IICLE®

ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION

800-252-8062
www.iicle.com

LITIGATING DISPUTED ESTATES, TRUSTS, GUARDIANSHIPS, AND CHARITABLE BEQUESTS

2016 Edition

General Editor: John T. Brooks

IICLE® ONLINE

IICLE® is your complete online source for keeping current on Illinois law.

With IICLE® Online, you choose your preferred content solution from three subscription options for one fee per attorney: IICLE® Online Library, IICLE® Online CLE, or IICLE® Online All-Access.

The IICLE® Online Library delivers searchable access to the entire IICLE® library of over 115 practical legal publications with more than 4,000 editable forms to your desktop or tablet.

IICLE® Online CLE gets you unlimited, Online On-Demand access to over 300 recorded IICLE® programs, as well as preferred pricing for IICLE® live programs at 50% of the standard tuition rate.

IICLE® Online All-Access combines the Online Library and Online CLE subscription options and gives you everything IICLE® has to offer.

Make your selection and start getting the answers you need from the source you trust, delivered right to your screen, right away.

LIBRARY

Private Practice Monthly Subscription Rate:

$50

Government/Pro Bono Monthly Rate: $25

- ✓ **Online Publications**
- ✓ **Online Forms**

- Over 115 titles
- Over 4,000 editable forms
- Search by key term or browse by title
- Save “favorite” searches
- 24/7 access

CLE

Private Practice Monthly Subscription Rate:

$50

Government/Pro Bono Monthly Rate: $25

- ✓ **Online On-Demand Programs**
- ✓ **50% of Live Event Tuition**

- Over 300 Online On-Demand programs
- 50% preferred pricing rate applies to live seminars, live webcasts, and livecasts
- 24/7 access

ALL-ACCESS

Private Practice Monthly Subscription Rate:

$100

Government/Pro Bono Monthly Rate: $50

- ✓ **Online Publications**
- ✓ **Online Forms**
- ✓ **Online On-Demand Programs**
- ✓ **50% of Live Event Tuition**

An All-Access pass to IICLE®’s unmatched books and outstanding programming.

Technical support for all IICLE® Online subscriptions is available by phone and by online chat during normal business hours. No minimum number of subscribers per firm/organization required. For information regarding multiple-user pricing and open firm access, contact IICLE® at 800-252-8062.

LITIGATING DISPUTED ESTATES, TRUSTS, GUARDIANSHIPS, AND CHARITABLE BEQUESTS (IICLE®, 2016)

This 2016 handbook replaces all previous editions and updates of this title.

IICLE® thanks John T. Brooks for his generous donation of time and knowledge in serving as the General Editor for this handbook. His willingness to select topic areas, recruit authors, review proofs, and coauthor five chapters is deeply appreciated.

IICLE® is grateful to the chapter authors for their dedication to this project. We are able to continue to publish current, accurate, and thorough practice handbooks because of the generous donation of time and expertise by volunteer authors like them.

Any tax information or written tax advice contained herein (including any forms or attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. This notice has been affixed pursuant to U.S. Treasury Regulations governing tax practice.

We would be interested in your comments on this handbook. Please address any comments to Director of Publishing, IICLE®, 3161 West White Oaks Drive, Suite 300, Springfield, IL 62704; call Amy McFadden at 800-252-8062, ext. 102; or e-mail comments to amcfadden@iicle.com. Call IICLE® Customer Representatives at 800-252-8062 for information regarding other available and upcoming publications and courses.

HOW TO CITE THIS BOOK

This handbook may be cited as LITIGATING DISPUTED ESTATES, TRUSTS, GUARDIANSHIPS, AND CHARITABLE BEQUESTS (IICLE® 2016).

Publication Date: March 10, 2016

NOTICE RE: ACCESSING EDITABLE FORMS FILES FOR THIS PUBLICATION

Thank you for purchasing LITIGATING DISPUTED ESTATES, TRUSTS, GUARDIANSHIPS, AND CHARITABLE BEQUESTS (IICLE®, 2016). In response to customer demand and technological advances, we are now offering a web link to deliver editable forms files that accompany IICLE® publications in lieu of a Forms CD.

PLEASE NOTE: IICLE® FORMS ARE NOT INTENDED TO TAKE THE PLACE OF PROFESSIONAL JUDGMENT AS TO THE LEGAL SUFFICIENCY AND LEGAL ACCURACY OF ANY MATERIAL CONTAINED IN THE FORM. ALWAYS PERFORM INDEPENDENT RESEARCH TO VERIFY THE APPLICABILITY OF ANY FORM TO THE SPECIFIC FACTS AND CIRCUMSTANCES OF YOUR MATTER BEFORE USING AN IICLE® FORM.

To access the Rich Text Format files for this book, please follow the instructions below:

1. Type this exact URL into the address bar of your Internet browser (*e.g.,* Google Chrome, Internet Explorer, Firefox):

   http://www.iicle.com/download/forms/litest16.zip

   **Please note that the ".zip" extension must be included in the URL for the download to work. Without it, you will receive an error message.*

2. Once you have entered the link, a download notification will appear in your browser (the location of which varies depending on your browser of choice) and may prompt you to decide what to do with the file. In that event, please choose the "Save" or "Save As" option, give the file a name, and save it to your directory of choice.

3. Clicking on the zip file itself will automatically open a window displaying the files in your computer directory. The file name of the form corresponds to the section in the handbook where the form is found. Simply double-click the subfolder of the chapter of, then the particular file for, the form you are looking for. Once you click on the form file name, it will automatically open in your word processing program, where you may then edit the form to your specifications.

Alternatively, you can access the forms by clicking on the "Start" button on your desktop. Choose the "Documents" option, and a window will open. Select the "Downloads" folder option on the left of the window. Within the "Downloads" folder, you will see the forms files and may select the particular file you wish to open by clicking on it.

If you are unable to access the forms files using these instructions, please contact IICLE® for technical support, at **800-252-8062** between 8:30 a.m. and 4:30 p.m. CST.

LITIGATING DISPUTED ESTATES, TRUSTS, GUARDIANSHIPS, AND CHARITABLE BEQUESTS

2016

John T. Brooks
General Editor

Chapter authors:

John T. Brooks
Richard A. Campbell
James R. Carey
Leslie J. Carter
Michael R. Conway, Jr.
Mary C. Downie
Ryan M. Harding
Louis S. Harrison
James R. Hellige
James W. Hitzeman
Jeanette S. Hunter
Richard C. Johnson
Ray J. Koenig III
Jessica R. Krull
Emily J. Kuo
Jena L. Levin
Robin Drey Maher
Elizabeth A. McKillip
Gina E. Oderda
Julie J. Olenn
Kerry R. Peck
Floyd D. Perkins
James R. Pranger
Peggy A. Quinn
Heather Ross
Suzanne L. Shier
Nora Zuckerman

This 2016 handbook replaces the 2012 edition and all prior editions and updates of the same title.

ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION
3161 West White Oaks Drive, Suite 300
Springfield, IL 62704
www.iicle.com

Owner: _____

IICLE® is a not-for-profit 501(c)(3) organization dedicated to supporting the professional development of Illinois attorneys through Illinois-focused practice guidance.

IICLE®'s publications and programs are intended to provide current and accurate information about the subject matter covered and are designed to help attorneys maintain their professional competence. Publications are distributed and oral programs presented with the understanding that neither IICLE® nor the authors render any legal, accounting, or other professional service. Attorneys using IICLE® publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original and fully current sources of authority.

