not expire unless specifically revoked in a writing delivered to the health care provider.

Finally, the new act includes a savings provision; any previously executed forms continue to be valid, even if they no longer match the newer requirements.

The new act becomes effective July 1, 2011.

---

152. 755 ILL. COMP. STAT. 45/1–1 (2010).

Public Act 96-1259: Nursing Home Care Vaccinations

This legislation amended the Nursing Home Care Act, at 210 ILCS 45/2–213, requiring all persons seeking admission to a nursing facility to be verbally screened for risk factors associated with hepatitis B, hepatitis C, and the Human Immunodeficiency Virus ("HIV"). The risk factors used are those guidelines established by the United States Centers for Disease Control and Prevention.

Persons identified as being at high risk for (but not known to be infected with) hepatitis B, hepatitis C, or HIV will be offered an opportunity to undergo laboratory testing if they are to be admitted to the nursing facility for at least seven days. All persons determined to be susceptible to the hepatitis B virus would be offered immunization within ten days of admission to any nursing facility.

Nursing facilities are required to document a resident's screening for risk factors associated with these three diseases, and whether or not the resident was immunized against hepatitis B. Nursing facilities licensed or regulated by the Illinois Department of Veterans' Affairs are exempt from this act.

This act became effective January 1, 2011.

Public Act 96-1357: Mental Health Code

This legislation amended the Mental Health and Developmental Disabilities Code at 405 ILCS 5/1-122. It expanded the list of professionals defined as a "qualified examiner" to include a licensed marriage and family therapist with a masters or doctoral degree in marriage and family therapy. The act requires the degree be from certain accredited educational institutions, and the professional have at least three years of specified experience. The bill also added an amendment to the Smoke Free Illinois Act.[153]

The law was effective January 1, 2011.

Public Act 96-1372: Nursing Home Safety Bill

One of the most significant pieces of nursing home reform legislation in recent years was passed and signed into law by the Governor on July 29, 2010, as Public Act 96-1372. This piece of legislation came about largely because of a series of articles in the *Chicago Tribune* the prior fall. The articles detailed the danger to older, frailer, and more vulnerable residents

153. 410 ILL. COMP. STAT. 82/35 (2010).

in long term care facilities from those who were generally younger and stronger, and who often were convicted felons and sexual predators. As a result, on October 3, 2009, Governor Pat Quinn appointed a blue-ribbon panel to look into the issue and recommend legislative and regulatory fixes.[154]

The Nursing Home Safety Task Force subsequently held public hearings, took testimony from citizens and advocates, and, on February 19, 2010, submitted a report to the Governor. The Task Force report detailed over two dozen legislative, administrative and regulatory recommendations.[155]

After considerable negotiations, the agreed upon legislative package was placed into Senate Bill 326 by House Floor Amendment No. 1, on May 6, 2010. As the legislative session was ticking to a close, the bill passed the House, the Senate quickly concurred with the amendments, and the bill was sent to the Governor. On July 29, 2010, the bill was signed into law.

The entire package of changes included in Public Act 96–1372 is complex and extensive. The legislation amended the Illinois Act on Aging,[156] the Illinois Health Facilities Planning Act,[157] the State Finance Act,[158] the Nursing Home Care Act,[159] and the Illinois Public Aid Code,[160] amongst others.

The critical elements included changes to the law to allow screening of long term care residents prior to admission, criminal history checks on the transfer of certain patients into nursing homes, certification of behavioral management units, and more comprehensive resident care plans.

The effective date of the legislation was July 29, 2010.

Public Act 96-1399: Mental Health Code

This lengthy new law amended the Mental Health and Developmental Disabilities Code[161] and the Mental Health and Developmental Disabilities Confidentiality Act.[162] The bill underwent extensive amendments in both the Senate and the House as it went through the legislative process.

---

154. *See Nursing Home Safety*, CHICAGO TRIBUNE, http://www.chicagotribune.com/news/watchdog/nursinghomes (last visited April 12, 2011).
155. *See* NURSING HOME SAFETY TASK FORCE, http://www.nursinghomesafety.illinois.gov (last visited April 12, 2011) (contains a list of the members of the Task Force, the reports of the public hearings, and a copy of the final report submitted to the Governor).
156. 20 ILL. COMP. STAT. 105/1 (2010).
157. 20 ILL. COMP. STAT. 3960/1 (2010).
158. 30 ILL. COMP. STAT. 105/1 (2010).
159. 210 ILL. COMP. STAT. 45/1-101 (2010).
160. 305 ILL. COMP. STAT. 5/1-1 (2010).
161. 405 ILL. COMP. STAT. 5/1-100 (2010).
162. 740 ILL. COMP. STAT. 110/1 (2010).

