

# SURVEY OF ILLINOIS LAW: ELDER LAW

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## I. INTRODUCTION

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<sup>\*\*</sup> 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.

<sup>\*\*\*</sup> Graduated from St. Louis University School of Law in 1987 where she was also an editor on its law journal; received her M.P.A. from Southern Illinois University at Edwardsville in Public Administration and her B.S. in Political Science from Frostburg State University in Maryland. Ms. Vetri has been a member of the National Academy of Elder Law Attorneys (NAELA) since 1999 and a Director on its national board since 2009 and is the Editor in Chief of NAELA News. She is licensed in both Illinois and South Dakota. She sits on the Elder Law Section Council and the Public Relations Standing Committee of the Illinois State Bar Association, is a founding member of the Elder Law Committee of the South Dakota Bar. She lectures on a variety of Elder Law topics throughout the United States, makes frequent guest appearances on radio, and has authored numerous articles. She is an adjunct professor of law at John Marshall Law School in Chicago. Her public policy background includes local politics where she has held a variety of positions over 20 years that included Alderman, Mayor and Township Supervisor.

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

The past year again brought about new cases and new statutes for the Elder Law practitioner. Perhaps of more significance, though, are the new administrative rules implementing the Deficit Reduction Act of 2005 (“DRA”). These new rules have the potential to significantly impact the practice of Elder Law to an extent not seen in Illinois for some time. What follows, then, is a summary of the rules, the cases, the statutes and more.<sup>1</sup>

The material here is organized with a desk reference of numbers and statistics for 2012 included in Section II. A sample of cases of interest to the Elder Law practitioner is presented in Section III. Legislative updates are presented in Section IV, and a summary of the DRA follows in Section V.

## II. ELDER LAW DESK REFERENCE

### A. 2012 Medicare Figures<sup>2</sup>

Part A deductible per benefit period: \$1,156

Part A daily coinsurance, days 61 through 90 (per benefit period): \$289 per day

Part A daily coinsurance, 60 lifetime reserve days: \$578 per day

Part A daily coinsurance, days 21 through 100 in skilled nursing facility (benefit period): \$144.50 per day

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

Part A reduced monthly premium (for voluntary enrollees who have 29 or fewer quarters of coverage): \$451

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<sup>1</sup> Portions of this article are adapted from the written material prepared by Martin W. Siemer for the 7<sup>th</sup> Annual Elder Law Short Course, presented by the Illinois Institute of Continuing Legal Education.

<sup>2</sup> The information regarding Medicare is summarized from the official Medicare website, [www.medicare.gov](http://www.medicare.gov).

Part B standard monthly premium: \$99.90

Part B monthly premium if filing individual tax returns:

\$ 99.90 (up to \$85,000 in AGI)  
\$139.90 (\$85,001 to \$107,000 in AGI)  
\$199.80 (\$107,001 to \$160,000 in AGI)  
\$259.70 (\$160,001 to \$214,000 in AGI)  
\$319.70 (over \$214,000 in AGI)

Part B monthly premium if filing joint tax returns:

\$ 99.90 (up to \$170,000 in AGI)  
\$139.90 (\$170,001 to \$214,000 in AGI)  
\$199.80 (\$214,001 to \$320,000 in AGI)  
\$259.70 (\$320,001 to \$428,000 in AGI)  
\$319.70 (over \$428,000 in AGI)

Part B monthly premium if married filing separate tax returns:

\$ 99.90 (up to \$85,000 in AGI)  
\$259.70 (\$85,001 to \$129,000 in AGI)  
\$319.70 (over \$129,000 in AGI)

Part B yearly deductible: \$140

Part D enrollment period: October 15, 2011 through December 7, 2011

Part D income-related monthly adjustment amount if filing individual tax returns:

\$ 0.00 (up to \$85,000 in AGI)  
\$11.60 (\$85,001 to \$107,000 in AGI)  
\$29.90 (\$107,001 to \$160,000 in AGI)  
\$48.10 (\$160,001 to \$214,000 in AGI)  
\$66.40 (over \$214,000 in AGI)

Part D income-related monthly adjustment amount if filing joint tax returns:

\$ 0.00 (up to \$170,000 in AGI)  
\$11.60 (\$170,001 to \$214,000 in AGI)  
\$29.90 (\$214,001 to \$320,000 in AGI)  
\$48.10 (\$320,001 to \$428,000 in AGI)  
\$66.40 (over \$428,000 in AGI)

Part D income-related monthly adjustment amount if married filing separate tax returns:

\$ 0.00 (up to \$85,000 in AGI)  
 \$48.10 (\$85,001 to \$129,000 in AGI)  
 \$66.40 (over \$129,000 in AGI)

B. Federal Poverty Income Limits<sup>3</sup>

<u>Persons in family unit</u>	<u>Poverty Limit</u>
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.  
 Income limits may be updated in early 2012.

C. Medicaid Limits<sup>4</sup>

Community Spouse Asset Allowance:

2011 – \$109,560  
 2012 – \$113,640

Community Spouse Maintenance Needs Allowance:

2011 – \$2,739  
 2012 – \$2,841

Home Equity Limits:

Minimum – \$525,000  
 Maximum – \$786,000

<sup>3</sup> *Federal Register*, Vol. 76, No. 13, January 20, 2011, pp. 3637–3638.

<sup>4</sup> The information regarding Medicaid is summarized from the Illinois Medicaid Policy Manual, found online at [www.dhs.state.il.us/page.aspx?item=13473](http://www.dhs.state.il.us/page.aspx?item=13473).

Current web address for Policy Manual and Workers Action Guide:

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

Irrevocable Prepaid Burial Expense Limit:

\$5,703, effective September 1, 2010

\$5,874, effective September 1, 2011

#### D. Maximum Deductions for Qualified Long Term Care Insurance Premiums<sup>5</sup>

<u>Attained Age before the close of the tax year</u>	<u>Maximum Deduction</u>
40 or less	\$ 350
More than 40 but not more than 50	\$ 660
More than 50 but not more than 60	\$1,310
More than 60 but not more than 70	\$3,500
More than 70	\$4,370

#### E. Estate and Gift Tax Exclusions

The basic estate tax exclusion amount for the estates of decedents dying in 2012 will be \$5,120,000, up from \$5,000,000 for calendar year 2011.<sup>6</sup>

The annual gift tax exclusion remains at \$13,000 per person per year for 2012.<sup>7</sup>

### III. CASES

#### A. Medicaid

##### *McDonald v. Illinois Department of Human Services*<sup>8</sup>

Brian McDonald filed an application for Medicaid long-term care benefits on behalf of his mother, Betty McDonald.<sup>9</sup> The application was

<sup>5</sup> Rev. Proc. 2011-52, §3.21, November 7, 2011.

<sup>6</sup> Rev. Proc. 2011-52, §3.29, November 7, 2011.

<sup>7</sup> Rev. Proc. 2011-52, §3.31, November 7, 2011.

<sup>8</sup> *McDonald v. Ill. Dep't of Human Servs.*, 406 Ill. App. 3d 792, 952 N.E.2d 21(4th Dist. 2011).