Printed in the United States of America.

16LITEST-R:3-16(738)CC
PRD: 3-10-16 (1:CTP)

Table of Contents

Preface

It's hard to believe that four years have passed since the last edition of this book. As usual, there are a lot of changes to report on. Here are a few highlights.

Trust and estate litigation is like other types of litigation in at least one respect: more cases settle than go to trial. Therefore, we all need to know how to craft settlement documents that bind all necessary parties and their interests. Jim Hitzeman updates us on the substantial changes to the virtual representation statute that went into effect on January 1, 2015. Among other things, those changes created a hierarchy regarding who can represent persons with a disability and unborn persons, and simplified class representation by making it more intuitive.

The *Will Contests* chapter covers the revisions to §4-1 of the Probate Act, which now creates a rebuttable presumption of incapacity to execute a will or codicil when a plenary guardian has been appointed. Also covered in that chapter, as well as in the *Trust Contests* chapter, is new §4a-10, which declares certain testamentary transfers to unrelated caregivers to be presumptively void. In the *Guardianship Litigation* chapter, Kerry Peck updates us on the Illinois Supreme Court's decision in, and the legislature's response to, *Karbin v. Karbin,* related to a guardian's ability to file for divorce on behalf of a ward.

These are only a few of the many important changes in the law covered by this 2016 edition.

As usual, thanks to all our authors for their hard work in bringing us this updated edition, with special thanks to new author Jim Pranger for the updated and expanded chapter on *Citations To Discover/Recover Assets* and also to Richard Campbell, Jim Hitzeman, and Jim Carey for pitching in to pick up and/or assist on certain chapters for departing authors.

We hope this edition provides a thorough and practical reference resource for all of your cases.

John T. Brooks
General Editor
March 2016

About the Authors

General Editor

John T. Brooks is a Partner at Foley & Lardner LLP in Chicago, where he focuses his practice on estate, trust, and fiduciary controversy and litigation, representing individuals as well as banks and trust companies. His practice encompasses all aspects of estate and trust issues, including breach of fiduciary duty; judicial constructions of wills and trusts; will and trust contests; tax litigation; contested heirship, adoption, and paternity; charitable pledge disputes; guardianship matters; estate planning malpractice; and wrongful-death actions. He also handles appeals of these matters. Mr. Brooks is a frequent speaker on topics related to estate and trust litigation and fiduciary risk management, including for IICLE®, the Chicago Bar Association, ALI-ABA, the Heckerling Institute, the American Bankers Association, the Chicago Estate Planning Council, and the Chicago Council on Planned Giving. He also authors a monthly email newsletter for and serves on the Advisory Board of Trusts & Estates magazine. He has been elected by his peers for inclusion in Best Lawyers in America since 2007 in the field of trusts and estates, and in 2015, he was named the Chicago Litigation — Trusts and Estates Lawyer of the Year by Best Lawyers in America. He was also selected for inclusion in the 2005 – 2015 Illinois Super Lawyers lists and Leading Lawyers in 2003 – 2013. Mr. Brooks is a member of the Chicago Bar Association and the American College of Trust and Estate Counsel. He earned both his B.S. and J.D. (magna cum laude) from the University of Illinois.

Chapter Authors

Richard A. Campbell is a Partner at Mayer Brown LLP in Chicago, where he concentrates his practice in wealth management. He is a frequent author and lecturer and an adjunct professor at the IIT Chicago-Kent Law School Graduate Tax Program. Mr. Campbell has been named a Leading Lawyer, was named Estate and Trust Trailblazer by the National Law Journal, and is Past President of the Trusts and Estates Section Council of the Illinois State Bar Association. He is a member of the American College of Trust and Estate Counsel, Past President of the Chicago Estate Planning Council, and a member of the Chicago Community Trust Professional Advisors Committee. Mr. Campbell received his B.S. summa cum laude and his J.D. from the University of Illinois.

James R. Carey is a Principal at Levin Schreder & Carey, Ltd., in Chicago, where he concentrates his practice in contested estate, trust, and family business matters; fiduciary risk management; and estate and gift tax controversies. He represents corporate and individual trustees, beneficiaries, and agents. Mr. Carey is active in a number of law-related organizations, including the American Bar Association's Section of Real Property, Trust and Estate Law, where he serves as the Chair of the Probate and Fiduciary Litigation Committee and is the Liaison between that Section and the ABA Section on Dispute Resolution. He is a frequent national speaker on various fiduciary topics for numerous organizations, including

the American Bar Association; IICLE®; the Estate Planning Councils of Chicago, Hawaii, Lake County, and DuPage County; ALI-ABA; the Illinois State and Chicago Bar Associations; and the American Academy of Matrimonial Lawyers. He has taught the course on estates at Loyola University Chicago School of Law. Mr. Carey received his B.A. from Marquette University and his J.D. from Loyola University Chicago School of Law, where he was Editor of The Business Lawyer and Articles Editor of the Loyola Law Journal.

Leslie J. Carter is an associate at Sidley Austin LLP in Chicago, where he practices in the Private Clients, Trusts and Estates Group. His practice involves estate planning, trust and estate administration, and related tax matters. Mr. Carter received his B.S. magna cum laude from the University of Scranton, his M.S. from Vanderbilt University (National Science Foundation Research Fellowship), and his J.D. from the University of Chicago Law School, where he was a Burton and Adrienne Glazov Scholar.

Michael R. Conway, Jr., is Executive Director at JPMorgan Chase Bank, NA, in Chicago, where he serves as tax counsel. He received his B.A. cum laude from Benedictine University and his J.D. magna cum laude from the University of Illinois College of Law.

Mary C. Downie is Associate General Counsel to BMO Financial Group in Chicago, where she leads the national team of lawyers advising the bank on all legal matters impacting the personal wealth businesses of BMO Private Bank. She is a Fellow of the American College of Trust and Estate Counsel; is a frequent author and lecturer on estate planning matters, estate administration, contested estate matters, and ownership succession issues; and has presented numerous seminars for IICLE®, the Illinois State and Chicago Bar Associations, the National Business Institute, and several institutional clients. She has published articles in the National Law Journal, the Illinois Bar Journal, and the Illinois State Bar Association Trusts and Estates Section Newsletter. Ms. Downie has been a member of the Illinois State Bar Association and its Trusts and Estates Section Council; is the former Chair of the Estate and Gift Tax Division of the Federal Taxation Committee of the Chicago Bar Association; and is a member of the Chicago Estate Planning Council, American Bankers Association, and Association of Corporate Counsel. She received her B.A. summa cum laude from Albion College and her J.D. magna cum laude from The John Marshall Law School.

Ryan M. Harding is a Partner in McDermott Will & Emery LLP in Chicago, where he is a member of the firm's Private Client Practice Group. He has been named to Best Lawyers in America 2016 and to Leading Lawyers 2016. He is a member of the American College of Trust and Estate Counsel and of the American Bar Association. Mr. Harding received both his B.A. and B.B.A. cum laude from the University of Notre Dame and his J.D. cum laude from the University of Michigan Law School, where he served as an Associate Editor of the University of Michigan Journal of Law Reform.