Both acts had multiple sections amended. Changes were made to existing provisions regarding "involuntary admission on an inpatient basis" and "involuntary admission on an inpatient or outpatient basis."

The act also adds provisions under which a person eighteen years of age or older may be found by a court to be subject to involuntary admission on an outpatient basis and may receive alternative treatment in the community or may be placed in the care and custody of a relative or other person.

The law also makes various changes regarding definitions, court hearings, discharge, restoration, transfer, persons who are entitled to inspect and copy an admitted person's mental health records, and the agencies that may disclose a person's mental health records.

The new law repeals certain provisions concerning dangerous conduct, examination and detention, and the duration and contents of certain orders.

The act became effective July 29, 2010.

Public Act 96-1428: Confidential Information in Meetings of Elder Abuse Review Teams

This legislation amended the Open Meetings Act at 5 ILCS 120/2, authorizing an elder abuse fatality review team to hold a closed meeting to consider confidential information relating to the death of a senior. Elder abuse fatality review teams are composed of law enforcement officers, coroners, and elder abuse caseworkers, who regularly review suspicious deaths of individual seniors to determine if elder abuse or neglect may be involved.[163] The review team member seeking to present the information in closed sessions must state on the record in the public portion of the meeting the nature of the information and the legal basis for otherwise holding the information confidential.

The new act became effective August 11, 2010.

State Regulations

Finally, it should be noted that the long anticipated state regulations for the implementation of the federal Deficit Reduction Act of 2005[164] (the "DRA") have finally been promulgated by the Illinois Department of Healthcare and Family Services. The final version has, as of the date of this writing, not been approved, so Illinois still waits to be one of the last states

163. 320 ILL. COMP. STAT. 20/15(b) (2010).

164. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).

to implement provisions of the DRA. First passed on February 8, 2006, and initially expected to bring quick revisions to the Illinois Medicaid rules, the DRA will most certainly bring about changes to how the Elder Law practitioner assists clients in planning for Medicaid eligibility.

Because these changes will arrive, the suggestion here is to look at the changes as an opportunity. Knowing the new rules, and learning them quickly, will allow you to better serve your clients. Quickly adapting your practice in light of new Medicaid rules will give you a professional advantage. Now, more than ever, your clients will need your sage advice. 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.[165]

V. ILLINOIS RULES OF PROFESSIONAL CONDUCT

New Illinois Rule of Professional Conduct 1.14, Client with Diminished Capacity, including its ten amplifying Comments, may have come just in time to assist Illinois Elder Law attorneys in best serving their clientele. For years we have been hearing about the big boomer bulge coming into their senior years. They are finally here. At the same time, Americans have been living longer. These two factors portend much greater odds that the clients coming into the offices of Elder Law attorneys, and those already there, will have diminishing capacity of some nature. To a greater or lesser degree it is a fact of aging.

Even before adoption of the new Rules, effective January 1, 2010, lawyers were admonished by the prior Rules of Professional Conduct to "as far as possible, maintain a normal client-lawyer relationship" with their clients under a disability. This, of course, accords with the Elder Law attorney's over-arching goal: to facilitate the client's desire to maintain maximum independence. With some wordsmithing, changing "under disability" to "with diminished capacity," the admonishment remains identical in the current rule. The difference now is that we are given some permission to seek outside help when we reasonably believe a client has diminished capacity, in order to determine the parameters of the appropriate "normal client-lawyer relationship." This tool was not available under the prior Rule 1.14 and therein referenced prior Rule 1.6.