<sup>9</sup> *Id.* at 793, 952 N.E.2d at 23

eventually approved by the Department of Human Services, subject to a 17 month penalty imposed due to nonallowable transfers.<sup>10</sup>

Betty resided in a nursing home beginning in June 2006. For every month from June 2006 through December 2006, she received social security of \$1,542.01, with an increase to \$1,583.44 as of January 2007.<sup>11</sup> For every month from June 2006 through June 2007, Betty made gifts by check each month to one of her children, each check being marked either as “gift of assets” or “gift of income” in the memorandum line.<sup>12</sup> The gifts of assets were in the amount of \$7,500 from June 2006 through August 2006 and \$7,800 from September 2006 through June 2007.<sup>13</sup> The gifts of income were in the amount of \$1,542.01 from June 2006 through December 2006 and \$1,583.44 from January 2007 through June 2007.<sup>14</sup>

Brian administratively appealed the portion of the penalty period imposed for the gifts of income.<sup>15</sup> The Department’s decision was upheld by an administrative law judge.<sup>16</sup> Brian then filed an administrative review action in the circuit court on Betty’s behalf.<sup>17</sup> The circuit court reversed and remanded with directions to exclude from the amount of monthly transfer calculations the amount of all income transferred in the same month.<sup>18</sup> The Department appealed.<sup>19</sup>

Both in the circuit court and in the appellate court, Brian argued that the provisions of Section 07-02-06-a of the Department’s Medicaid Policy Manual controlled in stating that money “considered as income for a month is not an asset for the same month.”<sup>20</sup> Thus, he argued, any income transferred in the month of receipt never became an asset and could not be subject to a penalty for the transfer of an asset.<sup>21</sup>

It was further argued that, even if the transfer of the income in month of receipt was subject to the asset transfer rules, the Department was estopped from imposing a penalty under these circumstances.<sup>22</sup> In support of the estoppel argument, Brian relied on a letter written by the chief of the bureau of policy development for the Department of Public Aid (considered the predecessor to the Department).<sup>23</sup> This letter was addressed in January

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<sup>10</sup> *Id.* at 795, 952 N.E.2d at 24.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 795, 952 N.E.2d at 24-25.

<sup>19</sup> *Id.* at 795, 952 N.E.2d at 25.

<sup>20</sup> *Id.* at 800, 952 N.E.2d at 28.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* 802, 952 N.E.2d at 30.

<sup>23</sup> *Id.*

2001 to a person, Joe Oettel, apparently not affiliated with Betty or Brian.<sup>24</sup> The letter specifically addresses the transfer of income in the month of receipt and states that such transfers are “not subject to the transfer of asset policy.”<sup>25</sup> Brian argued that as a statement of the Department’s interpretation of Medicaid law, the Department could not deviate from this interpretation and impose a penalty for Betty’s gifts of income.<sup>26</sup>

The Department argued on appeal that both federal and state law included income within the definition of an asset for purposes of the transfer penalties.<sup>27</sup> Thus, it was argued, the Department was required to impose the penalty.<sup>28</sup>

On review, the circuit court ruling was considered *de novo*.<sup>29</sup> However, consistent with administrative law, the Department’s interpretation of their own rules and regulations enjoy a presumption of validity.<sup>30</sup>

The appellate court agreed with the Department, reversed the circuit court and affirmed the administrative decision imposing the full 17 month penalty.<sup>31</sup> The appellate court agreed that federal law includes income within the definition of an asset for transfer purposes. 42 U.S.C. §1396p(h)(1).<sup>32</sup> States are required to implement and enforce the asset transfer policies of the federal law.<sup>33</sup> Illinois statutes and administrative rules likewise consistently impose transfer penalties for the transfer of any interest in either real or personal property for less than actual value, with personal property defined to include income.<sup>34</sup> Section 07-02-20 of the Department’s Policy Manual likewise refers to imposition of a penalty for the transfer of real or personal property, with personal property defined as “anything that is not land or permanently affixed to land.”<sup>35</sup>

In response to this argument and analysis, Brian relied on the provisions of Section 07-02-06-a of the Department’s Policy Manual, which states that income for a month is not an asset for that same month.<sup>36</sup> The court distinguished this provision as applying to determine the extent to which an applicant must spend down excess assets or income for

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<sup>24</sup> *Id.* at 796, 952 N.E.2d at 25.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 804, 952 N.E.2d at 31.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 797, 952 N.E.2d at 26.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 804, 952 N.E.2d at 31.

<sup>32</sup> *Id.* at 798, 952 N.E.2d at 27.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 800, 952 N.E.2d at 28.

<sup>36</sup> *Id.* at 801, 952 N.E.2d at 30.

eligibility.<sup>37</sup> Thus, this section of the Policy Manual was irrelevant to the transfer penalty calculation.<sup>38</sup>

The court also concluded that, even if Brian were correct in saying that income is not an asset for transfer penalty purposes, both federal and state provisions include within the definition of a transfer any action that would cause an asset to not be received.<sup>39</sup> If the income were not transferred in the month of receipt, it would become an asset under the provisions of the Policy Manual.<sup>40</sup> By transferring the income, then, Brian caused an asset to not be received and a transfer subject to a penalty has still been made.<sup>41</sup>

The court also rejected Brian's estoppel argument.<sup>42</sup> While the doctrine of equitable estoppel may generally be invoked whenever a party reasonably and detrimentally relies on the words or conduct of another, public policy disfavors application of this doctrine to bar state action.<sup>43</sup> There is no estoppel against the state unless necessary to prevent fraud and injustice or unless the state itself induced the detrimental action.<sup>44</sup> Action of the "state" must generally be action of the legislature and not of a ministerial officer.<sup>45</sup>

The appellate court held that the January 2001 letter did not support application of the estoppel doctrine.<sup>46</sup> No fraud or injustice resulted from imposition of the penalty period; penalties help ensure those applicants who can afford to contribute to their medical needs do so.<sup>47</sup> With the transfer of more than \$20,000 of income, in addition to assets, Betty clearly could have contributed to her care costs.<sup>48</sup> Further, the action relied upon was not the action of the state itself.<sup>49</sup> The letter was written by a ministerial officer.<sup>50</sup> The court concluded that the policy "expressed in the letter is irreconcilable with federal and state laws, and it would be absurd for us to require the departments to adhere to erroneous interpretations" under these circumstances.<sup>51</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 802, 952 N.E.2d at 30.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 803, 952 N.E.2d at 30.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 804, 952 N.E.2d at 31.

<sup>47</sup> *Id.* at 803, 952 N.E.2d at 31.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 804, 952 N.E.2d at 31.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

The court did add that the various state departments involved “owe it to the citizens of this state to adopt clear, understandable rules which assist applicants in navigating the complicated eligibility and transfer of assets requirements of the Medicaid laws.<sup>52</sup> If the participants can know and understand the rules, they can avoid the minefield that erupted in this case.”<sup>53</sup>

*Frerichs v. State*<sup>54</sup>

In this case, the appellate court relies heavily on its earlier decision in *McDonald*,<sup>55</sup> supra, and with good reason.<sup>56</sup> The facts presented are virtually identical to those in *McDonald*, just with different names, dates and dollar amounts.<sup>57</sup>

Christena Frerichs entered a long-term care facility in December 2004.<sup>58</sup> Her son, Roland, was her attorney-in-fact under a power of attorney.<sup>59</sup> When she first entered the facility, she was determined eligible for Medicaid long-term care benefits by the Department of Human Services.<sup>60</sup> In January 2008, however, Christena received an inheritance of \$114,862.48.<sup>61</sup> She lost her Medicaid eligibility due to have assets in excess of the Medicaid asset limits.<sup>62</sup> She then paid \$5,100 per month for her care.<sup>63</sup>

At the time of receiving her inheritance, Christena received \$1,561 per month from social security and \$906.93 per month from an annuity.<sup>64</sup> She purchased a second annuity for \$50,000, which annuity provided for 56 monthly payments of \$817.02.<sup>65</sup> For four straight months beginning with February 2008, Christina gave Roland \$10,100, along with the total amount of her social security and both annuity payments.<sup>66</sup> She then requested reinstatement of her Medicaid benefits as of June 2008.<sup>67</sup> This request was

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Frerichs v. State*, 2011 IL App (4<sup>th</sup>) 101046, 355 Ill. Dec. 721, 960 N.E.2d 603 (4th Dist. 2011).