Louis S. Harrison is a Partner at Harrison, Held, Carroll and Wall, LLP, in Chicago, where his practice emphasizes solutions to complex problems, including creative structures to interfamily disputes and litigation, consideration of trust structures to provide creditor and spousal protection, postmortem tax planning, income tax planning, charitable dispositions, and gifting strategies. Mr. Harrison is a frequent speaker before numerous groups nationwide

on tax and estate planning. He has been an adjunct Professor at Northwestern University Law School, Chicago-Kent College of Law, and DePaul University College of Law. He has authored more than 100 published articles on a broad range of tax and estate planning subjects in legal, accounting, tax, and estate journals and periodicals. He is a Fellow of the American College of Trust and Estate Counsel (and former Illinois State Chair) and has chaired the Estate and Gift Tax Committee of the Chicago Bar Association. Mr. Harrison received his B.A. magna cum laude from Colgate University, his M.B.A. from the University of Chicago, and his J.D. with high honors from Duke University School of Law.

James R. Hellige is a Partner at Foley & Lardner LLP, in Chicago, where he concentrates in trusts and estates. He is a member of the Advisory Board and Chair of the Planned Giving Subcommittee of Catholic Charities of the Archdiocese of Chicago; a member of the Planned Giving Advisory Council for the Salvation Army, Chicago Metropolitan Division; and a member of the Planned Giving Advisory Committee of WTTW-Channel 11 Public Television in Chicago. Mr. Hellige is listed in Best Lawyers in America and also has been consistently selected as an Illinois Super Lawyer for estate planning and probate work. He received the 2013 Russell V. Kohr Memorial Award for Excellence in Planned Giving by the Chicago Council on Planned Giving. Mr. Hellige is a Fellow of the American College of Trust and Estate Counsel, a member of the American Bar Association (Taxation and Real Property, Trust and Estate Law Sections), and a member of the Chicago Bar Association (Probate Practice Committee and Trust Law Committee). He received his B.A. summa cum laude from Saint Mary's University of Minnesota and his J.D. cum laude from the University of Notre Dame Law School, where he served as Associate Articles Editor for the Notre Dame Law Review.

James W. Hitzeman is a Partner at Sidley Austin LLP in Chicago, where his practice focuses on contested estate and trust matters and advising fiduciaries and also includes estate and gift tax planning and trust and estate administration. He is a member of the Chicago Bar Association Probate Practice Committee and of the Illinois State and American Bar Associations. Mr. Hitzeman received his B.A. from the University of Illinois and his J.D. magna cum laude from the University of Illinois College of Law.

Jeanette S. Hunter is a Partner at McDermott Will & Emery LLP in Chicago, where she is a member of the firm's Private Client Practice Group. Ms. Hunter has been named to the 2015 and 2016 lists of Emerging Lawyers Under 40 in the area of trust, will, and estate planning law by Leading Lawyers. She is also a member of the Chicago Bar Association. Ms. Hunter received her B.B.A. magna cum laude from the University of Goergia and her J.D. cum laude from Northwestern University School of Law.

Richard C. Johnson is a Partner at Ice Miller LLP in Lisle, where he concentrates his practice in estate, trust, and guardianship controversies. Mr. Johnson has argued cases at the trial and appellate levels involving contested estate, trust, and guardianship issues in courts throughout Illinois, representing both individuals and corporate fiduciaries. He has also written and spoken on these areas. Mr. Johnson received his B.A. from DePaul University and his J.D. from The John Marshall Law School.

Ray J. Koenig III is a Member at Clark Hill PLC in Chicago, where he concentrates in trust, estate, and guardianship litigation and controversy. He is Chair of the Leadership Development Committee of the Chicago Bar Association, a member of the Chicago Estate Planning Council, and a member of the Fiduciary Litigation Committee of the American College of Trust and Estate Counsel. Mr. Koenig has been recognized in Super Lawyers magazine as a Rising Star and as a Trust and Estate Litigation Super Lawyer, he was named an Illinois Leading Lawyer in trust, will, and estate planning law, and he was named one of the 40 Illinois Attorneys Under Forty to Watch — 2013. He is a member of the Chicago and Illinois State Bar Associations and of the American College of Trust and Estate Counsel. Mr. Koenig received his B.A. from Michigan State University and his J.D. from DePaul University College of Law.

Jessica R. Krull is an associate at Sidley Austin LLP in Chicago, where she practices in the Private Clients, Trusts and Estates Group. Her practice involves estate planning, trust and estate administration, and related tax matters. Ms. Krull received her B.A. from Northwestern University, M.A. from Loyola Marymount University, M.B.A. from the University of Chicago Booth School of Business (with a focus on statistics and managerial effectiveness), and J.D. from the University of Chicago Law School.

Emily J. Kuo is a Partner at Harrison, Held, Carroll and Wall, LLP, in Chicago, where she focuses her practice on estate planning and administration. Ms. Kuo also has written and spoken on these areas for the Chicago Estate Planning Council and IICLE®. She is a member of the American, Illinois State, and Chicago Bar Associations. She is a Fellow of the American College of Trust and Estate Counsel and a Member of the Leading Lawyers Network in the area of trust, will, and estate planning law. Ms. Kuo received her B.S. with highest distinction from the University of North Carolina at Chapel Hill and her J.D. from the University of Chicago Law School.

Jena L. Levin is Senior Counsel to Foley & Lardner LLP in Chicago, where she focuses her practice on estate and trust litigation, including will and trust contests, judicial constructions, contested heirship, adoption and paternity issues, disputes over the enforcement of charitable pledges, breach of fiduciary duty issues, and appeals. Ms. Levin is a frequent author and lecturer on contested estate and trust issues. She regularly contributes to IICLE® handbooks and seminars and writes for Trusts & Estates magazine. She also dedicates a significant portion of her practice to pro bono work and is a board member of the Legal Council for Health Justice and also of the AIDS Legal Council of Chicago. Ms. Levin received her B.A. with highest distinction, Phi Beta Kappa, from the University of North Carolina at Chapel Hill and her J.D. from Duke University School of Law.

Robin Drey Maher is a Partner at Levin Schreder & Carey, Ltd., in Chicago, where she focuses her practice on complex trust, estate, and other fiduciary-related controversies. She has spoken extensively on these areas for the Chicago Bar Association, National Business Institute, IICLE®, and JPMorgan. She was recognized as a Rising Star in Estate and Trust Litigation by Super Lawyers Magazine and is a member of the Chicago and American Bar Associations. Ms. Maher received her B.A. cum laude from Simpson College and her J.D. with high distinction, Order of the Coif, from the University of Iowa College of Law, where she was a member of the Journal of Gender, Race and Justice.

Elizabeth A. McKillip is a Partner at Ice Miller LLP in Lisle, where her practice focuses on estate planning and trust and estate tax issues. She works with trustees, trust beneficiaries, and heirs regarding probate court matters, trust administration, and assets distribution. In addition, she assists in the appointment of guardians for disabled adults and minors. Ms. McKillip has also spoken for IICLE® on these areas. She was named a Rising Star Super Lawyer in 2013 and also received the DuPage County Bar Association Board of Directors Award. She is a member of the Illinois State and DuPage County Bar Associations. Ms. McKillip received her B.A. with honors from the University of Illinois and her J.D. magna cum laude from Loyola University Chicago School of Law, where she was a member of the Loyola University Chicago Law Journal and Editor of the Illinois Judicial Conference Symposium.