Like the old Rules, as to "under disability," the current Terminology section in Rule 1.0 does not attempt to define "diminished capacity." Perhaps it is thought to be like Justice Potter Stewart's "obscenity" in his

---

165. *See* KAISER COMM'N ON MEDICAID & THE UNINSURED, DEFICIT REDUCTION ACT OF 2005: IMPLICATIONS FOR MEDICAID (2006), *available at* http://kff.org/medicaid/upload/7465.pdf.

concurring opinion to *Jacobelis v. Ohio*: we are expected to know it when we see it.[166] Any lawyer who has dealt with aging clients knows it is more complex than that. Losing capacity is a dynamic process—a work in progress, difficult to discern the extent of progression at any particular moment. It is, however, this very extent that lawyers must discern in determining how normal the client-lawyer relationship can be, and if it can exist at all.

Fortunately, without returning to the halls of ivy to acquire a graduate degree in psychology, more help is available for the conscientious Elder Law attorney. A joint product of the American Bar Association's Commission on Law and Aging and the American Psychological Association: *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* is available to flesh out the nuances of diminished capacity. It can help attorneys reach a reasonable belief about whether the client has diminished capacity, the qualitative nature of it and the lawyer's appropriate response. This Handbook was developed in the environment of and with frequent references to the 2002 revision of the ABA Model Rules of Professional Conduct, containing Rule 1.14 in the identical form now effective in Illinois.

The Handbook represents the first work product of the ABA/APA Assessment of Capacity in Older Adults Project Working Group formed in 2003. In its Executive Summary the publication states its intention to offer "ideas for effective practices" and make "suggestions for attorneys who wish to balance the competing goals of autonomy and protection as they confront the challenges of working with older adults with diminished capacity." It does this through discussion of the following sixteen key questions:

1. What are legal standards of diminished capacity?
2. What are clinical models of capacity?
3. What signs of diminished capacity should a lawyer be observing?
4. What mitigating factors should a lawyer take into account?
5. What legal elements should a lawyer consider?
6. What factors from ethical rules should a lawyer consider?
7. How might a lawyer categorize judgments about client capacity?

166. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

8. Should a lawyer use formal clinical assessment instruments?

9. What techniques can lawyers use to enhance client capacity?

10. What are the pros and cons of seeking an opinion of a clinician?

11. What if a client's ability to consent to a referral is unclear?

12. What are the benefits for the lawyer of a private consultation with a clinician?

13. How can a lawyer identify an appropriate clinician to make a capacity assessment?

14. What information should a lawyer provide to a clinician in making a referral?

15. What information should the lawyer look for in an assessment report?

16. How does a clinical capacity evaluation relate to the lawyer's judgment of capacity?

In the seven chapters that follow, there are substantive discussions of all of the questions, many of which Elder Law attorneys have faced with a paucity of help. In addition to the discussions there are four helpful appendices, the first of which is a one page roadmap of the lawyer's decision-making process regarding diminished capacity, entitled *Capacity Assessment Algorithm for Lawyers*.

The ten Comments to Rule 1.14, included in the 2002 version of the ABA Model Rules and now adopted in Illinois, while not defining diminished capacity, do facilitate the lawyer's processes toward maintaining the normal client-lawyer relationship. Comment 6, referred to in the Handbook, enumerates factors the lawyer should observe and balance in arriving at the client's capacity.

The Handbook contains a Capacity Worksheet for Lawyers. It is part of a chapter entitled *Lawyer Assessment of Capacity* and is intended for use either as a note-taking device for the client interview or to be completed immediately after the interview. Completing the worksheet is pictured as blending in naturally with the case interview process. The discussion suggests that every potential representation implicitly involves the lawyer's decision whether the prospective client possesses the capacity to enter into or continue in the client-attorney relationship and, if so, assessment of the presence of such additional capacity as might be required to carry out the

specific legal transaction contemplated. The worksheet assists the lawyer in deciding whether there are any diminished capacity problems and, if so, the impact upon the representation. It forms the basis and supportive information for any clinical consultation or assessment that may seem called for—the reasonable belief of Rule 1.14. It may also suggest to the lawyer some things she or he might set in motion to ameliorate remediable problems so that the representation may move forward as requested by the client. This would, of course, work in the direction of maintaining the normal client-lawyer relationship urged by Rule 1.14.

As the senior population swells, both from the aging of Boomers and from Americans just living longer, the likelihood that Elder Law attorneys will deal with greater numbers of clients with diminished capacity increases. New Rule 1.14 and the ABA/APA Handbook for Lawyers can work together to better maintain the normal client-lawyer relationship. In the bargain, our clients will retain precious maximum independence.