<sup>55</sup> *McDonald v. Ill. Dep't of Human Servs.*, 406 Ill. App. 3d 792, 952 N.E.2d 21 (4th Dist. 2011)

<sup>56</sup> *Id.*; 960 N.E.2d at 607.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*; 960 N.E.2d at 605.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*; 960 N.E.2d at 605.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

approved subject to an 8 month penalty for nonallowable transfers of assets.<sup>68</sup>

Roland appealed the 8 month penalty on behalf of his mother.<sup>69</sup> He argued that the gifts of income should not have been included within the penalty calculations since they were transferred in the same month as they were received.<sup>70</sup> A final administrative ruling upheld the imposition of the transfer penalty, so Roland filed a complaint for administrative review in the circuit court.<sup>71</sup> The administrative ruling was affirmed, so Roland proceeded with an appeal to the appellate court.<sup>72</sup>

Roland's arguments were essentially the same as those set forth in *McDonald*.<sup>73</sup> He argued that the Department should be estopped from deviating from its published policies and the interpretation of those policies as expressed in the same January 2001 letter as was at issue in *McDonald*.<sup>74</sup> The primary distinction relied upon by Roland was that the person to whom the letter was written had a connection to Christena.<sup>75</sup> The letter was addressed to Joseph Oettel, an estate and financial planner who was Christena's approved representative in applying for benefits.<sup>76</sup> He conceded that the letter was not in response to an inquiry made specifically on Christena's behalf.<sup>77</sup> In fact, the letter was dated four years before she even entered the facility and eight years prior to the transfers at issue.<sup>78</sup> The court agreed with the estoppel analysis in *McDonald*.<sup>79</sup>

Roland argued that the *McDonald* case was wrongly decided.<sup>80</sup> The appellate court found that it was controlling and relied on the *McDonald* analysis.<sup>81</sup>

The circuit court was affirmed and the imposition of the 8 month penalty was upheld.<sup>82</sup>

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<sup>68</sup> *Id.*; 960 N.E.2d at 605.

<sup>69</sup> *Id.*; 960 N.E.2d at 606.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*; 960 N.E.2d at 606.

<sup>72</sup> *Id.*; 960 N.E.2d at 606.

<sup>73</sup> *Id.*; 960 N.E.2d at 606.

<sup>74</sup> *Id.*; 960 N.E.2d at 606.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; 930 N.E.2d at 605, 606.

<sup>79</sup> *Id.*; 930 N.E.2d at 606.

<sup>80</sup> *Id.*; 930 N.E.2d at 609-10.

<sup>81</sup> *Id.*; 930 N.E.2d at 611.

<sup>82</sup> *Id.*; 930 N.E.2d at 611.

## Gifts and Financial Exploitation

*People v. Bailey*<sup>83</sup>

In a criminal proceeding, the defendant, Karen Bailey, was convicted of four counts of financial exploitation of an elderly person and two counts of theft. Bailey used two different powers of attorney, one general and one durable in the course of committing the crimes. Bailey was sentenced to concurrent sentences of 11 years' incarceration in the Illinois Department of Corrections. Bailey appealed on several grounds, including an argument that the State failed to prove beyond a reasonable doubt either that the victim was incapable of authorizing Bailey's various uses of the victim's money or that she had notice that the power of attorney had been terminated.<sup>84</sup>

Evidence in the trial court showed that the victim, Mary Ann Wilson, was in her 80s and living in a nursing home since 2006. Prior to moving to the nursing home, Wilson lived frugally and saved over \$300,000 in assets. Bailey acquired control over Wilson's finances in 2005 and subsequently drained the finances.<sup>85</sup>

Entered into evidence were a durable power of attorney and a Last Will & Testament, both dated January 16, 2004 and a general power of attorney dated January 15, 2004. Evidence showed that the forms used for these documents were ordered online from [www.legacywriter.com](http://www.legacywriter.com), a website that sells legal documents, from Bailey's email address. These particular forms were emailed to Bailey's address on April 20, 2006 and were not even available until after the date of purported signature.<sup>86</sup>

As of August 1, 2005, Wilson had more than \$291,000 in bank accounts and was living off her income.<sup>87</sup> By April 20, 2006, just over \$4,000 remained in her bank accounts.<sup>88</sup>

Wilson's condition had deteriorated in 2004 and 2005, and she was eventually admitted to the hospital in May 2006 by a crisis nurse. A cousin was then appointed as guardian for Wilson.<sup>89</sup>

The only in-court testimony presented by Bailey was that of her husband. He attempted to contradict the evidence as to Wilson's condition from 2004 and on. He testified that his father lived with Wilson, and they

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<sup>83</sup> *People v. Bailey*, 409 Ill.App.3d 574, 948 N.E.2d 690 (1<sup>st</sup> Dist. 2011)

<sup>84</sup> *Id.* at 580, 948 N.E.2d at 696.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 581, 948 N.E.2d at 697.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 582, 948 N.E.2d at 698.

<sup>89</sup> *Id.*

did things together as a family. He testified as to the financial help Wilson chose to give him during this time. He also testified as to family outings they took, including frequent outings where Wilson, 85 years old, with a double hip replacement and tremors in her hands, rode horses without any confirmation from her doctor that it was safe to do so.<sup>90</sup>

Defendant's husband, who witnessed the various documents, admitted that Bailey was married to someone else on the date the powers of attorney and the Will were signed.<sup>91</sup>

The trial court found that his testimony was not credible.<sup>92</sup> The trial court held that even though the power of attorney documents were of questionable authenticity, they created a fiduciary relationship between Bailey and Wilson.<sup>93</sup> The manner in which power of attorney was obtained and then finances were handled, met the necessary elements for deception. The trial court found that Wilson was unable to consent to Bailey's actions as agent.<sup>94</sup>

The appellate court held that the trial court record established beyond a reasonable doubt that Wilson suffered from dementia at the relevant times and was thus precluded from authorizing Bailey's use of Wilson's funds.<sup>95</sup> The State also proved beyond a reasonable doubt that Bailey had notice that the general power of attorney, used by Bailey, had terminated.<sup>96</sup> Bailey should have known that Wilson was unable to consent to the financial transactions.<sup>97</sup>

The appellate court also held that purported statements from Wilson to Bailey's husband authorizing Bailey to withdraw funds from her accounts and pay for the husband's new car were not words of contract; rather, they were words of inadmissible hearsay.<sup>98</sup>

The court on appeal also held that the concurrent sentences of 11 years' incarceration were not excessive, in light of Bailey having stolen almost all of Wilson's life savings of more than \$300,000. The funds went for a new car for Bailey's husband, private school tuition for her children, cell phone bills for her children, and furniture from the Pottery Barn. The evidence showed Wilson was living in squalor and with no clothing, shoes or personal items in the home by May 2006.<sup>99</sup>

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<sup>90</sup> *Id.* at 584, 948 N.E. at 700.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 585, 948 N.E.2d at 701.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 594, 948 N.E.2d at 710.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 587, 948 N.E.2d at 703.

<sup>99</sup> *Id.* at 594, 948 N.E.2d at 710.

The conviction was affirmed.<sup>100</sup>

### C. Guardianships

*Karbin v. Karbin*:<sup>101</sup> Guardian does not have authority to seek dissolution of marriage proceedings through a counter-petition, when the original petition has been dismissed.

Jan Karbin and his wife, Marcia Karbin were married for almost 14 years when Marcia was in a car accident, suffered brain damage and became severely disabled.<sup>102</sup> He served as her guardian from 1997 until 2004, when he resigned due to complications from Parkinson's disease.<sup>103</sup> Their daughter, Kara, then took over as her guardian.<sup>104</sup> An agreement was entered into for distribution of funds upon the sale of the marital home.<sup>105</sup> Marcia moved out of state to live with Kara.<sup>106</sup>

Jan filed a petition for dissolution of marriage from Marcia.<sup>107</sup> A counter-petition was filed by Marcia's plenary guardian.<sup>108</sup> At the time of filing his petition, Jan was residing in a townhouse with a woman; Kara claimed that Jan was romantically involved with this woman, while Jan denied this assertion and claimed the woman is his live-in caretaker.<sup>109</sup>

Jan later dismissed his original petition and filed a motion to dismiss the counter-petition filed on behalf of his wife.<sup>110</sup> The trial court granted the motion and dismissed the wife's counter-petition on the basis that two Supreme Court cases prohibiting a disabled person from initiating dissolution proceedings.<sup>111</sup> Jan claimed that there had been an understanding that he would file a petition for dissolution of marriage, it would be uncontested, and each party would retain their own assets and debts.<sup>112</sup> Discovery was conducted.<sup>113</sup> Eventually, disputes arose regarding assets and Marcia's guardian filed a motion to compel discovery. Jan responded with his voluntary dismissal.<sup>114</sup> He claimed that he never wanted

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<sup>100</sup> *Id.* at 597, 948 N.E.2d at 713.