Gina E. Oderda is an associate at Mayer Brown LLP in Chicago, where she concentrates her practice in wealth management. She has experience with estate planning and administration, tax planning, and various philanthropic matters. Ms. Oderda received her B.A. magna cum laude from Menlo College and her J.D. cum laude from Duke University School of Law.

Julie J. Olenn is Of Counsel to Sidley Austin LLP in Chicago, where her practice includes wealth transfer planning and trust and estate administration, with a particular focus on estate, gift, and generation-skipping transfer (GST) tax issues. Ms. Olenn received her B.A. with honors from St. John's College and her J.D. magna cum laude from the State University of New York Buffalo Law School, where she was Editor-in-Chief of the Buffalo Law Review.

Kerry R. Peck is a Managing Partner at Peck Ritchey, LLC, in Chicago, where he concentrates his practice in will contests, probate litigation, trust litigation, probate administration, elder law, estate planning, guardianship litigation, and expert witness testimony. He is Immediate Past Commissioner of the American Bar Association Commission on Law and Aging, is a former adjunct professor at The John Marshall Law School's Elder Law Studies Program, and has written for numerous publications, including for the American Bar Association and IICLE®. Mr. Peck was selected as an Illinois Super Lawyer in 2006 – 2016 and an Illinois Leading Lawyer in 2009 – 2015 and received the Justice John Paul Stevens Award in 2014. He is a Past President of the Chicago Bar Association (1999 – 2000), former Chair of the Illinois State Bar Association Elder Law Section Council, and former member of the Board of Directors for the National Association of Elder Law Attorneys. Mr. Peck received his J.D. with honors from IIT Chicago-Kent College of Law.

Floyd D. Perkins is a Partner at Nixon Peabody LLP in Chicago, where he concentrates his practice in financial and accounting litigation, commercial matters, corporate investigations, healthcare audits, government compliance, and probate trust litigation. His background as a Certified Public Accountant brings a unique perspective to how he addresses the legal needs of his clients. Previously, he was Bureau Chief of the Illinois Attorney General's Charitable Trusts Division, where he was responsible for litigating financial, trust, and probate actions. His experience includes hundreds of trials concerning accountings, breach of fiduciary duty, and document construction. Mr. Perkins has lectured before numerous groups, including IIT Chicago-Kent College of Law, the National Association of Attorneys General, the Chicago Council on Planned Giving, and the Chicago and Illinois State Bar Associations. He was named an Illinois Super Lawyer in 2005 – 2016 and received the Distinguished Service

Award from The John Marshall Law School Alumni Association in 2000. He is a member of the Chicago and Illinois State Bar Associations and the Illinois Trial Lawyers Association. He received his B.S. from the University of Illinois and his J.D. and LL.M. from The John Marshall Law School.

James R. Pranger is a Partner at Peter J. Latz & Associates LLC in Oak Park, where he represents individuals, corporations, and institutions in a wide array of contract, employment, probate, and other cases. He represents clients in arbitrations and before administrative agencies including the Equal Employment Opportunity Commission and the Illinois Department of Human Rights. Mr. Pranger has made numerous presentations to various industry organizations on topics including employment law and managing media coverage in litigation. Mr. Pranger received his undergraduate degree magna cum laude in the Honors Program at Loyola University Chicago and his J.D. cum laude from the University of Illinois College of Law.

Peggy A. Quinn is a Partner at McDermott Will & Emery LLP in Chicago, where she focuses her practice on estate, trust, and tax litigation and estate and trust administration. Ms. Quinn has represented fiduciaries and beneficiaries in litigation before courts in numerous jurisdictions, as well as in connection with out-of-court negotiations and settlements and fiduciary risk management. She received her B.S. summa cum laude from Marquette University and her J.D. cum laude from the University of Michigan Law School.

Heather Ross cofounded Ross and Zuckerman, LLP, in Northbrook in 2005 to focus solely on legal issues surrounding assisted reproductive technology. Ms. Ross represents intended parents seeking to build families through third-party reproduction (including single parents and same-sex couples), gamete donors, gestational surrogates, and fertility clinics. She also currently serves as Cochair to the Advisory Council of Women Employed and is a professional member of the American Society for Reproductive Medicine and of RESOLVE (the National Infertility Association). Ms. Ross received her undergraduate degree Phi Beta Kappa from Indiana University and her J.D. magna cum laude from the University of Illinois College of Law.

Suzanne L. Shier is the Wealth Planning Practice Executive and Chief Tax Strategist/Tax Counsel for wealth management at Northern Trust in Chicago and serves in the Wealth Management Operating Group. Previously, she was as a Partner at Chapman and Cutler LLP in Chicago for 26 years, leading the firm's trusts and estates practice, representing individuals, charitable organizations, and corporate fiduciaries in a full range of wealth planning and fiduciary matters, including philanthropy, domestic and international wealth planning, and fiduciary administration. She is an adjunct professor in the Master of Laws in Taxation Program at Northwestern University School of Law. Ms. Shier has been quoted in publications such as the Wall Street Journal and Bloomberg and has received numerous professional honors and recognitions, including selection for inclusion in Best Lawyers in America in Trusts and Estates. She is also a fellow of the American College of Trust and Estate Counsel and a member of the Chicago Bar Association, Chicago Estate Planning Council, American Bar Association, International Bar Association, and International Society of Trust and Estate Practitioners. Ms. Shier received her B.A. with distinction from the University of Michigan, her J.D. cum laude from Loyola University Chicago School of Law, and her LL.M. in taxation from DePaul University College of Law.

Nora Zuckerman cofounded Ross and Zuckerman, LLP, in Northbrook in 2005 to focus solely on legal issues surrounding assisted reproductive technology. Ms. Zuckerman has dedicated her practice to issues regarding infertility and has represented intended parents, egg donors, sperm donors, parties in surrogacy arrangements, and fertility clinics. She currently serves on the Luggage for Freedom Committee of the National Council of Jewish Women, which assists women and children residing in domestic violence shelters. She is also a member of RESOLVE (the National Infertility Association) and a professional member of the American Society for Reproductive Medicine. Ms. Zuckerman received her undergraduate degree from the University of Wisconsin — Madison and her J.D. from Washington University School of Law.

IICLE® Board of Directors

Chair
Thomas A. Lilien, Office of the State Appellate Defender, Elgin*

Vice Chair
Robert Z. Slaughter, Avison Young, Chicago*

Secretary
Ben Neiburger, Generation Law, Ltd., Elmhurst*

Treasurer
Paul E. Bateman, Littler Mendelson P.C., Chicago*

Immediate Past Chair
William J. Anaya, Greensfelder, Hemker & Gale, P.C., Chicago*

Mark Brittingham, SIU School of Law, Carbondale
Bradley L. Cohn, Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP, Chicago
Jane N. Denes, Posegate & Denes, P.C., Springfield*
LaVon M. Johns, Gonzalez Saggio & Harlan LLP, Chicago
Michele M. Jochner, Schiller DuCanto & Fleck LLP, Chicago
James M. Lestikow, Hinshaw & Culbertson LLP, Springfield
Hal R. Morris, Arnstein & Lehr, LLP, Chicago
Katherine Opel, Sandberg Phoenix & von Gontard P.C., St. Louis, MO
Stacy E. Singer, Northern Trust, Chicago
Janine L. Spears, DePaul University, Chicago
Hon. Ronald D. Spears, Taylorville
Kathy H. Xie, Attorneys' Title Guaranty Fund, Inc., Chicago