<sup>101</sup> *Karbin v. Karbin*, 352 Ill. Dec. 771, 954 N.E.2d 854 (1st Dist. 2011).

<sup>102</sup> *Id.* at 772, 954 N.E.2d at 855.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 772-773, 954 N.E.2d at 855-856.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 772, 954 N.E.2d at 855.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

a divorce and was just accommodating the guardian's wishes when he filed.<sup>115</sup> Kara claimed he dismissed just to avoid disclosing assets.<sup>116</sup>

The guardian for the wife appealed the dismissal of the counter-petition.<sup>117</sup> Jan argued that once his original petition was dismissed, the prior decisions in two Illinois Supreme Court cases that bar a disabled person from initiating a dissolution of marriage action prevented his wife from proceeding on her counter-petition.<sup>118</sup>

On appeal, the guardian argued that the Supreme Court cases prohibiting a guardian for a disabled person from pursuing a dissolution action are outdated and that such an action should be allowed to proceed when it is shown to be consistent with the best interests of the disabled person.<sup>119</sup> The appellate court did not find fault with this argument but felt bound to follow the Supreme Court cases.<sup>120</sup> Any resolution was left to the legislature.<sup>121</sup> The legislature did act to allow a guardian to continue or maintain an action if the ward filed the action prior to the adjudication of disability, but that was not deemed sufficient to allow for a disabled person to initiate an action (or, even as here, to continue the proceedings once the original petition was dismissed).<sup>122</sup>

The dismissal of the wife's counter-petition was affirmed.<sup>123</sup>

#### D. Wills, Trusts and Estates

##### *Carlson v. Gluekert Funeral Home, Ltd.*<sup>124</sup>

Following the death of Eleanor Carlson, her son, Scott, signed a contract with Gluekert Funeral Home for funeral arrangements.<sup>125</sup> In making these arrangements, Scott presented to Gluekert Eleanor's power of attorney naming Scott as agent as proof of authority to make the arrangements.<sup>126</sup> Gluekert took possession of Eleanor's body but then was contacted by Eleanor's estranged daughter with a demand for different arrangements.<sup>127</sup> Gluekert informed Scott that services would be delayed

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 773, 954 N.E.2d at 856.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 774, 954 N.E.2d at 857.

<sup>120</sup> *Id.* at 776, 954 N.E.2d at 859.

<sup>121</sup> *Id.* at 775, 954 N.E.2d at 858.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 776, 954 N.E.2d at 859.

<sup>124</sup> *Carlson v. Gluekert*, 407 Ill. App. 3d 257, 943 N.E.2d 237 (1st Dist 2011)

<sup>125</sup> *Id.* at 258, 943 N.E.2d at 238.

<sup>126</sup> *Id.* at 259, 943 N.E.2d at 238.

<sup>127</sup> *Id.*

due to this dispute.<sup>128</sup> Scott inquired about the effect this would have on Eleanor's body, which had not yet been embalmed. Gluekert allegedly assured Scott that there would not be a problem with this and the body could be stored at their facility indefinitely.<sup>129</sup>

Eleven days after Eleanor died, Gluekert considered the body abandoned and delivered Eleanor's body to the coroner.<sup>130</sup> Her body had not been refrigerated and was extensively decayed.<sup>131</sup> More than three weeks after her death, Scott was able to obtain a court order for the release of the body to another funeral home.<sup>132</sup> Burial took place more than 1 month after Eleanor's death.<sup>133</sup>

Scott filed suit against Gluekert for breach of contract, common law fraud, consumer fraud, intentional infliction of emotional distress and interference with the next of kin's right to control the body.<sup>134</sup> Gluekert moved for dismissal on the basis that the power of attorney was not valid, that it terminated on death, and that the Illinois Disposition of Remains Act shielded Gluekert from liability.<sup>135</sup> The trial court granted this motion, and the complaint against Gluekert was dismissed.<sup>136</sup>

On appeal, Scott argued that the trial court erred in finding that the power of attorney terminated upon Eleanor's death and that a dispute existed between the two children.<sup>137</sup>

In Eleanor's power of attorney, there is a provision stating that unless a limitation is initialed and completed the power of attorney will become effective upon signing and will continue until death and beyond death if disposition of remains is authorized.<sup>138</sup> Paragraph 3 of the power of attorney stated that it was effective on execution.<sup>139</sup> Paragraph 4 stated that it terminated on death unless sooner amended or revoked.<sup>140</sup> Neither paragraph was initialed by Eleanor.<sup>141</sup>

Scott argued that because paragraph 4 was not initialed, it never became effective.<sup>142</sup> Thus, there was no limitation initialed and the power

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 259, 943 N.E.2d at 239.

<sup>137</sup> *Id.* at 260, 943 N.E.2d at 239.

<sup>138</sup> *Id.* at 261, 943 N.E.2d at 240.

<sup>139</sup> *Id.* at 260-61, 943 N.E.2d at 239-40.

<sup>140</sup> *Id.* at 261, 941 N.E.2d at 240.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

of attorney extended beyond death to allow for disposition of remains.<sup>143</sup> The appellate court agreed and found that the power of attorney did not terminate upon Eleanor's death.<sup>144</sup>

The Illinois Disposition of Remains Act states that any dispute among persons listed in the statute "concerning their right to control the disposition... shall be resolved by a court of competent jurisdiction."<sup>145</sup> The Act also provides that a funeral home is not liable if it refuses to accept the remains or if it refuses to inter or dispose of the remains until it receives a court order or other sufficient confirmation that there is no longer a dispute.<sup>146</sup> Scott argued that since the power of attorney did not terminate at death and allowed him to direct disposition of remains, his sister did not have the right to dispute the control of Eleanor's remains.<sup>147</sup>

The appellate court concluded that a dispute for purposes of the Act does not have to be a legitimate dispute made by persons entitled to control disposition.<sup>148</sup> It is not for the funeral home to decide who has the right to dispose of remains.<sup>149</sup> If there is a dispute between persons listed in the Act (and adult children are listed), then the liability protections of the Act apply.<sup>150</sup> The court found that there was a dispute. The funeral home can then refuse to dispose of the remains without fear of liability.<sup>151</sup>

As Gluekert was protected from liability under the Act, the trial court's dismissal of the complaint was affirmed.<sup>152</sup>

#### E. Grandparent Visitation

##### *In re Guardianship of K.R.J.*<sup>153</sup>

Keith and Katherine Peterson filed a petition for guardianship of K.R.J., grandchild of Katherine and step-grandchild of Keith, alleging that the parents of K.R.J., Katherine's daughter, Kimberly Stark, and Gene Jensen were unable to make and carry out day-to-day decisions for K.R.J.<sup>154</sup> It was alleged that Gene had his two sons removed from his care in juvenile court in Kentucky and that he "tortured" Kimberly's daughter, B.S.<sup>155</sup>

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 263, 941 N.E.2d at 242.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 263, 941 N.E.2d at 243.

<sup>153</sup> *In re Guardianship of K.R.J.*, 405 Ill.App.3d 527, 942 N.E.2d 598 (4<sup>th</sup> Dist. 2010).

<sup>154</sup> *Id.* at 528, 942 N.E.2d at 599.

<sup>155</sup> *Id.* at 529, 942 N.E.2d at 600.