Executive Committee Members

IICLE® Board of Directors Past Chairs

H. Ogden Brainard (1962 – 1969)
John S. Pennell (1969 – 1971)
William K. Stevens (1971 – 1972)
J. Gordon Henry (1972 – 1973)
Roger J. Fruin (1973 – 1974)
Joseph J. Strasburger (1974 – 1975)
William J. Voelker (1975 – 1976)
Harold W. Sullivan (1976 – 1977)
John J. Vassen (1977 – 1978)
James M. (Mack) Trapp (1978 – 1979)
Theodore A. Pasquesi (1979 – 1980)
George W. Overton (1980 – 1981)
Peter H. Lousberg (1981 – 1982)
Kenneth C. Prince (1982 – 1983)
Edward J. Kionka (1983 – 1984)
Joseph L. Stone (1984 – 1985)
Thomas S. Johnson (1985 – 1986)
Richard William Austin (1986 – 1987)
J. William Elwin, Jr. (1987 – 1988)
Donald E. Weihl (1988 – 1989)
Tomas M. Russell (1989 – 1990)
John K. Notz, Jr. (1990 – 1991)
Michael J. Rooney (1991 – 1992)
Willis R. Tribler (1992 – 1993)
Thomas Y. Mandler (1993 – 1994)
Ralph T. Turner (1994 – 1995)
Robert E. Bouma (1995 – 1996)
Patrick B. Mathis (1996 – 1997)
Michael H. Postilion (1997 – 1998)
Robert V. Dewey, Jr. (1998 – 1999)
Roma Jones Stewart (1999 – 2000)
Hon. John A. Gorman (2000 – 2001)
Michael L. Weissman (2001 – 2002)
George W. Howard III (2002 – 2003)
Robert E. Hamilton (2003 – 2004)
Patricia A. Hoke (2004 – 2005)
Thomas M. Hamilton, Jr. (2005 – 2006)
Hon. Dale A. Cini (2006 – 2007)
Susan T. Bart (2007 – 2008)
Adrianne C. Mazura (2008 – 2009)
George F. Mahoney, III (2009 – 2010)
Robert G. Markoff (2010 – 2011)
Hon. Leonard Murray (2011 – 2012)
Donald P. Seberger (2012 – 2013)
Lorraine K. Cavataio (2013 – 2014)
William J. Anaya (2014 – 2015)

IICLE® Staff

Michael J. Rooney, *Executive Director*

Amy L. McFadden, *Director of Publications*

Megan K. Moore, *Director of Programs*

Publications

Manny Banks, *Publications Administrative Assistant*
Carole Chew, *Executive Managing Editor*
Matthew Lund, *Editor*
Angela Moody, *Managing Editor*
Darryl Parr, *Editor-in-Chief*
Sarah Payne, *Subscriptions Coordinator*
Laura Reyman, *Managing Editor*
Kim Rouland, *Publications Compositor*
Courtney Smith, *Managing Editor*
Megan Smith, *Publications Marketing Associate*
Joy Wolfe, *Managing Editor*

Programs

Konner Dudley, *Programs Marketing Associate*
Stephanie Laffey, *Online Project Coordinator*
Alonnah Madson, *Programs Associate*
Christopher Noel, *Volunteer Coordinator*
Tessa White, *Programs and Partnership Development*

Administrative Services

Sarah Lawson, *Assistant to Executive Director*

Business Office

Dawn Bruce, *Accounts Payable*
Jeff Kurmann, *Human Resources/Accounting Associate*

Customer Support

Diana Celano, *Representative*

Information Technology

Chris Hull, *Information Technology Manager*
Dane Vincent, *Information Technology Specialist*

Readers may contact staff members via e-mail at info@iicle.com or [first initial][last name]@iicle.com (*e.g.,* mrooney@iicle.com)

1 Will Contests

JOHN T. BROOKS
Foley & Lardner LLP
Chicago
ELIZABETH A. McKILLIP
RICHARD C. JOHNSON
Ice Miller LLP
Lisle

I. Preliminary Issues

A. [1.1] Venue
B. Issues Relating to Jurisdiction
   1. [1.2] Time-Bar
   2. [1.3] Service
C. [1.4] Formal Proof of Will
D. [1.5] Standing To Contest a Will
E. [1.6] Notice Provisions
F. Executor's Role: A Duty To Defend the Will
   1. [1.7] In General
   2. Attorneys' Fees
      a. [1.8] Reasonable Fees for Work Done To Benefit the Estate
         (1) [1.9] A benefit to the estate must exist
         (2) [1.10] Fees must be "reasonable"
      b. [1.11] Specific Cases in Which Fiduciaries' Attorneys' Fees Generally Are Not Allowed
      c. [1.12] Allowance of Fees Under the Common Fund Doctrine, Based on Equitable Contribution, and as Punitive Damages
G. [1.13] Jury Demand

II. Causes of Action

A. Undue Influence
   1. [1.14] In General
   2. [1.15] Presumption
   3. [1.16] Pleading
B. Lack of Testamentary Capacity
   1. [1.17] In General
   2. [1.18] Elements
   3. [1.19] Insane Delusion
   4. [1.20] Adjudication of Disability Does Not Equal Lack of Capacity
   5. [1.21] Pleading
C. [1.22] Intentional Interference with an Expectancy and Fraudulent Inducement
D. [1.23] Fraud, Forgery, Compulsion, and Other Improper Conduct
E. [1.24] Revocation
F. [1.25] Noncompliance with the Essential Formalities of Execution
G. [1.26] Equitable Adoption and Contract To Adopt

III. Defenses to Will Contests

IV. Trial and Appeal

I. PRELIMINARY ISSUES

A. [1.1] Venue

Under the Illinois Probate Act of 1975 (Probate Act), 755 ILCS 5/1-1, *et seq.,* venue for a will contest is proper in the court of the county where the estate administration is proceeding. 755 ILCS 5/8-1(a). This is the case even when the testator's property is located in another county. *Blackhurst v. James,* 304 Ill. 586, 136 N.E. 754 (1922). If a petition has been timely filed in another division of the circuit court, the procedural error will not bar the will contest; rather, the error may be corrected by a motion to transfer the petition to the probate proceedings. *In re Estate of Olsen,* 120 Ill.App.3d 744, 458 N.E.2d 164, 76 Ill.Dec. 25 (2d Dist. 1983). In some jurisdictions, will contests and related actions shall be designated as "supplemental proceedings." See Cook County Circuit Court Rule 12.1(c); Will County Circuit Court Rule 10.03; Kane County Circuit Court Rule 18.00(d).

B. Issues Relating to Jurisdiction

1. [1.2] Time-Bar

The six-month statute for court jurisdiction (755 ILCS 5/8-1(a)) is an absolute bar to a will contest filed thereafter. The six-month time period cannot be tolled by fraudulent concealment or for any other reason not expressly stated in the Probate Act. There is no jurisdiction for the court to proceed after the six-month time period following admission of the will to probate has elapsed. *In re Estate of Mohr,* 357 Ill.App.3d 1011, 830 N.E.2d 810, 294 Ill.Dec.398 (1st Dist. 2005); *Robinson v. First State Bank of Monticello,* 97 Ill.2d 174, 454 N.E.2d 288, 293, 73 Ill.Dec. 428 (1983), citing *Ruffing v. Glissendorf,* 41 Ill.2d 412, 243 N.E.2d 236 (1968). Beware of opposing counsel offering a tolling agreement. However, even after the six-month time period has elapsed, a subsequent will that has not been lost or destroyed may be admitted because it is not a collateral attack on the order admitting the initial will to probate, and therefore it is not a will contest. *Coussee v. Estate of Efston,* 262 Ill.App.3d 419, 633 N.E.2d 815, 199 Ill.Dec. 19 (1st Dist.), *appeal denied,* 157 Ill.2d 497 (1994).