That petition was originally dismissed with prejudice in 2007. The appellate court reversed and remanded in an unpublished order, directing the trial court to hold an evidentiary hearing to determine whether Keith and Katherine rebutted the presumption that Gene and Kimberly were able to make and carry out the day-to-day decisions.<sup>156</sup> Following five days of evidentiary hearings, the trial court concluded that Keith and Katherine had failed to rebut this presumption.<sup>157</sup> Keith and Katherine again appealed.<sup>158</sup>

Testimony in the trial court centered on Gene's treatment of his other children, Robert and Raymond.<sup>159</sup> He lived with Kimberly from 1999 to 2006.<sup>160</sup> In 1999 and 2000, Gene's sons and Kimberly's daughter would visit in the summer and on holidays.<sup>161</sup> Robert is mentally five years old and suffers from a rare chromosomal disorder.<sup>162</sup> He returned from a visit with Gene and Kimberly in 2000 with bruises on his behind and down his legs.<sup>163</sup> Charges were filed against Gene, but the case ended in a mistrial and charges were dropped.<sup>164</sup> There was testimony of juvenile proceedings in Illinois and being indicated by the Illinois Department of Children and Family Services. Gene testified that he complied with all requirements and was found by DCFS to not be a risk to K.R.J.<sup>165</sup>

In 2003, Gene's sons moved to Georgia. Gene had not seen them since that time. Gene's ex-wife obtained an order of protection against him, with evidence that Katherine had paid for her attorney fees in that proceeding.<sup>166</sup>

B.S. was residing with Katherine, but she would allow Kimberly to have supervised administration. This visitation stopped in 2003. In 2005, Katherine obtained guardianship over B.S., though Kimberly denied having notice of that proceeding prior to receiving a copy of the court order.<sup>167</sup>

All three of these other children testified *in camera*.<sup>168</sup> There was testimony of sexual abuse, physical abuse, being wrapped in duct tape, and fear of Gene.<sup>169</sup> Raymond would not testify in the courtroom because it brought back horrible memories of abuse by Gene.<sup>170</sup> Gene denied most of

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 532, 942 N.E.2d at 603.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 530-531, 942 N.E.2d at 601-602.

<sup>160</sup> *Id.* at 529, 942 N.E.2d at 600.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 530, 942 N.E.2d at 600.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 530, 942 N.E.2d at 601.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 531, 942 N.E.2d at 601.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

the allegations and said that the children were afraid of him because of lies told to them by Katherine and others.<sup>171</sup>

Kimberly testified to her own abuse as a child.<sup>172</sup> When she reported it to Katherine, she was told that she deserved it.<sup>173</sup> Kimberly realized after therapy that any relationship with Katherine was detrimental to her well-being.<sup>174</sup>

After Gene and Kimberly broke up, K.R.J. went to live with Gene in Rantoul, in part because Kimberly then felt that Katherine would have less chance to get her.<sup>175</sup> Gene and K.R.J. later moved to Kansas.<sup>176</sup> K.R.J. testified that she enjoyed living in Kansas with Gene and that she speaks with Kimberly by phone three times per week.<sup>177</sup> Her paternal aunt testified that she provided day care to K.R.J. and found her to be outgoing, good with other children and without problems at school.<sup>178</sup> Kimberly testified that she had never seen Gene physically discipline K.R.J. or inappropriately touch her.<sup>179</sup> The guardian *ad litem* indicated that the report filed with a recommendation that Keith and Katherine be granted guardianship was based only on the best interests standard and was not a determination of whether they met their burden of proof and rebutted the presumption.<sup>180</sup>

The trial court found the testimony of the other children to not be credible and noted the relationship between Kimberly and Katherine in terms of Katherine's possible motivation for bringing these proceedings.<sup>181</sup>

The appellate court first noted that jurisdiction in Illinois was appropriate, even after the move to Kansas, as Illinois was K.R.J.'s home state when the original petition was filed.<sup>182</sup> The court then reviewed the provisions for appointment of a guardian of a minor in the Probate Act.<sup>183</sup> To have standing to bring a petition for guardianship of a minor when the minor has a living parent, the petitioner must rebut the statutory presumption that the living parent is willing and able to make and carry out day-to-day child care decisions concerning the minor.<sup>184</sup> The presumption must be rebutted by a preponderance of the evidence.<sup>185</sup> If the presumption

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<sup>171</sup> *Id.* at 532, 942 N.E.2d at 602.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 533, 942 N.E.2d at 602.

<sup>179</sup> *Id.* at 533, 942 N.E.2d at 603.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 534, 942 N.E.2d at 604.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 534-35, 942 N.E.2d at 604.

<sup>185</sup> *Id.* at 535, 942 N.E.2d at 604.

is not rebutted, then the petitioner lacks standing and the petition must be dismissed.<sup>186</sup> If the presumption is rebutted, then the trial court is to proceed on the petition and determine whether the parents are fit persons who are competent to transact their own business.<sup>187</sup> If so, the parents are entitled to custody.<sup>188</sup> If not, then the court is to determine the minor's best interests.<sup>189</sup>

The appellate court reviewed the trial court's factual findings under a manifest weight of the evidence standard and then applied the facts *de novo* to the question of standing.<sup>190</sup> The appellate court concluded that the findings of the trial court were not against the manifest weight of the evidence.<sup>191</sup> These facts were then correctly applied in determining that the grandparents of K.R.J. did not have standing to proceed on the petition because they did not rebut the presumption.<sup>192</sup> The judgment of the trial court was affirmed.<sup>193</sup>

#### F. Miscellaneous

##### *Carter v. SSC Odin Operating Co., LLC.*<sup>194</sup>

The special administrator of decedent's estate filed suit against defendant nursing home alleging violations of the Nursing Home Care Act and accompanying regulations and also alleging in a wrongful death action that the nursing home was negligent, 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.<sup>195</sup>

The trial court denied the motion to compel without an evidentiary hearing. The appellate 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 voided the arbitration agreements. Leave to appeal to the Illinois Supreme Court was granted. Following a detailed analysis, the Supreme Court held that the public policy behind the

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 536, 942 N.E.2d at 606.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Carter v. SSC Odin Operating Co., LLC*, 2011 IL App (5<sup>th</sup>) 070392-B, --- N.E.2d --- (5<sup>th</sup> Dist. 2011)

<sup>195</sup> *Id.* at 2, ---N.E.2d---

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.<sup>196</sup>

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.<sup>197</sup>

On remand, the appellate court considered several remaining issues, including whether the arbitration agreements evidence a transaction involving interstate commerce within the meaning of the Federal Arbitration Act, whether the arbitration agreements are void for lack of mutuality, and whether the arbitration agreements apply to the wrongful death claim.<sup>198</sup>

The appellate court held that the agreements were subject to the Federal Arbitration Act as involving interstate commerce.<sup>199</sup> With regard to plaintiff's allegation that the agreements should be void for lack of mutuality, the court found that the agreements were stand-alone agreements that must be supported by consideration or mutually binding agreements to arbitrate.<sup>200</sup> The court concluded that the agreements were not enforceable because they did not contain mutually binding agreements to arbitrate. The agreements required arbitration only for claims of \$200,000 or more.<sup>201</sup> In effect, this excludes claims that the nursing home will have against the resident and will only require arbitration for personal injury claims against the facility. The agreements lacked mutuality.<sup>202</sup>

The appellate court went on to address whether the agreements apply to wrongful death claims brought by the plaintiff, who was not a party to the arbitration agreements. Wrongful death claims are derivative of the action the decedent would have had if living, yet they are independent claims designed to compensate the next of kin. As the claims are independent, and plaintiff signed the arbitration agreements only as "Legal Representative" for the decedent, the agreements were not binding on plaintiff as to the wrongful death claim.<sup>203</sup>

The original order of the trial court denying the motion to compel arbitration was affirmed.<sup>204</sup> A dissent was filed as to the portion of the

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 3.

<sup>199</sup> *Id.* at 6.

<sup>200</sup> *Id.* at 8.

<sup>201</sup> *Id.* at 9.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 10.

opinion finding the agreements lacked mutuality.<sup>205</sup> The majority found the agreement to arbitrate on the part of the facility to be illusory, as the facility “cannot offer any realistic scenario where the amount in controversy” in disputes over payment for care would exceed the \$200,000 limit. The dissent did not find it impossible to conceive of situations where the limit would be exceeded. An example was given of a nursing home resident causing a fire with damages exceeding the limit. The dissent did not feel it was “the province of this court to determine the relative frequency of such claims but only to determine that both parties made promises to arbitrate.”<sup>206</sup>

*Snyder v. Heidelberg*<sup>207</sup>

Judith Snyder filed suit against Attorney Elliott Heidelberg for malpractice in drafting a deed to real estate that her late husband allegedly wanted to transfer to her as a joint tenant.<sup>208</sup> A quitclaim deed was signed, but the husband only owned a beneficial interest in the land trust that held title to the property.<sup>209</sup> The quitclaim deed conveyed nothing.<sup>210</sup> Heidelberg’s motion to dismiss was granted.<sup>211</sup>

Heidelberg’s motion was based on the six year statute of repose included in the statute of limitations applicable for claims against attorneys, 735 ILCS 5/13-214.3.<sup>212</sup> Snyder countered that subsection (d) of this statute excludes this case from the six-year statute of repose.<sup>213</sup> Instead, Snyder argued, her injury did not occur until her husband’s death.<sup>214</sup> 735 ILCS 5/13-214.3(d) provides that an action for damages against an attorney, when the injury does not occur until the death of the person for whom professional services were rendered, may be commenced within two years after that person’s date of death.<sup>215</sup> Here, Snyder’s suit was commenced within that time period.<sup>216</sup> The appellate court reversed and relied on *Wackrow v. Niemi*, 231 Ill.2d 418, 899 N.E.2d 273 (2008), in support of the conclusion that subsection (d) applied and the claim was timely filed.<sup>217</sup>

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Snyder v. Heidelberg*, 352 Ill. Dec. 176, 953 N.E.2d 415. (2011)

<sup>208</sup> *Id.* at 178, 953 N.E.2d at 417.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 180, 953 N.E.2d at 419.

An alternate basis for reversal was also included in a superseding opinion upon rehearing.<sup>218</sup> The complaint alleged two injuries.<sup>219</sup> The first injury occurred when the initial one-half interest in the real estate was not presently transferred.<sup>220</sup> That injury would be barred.<sup>221</sup> The second injury occurred with the failure to effectuate a transfer of the entire interest in the real estate upon the husband's death.<sup>222</sup> The first injury was part and parcel of the second and was subsumed by the damages for loss of the entire interest.<sup>223</sup>

The Supreme Court concluded that injury in this case occurred when the deed was prepared and executed.<sup>224</sup> The six year statute of repose under subsection (c) applied to bar the claim that was filed more than ten years after the deed was signed.<sup>225</sup> The Supreme Court rejected plaintiff's claim that there was more than one injury (one upon signing and another upon her husband's death) and that the statute of limitations can apply to multiple injuries separately triggering the limitations period.<sup>226</sup> The Court found the statute at issue to be phrased toward a single injury.<sup>227</sup> Had the legislature wished to recognize more than one injury, it could have done so.<sup>228</sup> Subsection (d) only applies upon the death of the client; if an injury occurred prior to death, then it does not apply.<sup>229</sup> Even if a second injury were to be recognized, subsection (d), then, still would not apply.<sup>230</sup>

The decision of the appellate court was reversed, while the judgment of the circuit court was affirmed.<sup>231</sup> A lengthy dissent was filed by Justice Freeman.<sup>232</sup> The dissent was filed because the majority opinion is "inconsistent with this court's previous case law concerning injury in legal malpractice cases."<sup>233</sup> In reaching its decision, the court also overlooks well-settled principles concerning the application of the discovery rule in such cases.<sup>234</sup> The result is a decision that protects negligent attorneys."<sup>235</sup> The dissent took issue with the court fixing the date of injury in a manner that

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<sup>218</sup> *Id.* at 181, 953 N.E.2d at 420.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 182, 953 N.E.2d at 421.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 183, 953 N.E.2d at 422.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

means only the husband could have been able to state a viable cause of action within the correct time frame.<sup>236</sup> The dissent took issue with the lack of clarity in how either plaintiff or her husband would have discovered negligence on or before the limitations date. After an extensive review of attorney negligence and limitations law in Illinois, the dissent took the majority to task for (i) failing to define “injury” consistently with previous case law; (ii) failing to apply settled principles concerning the application of the discovery rule to legal malpractice; and (iii) failing to give effect to the legislature’s exception to the statute of repose.<sup>237</sup> The dissent speculated that readers may be left to wonder whether “the court, made up as it is of lawyers, is merely ‘protecting its own’ and thus [making] programs like mandatory continuing legal education appear as mere window-dressing.”<sup>238</sup>

*Vincent v. Alden-Park Strathmoor, Inc.*<sup>239</sup>

Thomas Vincent, legal representative of nursing home resident Marjorie Vincent’s estate, filed a three count survival action against defendant nursing home.<sup>240</sup> Thomas alleged negligent acts in violation of the Nursing Home Care Act, actions in violation of the Wrongful Death Act, and willful and wanton conduct violating the Nursing Home Care Act and reserving the issue of punitive damages.<sup>241</sup> Defendant, Alden-Park Strathmoor, a long-term care facility in which Marjorie had resided, moved to strike the claim, or at least the reservation of the claim for punitive damages.<sup>242</sup> Defendant argued that the claim for punitive damages did not survive the resident’s death.<sup>243</sup>

The trial court granted defendant’s motion to strike the punitive damages claim. Leave to file an interlocutory appeal pursuant to Supreme Court Rule 308 was granted on the question of whether common-law punitive damages are available in an action brought by the personal representative of the estate of a deceased nursing home resident based on the Survival Act for willful and wanton violations of the Nursing Home Care Act.<sup>244</sup>

The appellate court concluded that the trial court was correct in striking the reservation of the right to seek punitive damages. Based on

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<sup>236</sup> *Id.* at 185, 953 N.E.2d at 424.

<sup>237</sup> *Id.* at 188, 953 N.E.2d at 427,

<sup>238</sup> *Id.*

<sup>239</sup> *Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill.2d 495, 948 N.E.2d 610 (2011)

<sup>240</sup> *Id.* at 497, 948 N.E.2d at 611.

<sup>241</sup> *Id.* at 498, 948 N.E.2d at 611.

<sup>242</sup> *Id.* at 500, 948 N.E.2d at 613.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 500-01, 948 N.E.2d at 613.

statutory provisions, legislative history, judicial precedent and equitable considerations, any right to punitive damages ended with Marjorie's death.<sup>245</sup> Leave to appeal to the Illinois Supreme Court was granted.<sup>246</sup>

The Court acknowledged that, while the Nursing Home Care Act does not specifically allow punitive damage, common law punitive damages can be awarded for violations of the Act.<sup>247</sup> The Court further acknowledged that causes of action under the Act survive the death of the resident.<sup>248</sup> It does not necessarily follow, though, that common law punitive damages also survive the death of the resident.<sup>249</sup> As a general rule in Illinois, punitive damages for personal injuries will not survive the death of the injured party.<sup>250</sup>

The Survival Act in Illinois does provide some exceptions to the general rule that punitive damages do not survive the death of the injured party.<sup>251</sup> If a statutory cause of action specifically authorizes punitive damages and the cause of action survives the death of a party, then the claim for punitive damages also survives.<sup>252</sup> The Court has never held, however, that a claim for punitive damages survives merely because the Survival Act allows a statutory cause of action to survive the death of a party; the punitive damages claim survives only when punitive damages are specifically authorized by the statute on which the cause of action is predicated.<sup>253</sup> The legislature has had ample opportunity to address this holding in Illinois while otherwise amending the Survival Act but has not done so.<sup>254</sup> Therefore, this construction of the Survival Act is deemed incorporated into the statute.<sup>255</sup>