However, the six-month time period provided for in the Probate Act does not apply to tort actions, and, in some circumstances, an action for intentional interference with inheritance may be brought after expiration of the six-month time limit. *In re Estate of Ellis,* 236 Ill.2d 45, 923 N.E.2d 237, 337 Ill.Dec. 678 (2009). *Cf. Fitch v. McDermott, Will & Emery, LLP,* 401 Ill.App.3d 1006, 929 N.E.2d 1167, 1177 – 1178, 341 Ill.Dec. 88 (2d Dist. 2010) (court found that complaint relied on undue influence, not intentional interference with inheritance, in seeking to set aside will; six-month time limitation will apply to bar causes of action filed outside that limitation). *See also Bjork v. O'Meara,* 2013 IL 114044, 986 N.E.2d 626, 369 Ill.Dec. 313; *In re Estate of Jeziorski,* 162 Ill.App.3d 1057, 516 N.E.2d 422, 114 Ill.Dec. 267 (1st Dist. 1987); *Robinson v. First State Bank of Monticello,* 97 Ill.2d 174, 454 N.E.2d 288, 73 Ill.Dec. 428 (1983); *Ellis, supra.*

2. [1.3] Service

Jurisdiction over defendant parties to a will contest may be obtained by mailing or delivering the petition to contest the will to the addresses in the most recent petition to admit the will that is on file with the probate court. 755 ILCS 5/8-1(b). The petition to contest must be sent to any heir, legatee, fiduciary, or other person whose property rights would be impacted by the will contest, including the representative's attorney. This mailing or delivery is the responsibility of the petitioner. However, failure to mail or deliver a copy of the petition to contest a will to any heir or legatee is insufficient to invalidate a judgment arising from the will contest. *Id.*

C. [1.4] Formal Proof of Will

Illinois is often referred to as a "double contest" state. Formal proof is the first stage of challenge. The inquiry is limited to issues related to execution of the document and gives counsel for a challenger an opportunity to assess the overall credibility of the witnesses. It is strongly recommended that counsel take advantage of this procedure. It is also recommended that counsel confirm the presence of a court reporter at a hearing for formal proof of will, as the recorded testimony may be useful if further action is required.

Pursuant to 755 ILCS 5/6-21, an interested person can request a formal proof of will by filing a motion seeking a formal proof within 42 days of the admission of the will to probate. At the formal proof of will hearing, the proponent of the will at issue must produce the attesting witnesses to the will. The interested party-movant may seek to overturn the prior admission of the will to probate. The court will determine whether there is "proof of fraud, forgery, compulsion or other improper conduct, which in the opinion of the court is sufficient to invalidate or destroy the will." *Id.* Usually, the hearing is confined to direct examination and cross-examination of the attesting witnesses or, for witnesses residing elsewhere or who are otherwise unavailable, by their deposition testimony pursuant to 755 ILCS 5/6-5. An attestation clause or affidavit signed by the witness and attached to or forming a part of the will is insufficient for this purpose. 755 ILCS 5/6-21, 5/6-4(b)(2), 5/6-4(b)(3). However, other evidence of fraud, forgery, or compulsion may be offered. The executor-proponent of the will shall then seek an order of the court confirming the court's prior order admitting the will to probate.

When there is a hearing regarding the admission of a will to probate on grounds of the testator's lack of mental capacity, the only evidence allowed is the testimony of the subscribing witnesses to the will. *Stuke v. Glaser,* 223 Ill. 316, 79 N.E. 105, 106 (1906), citing *Andrews v. Black,* 43 Ill. 256 (1867), *Walker v. Walker,* 3 Ill. (2 Scam.) 291 (1840), and *O'Brien v. Bonfield,* 213 Ill. 428, 72 N.E. 1090 (1904). Evidence of undue influence is improper in a hearing for a formal proof of will. *In re Estate of Davison,* 119 Ill.App.2d 477, 256 N.E.2d 16 (1st Dist. 1970).

Should the court overturn its prior order admitting the will to probate and enter an order denying the admission of the will to probate, the executor will be removed. Thereafter, the executor cannot use the assets of the estate to defend the will; neither may the executor control the estate assets.

The remedy pursuant to a formal proof of will is somewhat different from the available remedy in a will contest. When formal proof of the will is required, the court may deny a document from being probated if there is "proof of fraud, forgery, compulsion or other improper conduct, which in the opinion of the court is sufficient to invalidate or destroy the will." 755 ILCS 5/6-21. However, because a will can be contested only after its admission to probate (755 ILCS 5/8-1(a)), the remedy therein cannot be denial of admission. Rather, a successful will contest will result in the entry of an order (by a court) or a verdict (by a jury) that the will is invalid in that it was not the will of the testator. *See, e.g., Beyers v. Billingsley,* 54 Ill.App.3d 427, 369 N.E.2d 1320, 12 Ill.Dec. 306 (3d Dist. 1977). The estate representative acting under that prior will is then removed, though his or her actions as administrator will stand. 755 ILCS 5/23-2, 5/23-8. The court will then appoint a new estate representative. 755 ILCS 5/6-9.

D. [1.5] Standing To Contest a Will

The Probate Act provides that any interested person may, within six months after the admission to probate of a will, file a petition to contest the validity of the will. 755 ILCS 5/8-1(a). The Probate Act defines an "interested person" as one "who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative." 755 ILCS 5/1-2.11.

The requisite interest requirement is met when a person is affected detrimentally by being deprived of a right he or she would have otherwise had in the absence of the will. *In re Estate of Schlenker,* 209 Ill.2d 456, 808 N.E.2d 995, 283 Ill.Dec. 707 (2004). Accordingly, a disinherited heir at law would have standing because he or she would have inherited a portion of the decedent's estate under the laws of intestacy and therefore would be detrimentally affected by the probate of the decedent's will. An heir or next of kin would have standing to contest a will if he or she would have taken more if the testator had died intestate than if the will were admitted to probate. *Id. See In re Estate of Lipchik,* 27 Ill.App.3d 331, 326 N.E.2d 464, 468 (1st Dist. 1975). The same analysis stands when a decedent's executor could submit one or more prior wills for probate if the latest will were declared invalid. *Schlenker, supra.* One who had an interest under a prior will, whether as a devisee, legatee, or executor, is also considered an interested person with standing to contest a later will that diminished his or her interest. *See Wilson v. Bell,* 315 Ill.App. 418, 43 N.E.2d 162, 165 (1st Dist. 1942). Residuary legatees who would benefit from partial invalidation of a will are interested persons for purposes of standing (*Williams v. Crickman,* 81 Ill.2d 105, 405 N.E.2d 799, 805, 39 Ill.Dec. 820 (1980)), as is the successor trustee of a trust that would be revived if the testator's final will were determined to be invalid (*In re Estate of Stern,* 263 Ill.App.3d 1002, 636 N.E.2d 939, 942, 201 Ill.Dec. 507 (1st Dist. 1994)).