The Nursing Home Care Act does not specifically authorize punitive damages.<sup>256</sup> The legislature has declined to amend the Nursing Home Care Act to provide for punitive damages.<sup>257</sup> The Court cannot now read such a provision into the Act. Thus, any right to punitive damages ended upon Marjorie's death.<sup>258</sup>

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<sup>245</sup> *Id.* at 501, 948 N.E.2d at 613.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 502, 948 N.E.2d at 614.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 504, 948 N.E.2d at 615.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 506, 948 N.E.2d at 616.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

Thomas argued that punitive damages are necessary to effectuate the purpose of the Nursing Home Care Act.<sup>259</sup> The Supreme Court acknowledged that there is some support for this argument in appellate court decisions.<sup>260</sup> However, these decisions are based on a misreading of a prior Supreme Court decision, and this argument was rejected.<sup>261</sup> The Court also acknowledged that there are policy arguments both in favor and against allowing the punitive damages claim to survive the death of the nursing home resident, but those arguments should instead be directed to the legislature.<sup>262</sup>

The decisions of the trial court and the appellate court were affirmed. Any right to punitive damages under the Nursing Home Care Act ends upon the death of the nursing home resident.<sup>263</sup>

### 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, go to [www.ilga.gov](http://www.ilga.gov).<sup>264</sup>

Public Act 97-0038: Specialized Mental Health Rehabilitation Act *Effective June 28, 2011*

This bill was part of the package of legislation (and, consequently, several major rulemakings) which came out of the Nursing Home Safety Task Force. This Task Force was created by Governor Pat Quinn in the wake of a series of articles in the *Chicago Tribune* in late 2009, which described the dangers to nursing home residents from other residents. In a number of cases, more vulnerable, older or disabled residents were being assaulted by younger, more violent residents, some having criminal backgrounds.

This significant legislative enactment created the Specialized Mental Health Rehabilitation Act. It provided that all long-term care facilities for the mentally ill would be licensed by the Department of Public Health

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<sup>259</sup> *Id.* at 507, 948 N.E.2d at 616.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 507, 948 N.E.2d at 617.

<sup>262</sup> *Id.* at 507-8, 948 N.E.2d at 617.

<sup>263</sup> *Id.* at 508, 948 N.E.2d at 617.

<sup>264</sup> To access the summaries, text and procedural history of individual public acts at the Illinois General Assembly website: for current public acts (2011-2012) click on the menu for "Public Acts from the 97<sup>th</sup> General Assembly"; to access public acts from prior General Assembly sessions, go to: "Public Acts/Leg. From Previous General Assemblies," then click on the number (95<sup>th</sup>, 96<sup>th</sup>, etc.) of the desired General Assembly.

under the Specialized Mental Health Rehabilitation Act, instead of under the Nursing Home Care Act; however, the provisions in the Specialized Mental Health Rehabilitation Act are substantially the same as those in the Nursing Home Care Act.

The legislation amended pieces of the Nursing Home Care Act, the Hospital Licensing Act, the Nursing Home Administrators Licensing and Disciplinary Act, the Illinois Act on the Aging, the Criminal Identification Act, and the MR/DD Community Care Act.

The bill made changes concerning medical treatment and records; drug treatment; unlawful discrimination; right to notification of violations; screening prior to admission; criminal history reports; disclosure of information; notice of imminent death, unusual incident, abuse, or neglect; notification of violations; minimum staffing; licensure; ban on new admissions; standards; care plans; curricula; inspection; various violations and penalties; and protocols.

#### Public Act 97-0107: Nursing Home Care Act

This law amended the Nursing Home Care Act to require skilled nursing facilities to designate one or more staff members as “Infection Prevention and Control Professionals.” These designated staff members must develop and implement policies governing control of infections and communicable diseases. The facility must document the qualifications of the staff so designated and make this documentation available for inspection by the Department of Public Health.

#### Public Act 97-0481: Senior Citizens Real Estate Tax Deferral Act

This enactment amended the Senior Citizens Real Estate Tax Deferral Act by increasing the taxpayer's income limit from \$50,000 to \$55,000, beginning in tax year 2012.

It further provided that property qualified for the senior tax deferral could not be held in trust (unless the trust was an Illinois land trust with the taxpayer identified as the sole beneficiary) if the taxpayer is filing for the program for the first time, beginning in the 2011 assessment year, or the 2012 tax year. This law now limits the total amount of any deferral to \$5,000 per taxpayer per tax year.

#### Public Act 97-0555: Property Transfer on Death Act

This legislation created the Illinois Residential Real Property Transfer on Death Instrument Act. The “Residential Real Estate Property Transfer on Death Instrument” (TODI) will serve as a way to transfer residential real

estate to a beneficiary without going through probate. As such, they will make it easier for a person to make a transfer of residential real estate to a relative or friend and avoid attendant probate costs and delays.

The Act, as codified at 755 ILCS 27/1 *et seq.*, defines “residential real estate,” details the formal requirements of executing and revoking a TODI, and spells out the process for the actual transfer of the real estate to occur.

The Act provides that only a living person can create a TODI—a corporation, trust or other legal entity cannot do so. However, the beneficiary of the real estate transfer can be an actual person, or a charity, trust or corporation.

Only “residential real estate” can be transferred. This is defined as real property including at least one, but not more than four, residential dwelling units, including condo units. It can also include up to forty acres of agricultural real estate if there is a single family residence located upon it.

The property owner executing (or revoking) the TODI must have decisional capacity equal to that required to execute or revoke a will, in other words, sufficient decisional capacity to understand what he or she is doing, what property is involved, and who is the beneficiary.

The TODI itself must meet certain formalities of execution, including being signed and witnessed (by two disinterested witnesses) before a notary public.

In addition to the required execution formalities, the completed TODI must be registered at the local county recorder of deeds. The TODI cannot take effect unless it has been recorded prior to the death of the property owner; if the TODI has been revoked by the property owner, then that revocation must also be filed at the county office. TODIs are *always* revocable by the property owner, as long as he or she retains decisional capacity, up to the point of his or her death.

The actual transfer of the residential real estate pursuant to the TODI does not occur until the death of the property owner who signed the TODI. Until the death of the individual, the TODI gives the anticipated beneficiary no property rights in the property at all.

The preparation of a transfer on death instrument or its revocation is the practice of law. A transfer on death instrument or its revocation must be prepared by an Illinois licensed attorney or by the owner on his or her own behalf.

#### Public Act 97-0482: Criminal Code

Public Act 97-0482 was enacted to enhance the prosecution of cases of financial exploitation of older or disabled persons.

This law amended the Criminal Code of 1961 relating to financial exploitation of an elderly person or a person with a disability (320 ILCS 5/17-56). It provides that the financial exploitation of an elderly person or person with a disability is a Class 1 felony if the value of the property is \$50,000 or more (previously was \$100,000 or more).

This legislation altered the definition of a Class 2 felony under this provision of the Criminal Code to when the value of the property exploited is greater than \$5,000, but less than \$50,000 (instead of the previous \$100,000 limit). The change also allows orders for restitution payments for financial exploitation of an elderly person or a person with a disability to be made in excess of 5 years.

#### Public Act 97-0300: Elder Abuse and Neglect Act

This bill was an initiative of the Illinois Elder Abuse and Neglect Program. The bill amended the Elder Abuse and Neglect Act to alter the definition of “domestic living situation.” This allowed the Program to keep open cases of alleged or suspected elder abuse, neglect or financial exploitation, even after the older person (the alleged victim) moved into a long term care facility.

Prior law did not permit the Elder Abuse and Neglect Program to continue an elder abuse, neglect, or financial exploitation case once the older person had moved into a long term care facility. The amendment changed the jurisdictional requirement so that the older person now only has to be living in a “domestic living situation” (i.e., not a long term care residential facility) at the time of the initial abuse report, not for the whole duration of the case.

#### Public Act 97-0584: Long Term Care Funding

The legislation amended the Long-Term Care Provider Funding Article of the Illinois Public Aid Code by stating that specified increased payments and assessments for long-term care providers (the new “bed tax”) are not due and payable until after the Department of Healthcare and Family Services notifies the long-term care providers, in writing, that the payment methodologies to long-term care providers required under specified provisions of the Code have been approved by the Centers for Medicare and Medicaid Services of the U.S. Department of Health and Human Services.

The required approval of the “bed tax” assessment was granted by the federal government in January, 2012.

The language also included an important provision for long term care residents and their families: providing that the “bed tax” assessment

imposed on long-term care providers could not be billed or passed on to the resident.

#### Public Act 97-0148: Changes to Health Care Powers of Attorney

Public Act 97-0148 was enacted in response to one part of the amendments passed last year to the Power of Attorney Act, (Public Act 96-1195). This enacted legislation strikes out one part of the new language in the Power of Attorney Act which would have allowed a health care agent the authority to seek from the principal's medical provider information about the principal, even when the power of attorney was a "springing" power. This was designed to permit the health care agent to make an educated determination of the proximity of his or her principal's possibly imminent onset of incapacity.

#### Public Act 97-0382: Changes to Advance Directive Forms

This bill changes the law regarding the Department of Public Health's Uniform Do Not Resuscitate Order Advance Directive forms. It requires these forms to be modified to meet minimum national standards in order to be considered a physician order for life-sustaining treatment (POLST) form. The new law also requires these forms to be published in Spanish in addition to English.

#### HB 1712: Significant Amendment to the Power of Attorney Act Vetoed

During the 2011 "veto session" of the Illinois General Assembly, the Governor's amendatory veto of HB 1712 was neither adopted nor overridden. This resulted in a veto of HB 1712 (as of November 17, 2011). At the time of this writing, amendatory language, similar to, but somewhat more limited than, that which was in HB 1712 is being negotiated between proponents and opponents of HB 1712 (and will be incorporated into SB 3204 in the 2012 legislative session).

The original form of the bill would have amended the Power of Attorney Act to create a new kind of "excluded powers of attorney" in which certain safeguards would not apply. These "excluded powers" were defined as various kinds of delegations of authority executed for financial, business, commercial, real estate, and stock transfer purposes.

These "excluded powers of attorney" would have been largely excluded from the various provisions of the newly amended Power of Attorney Act (the 2010 amendments of Public Act 96-1195, which took effect on July 1, 2011) designed to provide more protections and enhanced remedies to the principals.

## V. DEFICIT REDUCTION ACT OF 2005

Reaching a compromise with the Illinois Department of Healthcare and Family Services (HFS) on rules for implementing the asset-transfer provisions of the Federal Deficit Reduction Act of 2005<sup>265</sup> (DRA), the Joint Committee on Administrative Rules (JCAR) in Illinois voted to lift the prohibition on implementation of the Deficit Reduction Act of 2005 (DRA) in Illinois on October 11, 2011. The agreement removes some of the harshest provisions that were initially proposed by HFS. As a result, Illinois will finally (six years late) implement their version of the DRA regarding Medicaid eligibility. The new rules will affect eligibility for long term care Medicaid coverage, namely, coverage of nursing home care, supportive living facilities, and community care (in-home services). Under the compromise agreement Medicaid Applicants who made asset transfers prior to November 1, 2011 will be covered under the former rules by a generous hardship waiver allowing them to sign affidavits stating they relied on the old rules for transfers.

The new Illinois rules adopting the DRA are found at Title 89, part 120 of the Illinois Administrative Code. Summarized below are some of the more important provisions of the new regulations that became effective January 1, 2012.

**60-Month Look Back.** For applications filed on or after January 1, 2012, the new rules regarding transfers and penalties will be applied if an impermissible transfer was made on or after November 1, 2011. Transfers made within 60 months prior to the application for Medicaid (“look-back” period) that do not qualify as a “permissible” transfer will trigger a penalty period, that is, a period of ineligibility.<sup>266</sup>

**Penalty Period Calculation.** The penalty period will be calculated by dividing the total value of uncompensated assets transferred by the average monthly cost of long-term care services at the private rate in the community in which the person is institutionalized at the time of the application. There will be no more “dropping” of partial months in the penalty period calculation, rather the penalty period will be calculated in months, days, and portions of a day.<sup>267</sup>

**Inception of Penalty Period.** The penalty period begins when applicant is institutionalized and has been otherwise approved for Medicaid. At least 10 days notice must be given of an impending penalty period and the person must be advised of their right to appeal or seek a hardship waiver. The penalty begins with the later of 1) the date of the transfer or 2)

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<sup>265</sup> Deficit Reduction Act of 2005, Pub.L.109-171, 120 Stat. 4, enacted February 8, 2006.

<sup>266</sup> 42 USC 1396p (c) (1)(B)(i)

<sup>267</sup> 42 USC 1396p(c)(1)(E)(iv)

the date when the person is receiving institutional-level care and would otherwise qualify for Medicaid.<sup>268</sup>

**Aggregation of Penalty Periods.** Under the old rules each impermissible transfer incurred a separate penalty period, but under the new rules all penalties will be aggregated into one penalty period.<sup>269</sup>

**Partial Asset Return.** Transfers prior to January 1, 2012 will continue to be eligible for partial returns, however, transfers after January 1, 2012 will require a return of all the assets prior to the imposition of the period of ineligibility.<sup>270</sup>

**Allowable Transfers.** Certain transfers continue as “permissible” and do not affect eligibility. Some examples include transfer of the homestead to the applicant’s spouse, to a child under 21 years of age (or a blind or disabled child), a transfer to the applicant’s brother or sister who has an equity interest in the home and has been living in the home for at least one year prior to application, or a transfer to the applicant’s child who provided care to the applicant and lived with the applicant in the home for the two years prior to the date the person became institutionalized. Under the new rules credible tangible evidence must be provided.<sup>271</sup>

**Annuities.** Ownership or purchase of all annuities must be disclosed under the new rules. The purchase of an annuity by an institutionalized person will be treated as a transfer for less than fair market value unless it is purchased from a commercial financial institution (or insurance company), is actuarially sound and based on the estimated life expectancy of the person, and is irrevocable and non assignable (benefits must be paid in approximately equal periodic payments with no balloon or deferred payments). Illinois must be named as the first remainder beneficiary up to the amount it paid in Medicaid payments.<sup>272</sup>

**Undue Hardship Definition.** Under the old rules an applicant could claim a hardship if he were unable to explain how the assets were transferred; if a denial of assistance would force him to move from the nursing home; or he was prevented from living with his spouse or near his family. The new rules an undue hardship exists when the application of a penalty would deprive an institutional person of medical care, food, clothing, shelter, or other necessities of life.<sup>273</sup>

**Hardship Waivers.** The old rules allowed a hardship waiver if the Department determined the imposition of a penalty period would cause an undue hardship, but under the new rules the applicant has the burden of

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<sup>268</sup> 42 USC 1396p (c)(1)(D)(ii)

<sup>269</sup> 42 USC 1396p (c)(1)(H)

<sup>270</sup> 42 USC 1396p (c)(2)(C)(iii).

<sup>271</sup> 42 USC 1396p(c)(2)(B) and (C).

<sup>272</sup> 42 USC 1396p (c)(1)(F) and (G).

<sup>273</sup> 42 USC 1396p(c)(2)(D).

proving that an actual hardship exists by showing evidence of fraud or elder abuse, being forced to move, or being separated from a spouse. It is important to note, however, that for penalized transfers made prior to November 1, 2011, hardship waivers will be granted if the applicant attests to reliance on old asset transfer rules and that the penalty would cause an undue hardship.

**Prepaid Funeral or Burial Contracts.** This exemption was increased to \$10,000 under the new rules and adjusts with inflation. The exemption applies to all contracts made directly with funeral homes as well as those financed by insurance, trusts or other pre-need arrangements.