In contrast, courts have held there to be lack of standing in certain situations. A person who would receive the same or lesser amount from a previous will lacks standing because he or she has not been detrimentally affected. *Estate of Malcolm,* 234 Ill.App.3d 962, 602 N.E.2d 41, 43, 176 Ill.Dec. 734 (1st Dist. 1992). A person whose only interest comes from being named in an alleged subsequent codicil that has not been probated lacks standing to contest the probate of another codicil. *Lowe Foundation v. Northern Trust Co.,* 342 Ill.App. 379, 96 N.E.2d 831, 834

(1st Dist. 1951). An assignee of a disinherited heir's expectancy lacks standing to contest the validity of a will. *In re Estate of Davis,* 126 Ill.App.3d 518, 467 N.E.2d 402, 403, 81 Ill.Dec. 702 (3d Dist. 1984).

Courts have also found that there is no standing to contest a will before the testator's death in a guardianship proceeding. A legacy under a will is not a vested property right, but it is a future interest. Therefore, legatees have no present property interest and, therefore, no due-process rights in the property of a living testator. *In re Estate of Henry,* 396 Ill.App.3d 88, 919 N.E.2d 33, 335 Ill.Dec. 512 (1st Dist. 2009).

E. [1.6] Notice Provisions

Under the Probate Act, in actions regarding will contests, a contesting party must mail or deliver a copy of the petition to the personal representative, to the personal representative's attorney of record, and to each heir and legatee whose name is listed in the petition. 755 ILCS 5/8-1(b), 5/8-2(b). Furthermore, the Probate Act articulates that the failure to mail or deliver a copy of the petition to the personal representative's attorney of record, and to each heir and legatee whose name is listed in the petition, "does not . . . affect the validity of the judgment entered in the proceeding." 755 ILCS 5/8-1(b), 5/8-2(b). Previously, the Probate Act required that certain people be made parties to will contest actions. Section 8-1, prior to its amendment by P.A. 89-364 (eff. Aug. 18, 1995), had defined the necessary parties to will contest actions: "The representative, if any, and all heirs and legatees of the testator must be made parties to the proceeding" in will contest actions. Ill.Rev.Stat. (1985), c. 110½, ¶8-1(a). *See also Estate of Watson,* 127 Ill.App.3d 186, 468 N.E.2d 836, 839, 82 Ill.Dec. 289 (2d Dist. 1984); *Forys v. Bartnicki,* 107 Ill.App.3d 396, 437 N.E.2d 706, 709, 63 Ill.Dec. 57 (5th Dist. 1982). The 1995 amendment deleted this language.

F. Executor's Role: A Duty To Defend the Will

1. [1.7] In General

Section 8-1(e) of the Probate Act imposes a duty on the representative to defend a proceeding to contest the validity of a will. 755 ILCS 5/8-1(e). *See also In re Estate of Feinberg,* 235 Ill.2d 256, 919 N.E.2d 888, 905, 335 Ill.Dec. 863 (2009) (executors are "duty-bound" to defend estate plan). The court may order the representative to defend the proceeding or to prosecute an appeal from the judgment. If the representative fails or refuses to comply with the court order, the court, on its own motion or that of any interested party, may appoint a special administrator to defend or appeal. *Id.* The exception to this duty arises when the executor has reasonable grounds to believe that the judgment finding the will invalid is proper. *In re Estate of Lipchik,* 27 Ill.App.3d 331, 326 N.E.2d 464, 468 (1st Dist. 1975). An attorney for an estate must act with due care and protect the beneficiaries' interests. *See Grimes v. Saikley,* 388 Ill.App.3d 802, 904 N.E.2d 183, 195, 328 Ill.Dec. 421 (4th Dist. 2009), citing *Gagliardo v. Caffrey,* 344 Ill.App.3d 219, 800 N.E.2d 489, 497, 279 Ill.Dec. 421 (1st Dist. 2003). Defending the will frequently poses potential conflicts between the estate and some other party, such as an heir or beneficiary. The attorney for the executor, in such an adversarial situation, is obligated to act with due care for the beneficiaries but does not have an attorney-client relationship with the beneficiaries. *Estate of Vail v. First of*

America Trust Co., 309 Ill.App.3d 435, 722 N.E.2d 248, 253, 242 Ill.Dec. 759 (4th Dist. 1999). Under Rule 1.7 of the Illinois Rule of Professional Conduct of 2010, an attorney is barred from representing a client directly adverse to another client or if an attorney's representation of one client will materially limit the attorney's responsibilities to the other client. The executor has an allegiance to the estate. 722 N.E.2d at 253.

2. Attorneys' Fees

a. [1.8] Reasonable Fees for Work Done To Benefit the Estate

The caselaw draws a connection between the executor's duty to defend a proceeding to contest the validity of a will pursuant to §8-1(e) of the Probate Act, 755 ILCS 5/8-1(e), and the recovery of attorneys' fees. *In re Estate of Brannan,* 210 Ill.App.3d 563, 569 N.E.2d 104, 109, 155 Ill.Dec. 104 (3d Dist. 1991) ("A personal representative needs legal counsel, and the practice has been to permit the court to authorize the payment of fees for such work from the assets of the estate."). The Probate Act states that "[t]he attorney for a representative is entitled to reasonable compensation for his services." 755 ILCS 5/27-2. As a prerequisite to recovery of attorneys' fees from an estate under §27-2, the party seeking recovery must be a "representative," and his or her actions must have been performed in the interest of and to the benefit of the estate. *See In re Estate of Goffinet,* 318 Ill.App.3d 152, 742 N.E.2d 874, 879, 252 Ill.Dec. 336 (4th Dist. 2001). *See also In re Estate of Zagaria,* 2013 IL App (1st) 122879, 997 N.E.2d 913, 375 Ill.Dec. 602 (attorneys' fees awarded from estate even after decedent (presumed dead after seven years) turned up alive). It is one author's opinion that any interested party should have the right to seek payment of his or her attorneys' fees from the estate, for work that benefits the estate, regardless of his or her role as representative.

But beware. A personal representative who appeals the decision of the trial court in a will contest does so at his or her own risk and cost. *See NC Illinois Trust Co. v. Madigan,* 351 Ill.App.3d 311, 812 N.E.2d 1038, 1040, 286 Ill.Dec. 23 (4th Dist. 2004), citing *Glaser v. Chicago Title & Trust Co.,* 401 Ill. 387, 82 N.E.2d 446, 449 (1948).

(1) [1.9] A benefit to the estate must exist

In order for a fiduciary's attorneys' fees to be payable from an estate, the work done by the attorney must be rendered in the interest, and to the benefit, of the estate. *In re Estate of Freund,* 63 Ill.App.3d 1, 379 N.E.2d 935, 937, 20 Ill.Dec. 102 (2d Dist. 1978). *But see In re Estate of Riordan,* 351 Ill.App.3d 594, 814 N.E.2d 597, 286 Ill.Dec. 609 (3d Dist. 2004) (attorneys' fees denied to attorney hired by heirs to contest claim against estate). If the work is not in the interest of or to the benefit of the estate, then attorneys' fees will not be recoverable from the estate. *See In re Estate of Minsky,* 59 Ill.App.3d 974, 376 N.E.2d 647, 651, 17 Ill.Dec. 501 (1st Dist. 1978). In general, the court will consider all potential benefits resulting from the representative's actions. *See, e.g., In re Estate of Shull,* 295 Ill.App.3d 687, 693 N.E.2d 489, 492, 230 Ill.Dec. 360 (4th Dist. 1998). Success in litigation is not absolutely necessary as long as the representative's actions benefit the estate in some other manner. *Estate of Roselli,* 70 Ill.App.3d 116, 388 N.E.2d 87, 92, 26 Ill.Dec. 463 (1st Dist. 1979). Counsel fees are to be rejected, however, when it is clear that the legal services were not in the interest of or did not benefit the estate, or when the executor involved the estate in unnecessary litigation. *Minsky, supra.*

(2) [1.10] Fees must be "reasonable"

The Probate Act permits a representative to recover only "reasonable" attorneys' fees. 755 ILCS 5/27-2. The court determines whether a representative's fees are reasonable, and it possesses broad discretion in making the determination. *Estate of James,* 10 Ill.App.2d 232, 134 N.E.2d 638, 641 – 642 (3d Dist. 1956). The reasonableness of fees is a question of fact. To make the determination whether attorneys' fees are reasonable, courts typically consider (a) the work involved, (b) the size of the estate, (c) the skill evidenced by the work, (d) the time expended, (e) the success of the efforts, (f) the presence of good faith, and (g) the efficiency with which the work was done. *See, e.g., In re Estate of Shull,* 295 Ill.App.3d 687, 693 N.E.2d 489, 492, 230 Ill.Dec. 360 (4th Dist. 1998). The court generally will weigh each factor, and although no single factor is dispositive, courts appear to weigh some factors, such as good faith, more heavily. *In re Estate of Breault,* 63 Ill.App.2d 246, 211 N.E.2d 424, 430 – 431 (1st Dist. 1965) (fiduciary entitled to recover attorneys' fees incurred in good-faith defense of estate, regardless of outcome of litigation). In *Shull, supra,* the appellate court found the requested attorneys' fees to be reasonable, citing such factors as the complex legal issue faced by the attorney, the relatively large size of the estate, the fact that the attorney's work ultimately benefited the client, and the good faith demonstrated by the attorney. In contrast, factors such as bad faith on the part of the party seeking fees, unnecessary work and research, and inaccurate or incomplete attorney time records may lead to a denial of fees. *See, e.g., In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 111 Ill.Dec. 639 (1st Dist. 1987) (affirming judgment awarding law firm only $535,000 of requested $957,099.05). An attorney should research the "usual and customary" fees in the relevant jurisdiction, because this often varies from county to county.

b. [1.11] Specific Cases in Which Fiduciaries' Attorneys' Fees Generally Are Not Allowed

When an estate has multiple fiduciaries, these fiduciaries often cannot recover fees if they each retain separate counsel. *In re Estate of Greenberg,* 15 Ill.App.2d 414, 146 N.E.2d 404, 408 (1st Dist. 1957). The one exception to this rule is that attorneys' fees incurred by multiple fiduciaries acting separately may be charged against an estate if the employment is necessary to ensure its proper administration. 146 N.E.2d at 409; *Northern Trust Co. v. Continental Illinois National Bank & Trust Company of Chicago,* 43 Ill.App.3d 169, 356 N.E.2d 1049, 1071 – 1072, 1 Ill.Dec. 767 (1st Dist. 1976) (holding that "irreconcilable conflict between the corporate and individual trustees necessitated a final judicial resolution" and that this honest difference of opinion justified retention of separate counsel at expense of trust), *rev'd in part on other grounds sub nom. Stuart v. Continental Illinois National Bank & Trust Company of Chicago,* 68 Ill.2d 502 (1977). Attorneys' fees also are not allowed when the fiduciary has employed an attorney for his or her individual benefit and not for the benefit of the estate. *In re Estate of Dyniewicz,* 271 Ill.App.3d 616, 648 N.E.2d 1076, 1083, 208 Ill.Dec. 154 (1st Dist. 1995). Attorneys should be careful to maintain separate billing records when representing the fiduciary in other individual matters that do not directly benefit the estate.

c. [1.12] Allowance of Fees Under the Common Fund Doctrine, Based on Equitable Contribution, and as Punitive Damages

The common fund doctrine is one of the earliest and most prevalent exceptions to the so-called "American rule" that each party to litigation bears its own attorneys' fees. The common

fund doctrine permits a party who "creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees." *In re Estate of Pfoertner,* 298 Ill.App.3d 1134, 700 N.E.2d 438, 440, 233 Ill.Dec. 133 (5th Dist. 1998), citing *Brundidge v. Glendale Federal Bank, F.S.B.,* 168 Ill.2d 235, 659 N.E.2d 909, 911, 213 Ill.Dec. 563 (1995). In *Pfoertner,* the appellate court upheld the trial court's decision that the common fund doctrine applied and should allow for the compensation of the attorney who filed the contest petition from each of the heirs' shares, including those who had not retained the attorney. Even more, the court may assess fees against a party in a probate proceeding based on "equitable contribution" or as punitive damages in the case of wrongdoing. *In re Estate of Elias,* 408 Ill.App.3d 301, 946 N.E.2d 1015, 1038, 349 Ill.Dec. 519 (1st Dist. 2011).

G. [1.13] Jury Demand

Any contestant or proponent of a will may demand a trial by jury. 755 ILCS 5/8-1(c), 5/8-2(c). In other words, as in other civil actions, if the petitioner does not request a trial by jury, then any of the respondents may do so. 735 ILCS 5/2-1105(a) (requiring that defendants file jury demand no later than they file their answer).

II. CAUSES OF ACTION

A. Undue Influence

1. [1.14] In General

"Undue influence" is defined as "any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely." *Powell v. Bechtel,* 340 Ill. 330, 172 N.E. 765, 768 (1930), quoting *Prinz v. Schmidt,* 334 Ill. 576, 166 N.E. 209, 212 (1929). *See also Franciscan Sisters Health Care Corp. v. Dean,* 95 Ill.2d 452, 448 N.E.2d 872, 69 Ill.Dec. 960 (1983); *In re Estate of DiMatteo,* 2013 IL App (1st) 122948, ¶62, 995 N.E.2d 420, 374 Ill.Dec. 281. Generally, undue influence is shown in one of two ways: (a) proof of a specific conduct that constitutes undue influence; or (b) a fiduciary relationship plus other conduct which raises a presumption of undue influence, to be rebutted by the defendant.

The Illinois Supreme Court has held that in order to invalidate a will, the alleged undue influence "must be of such a character as to deprive the testator of free agency." *Flanigon v. Smith,* 337 Ill. 572, 169 N.E. 767, 769 (1929). The undue influence must be exerted at the time the will is drafted so that the will essentially reflects the wishes of the wrongdoer more than of the testator. Advice or persuasion is not enough to render a will invalid. *Id.*

The influence must be directly connected to the execution of a new will, be in operation at the time the will is made, and be directed toward procuring the will in favor of the defendant. *DiMatteo, supra,* 2013 IL App (1st) 122948 at ¶62. Although the defendant must have procured the will, he does not have to be present when the will was signed.

Influence arising from love or affection that is not used to manipulate the decisions of a testator is not considered undue influence. *Flanigon, supra,* 169 N.E. at 769, citing *Pollock v. Pollock,* 328 Ill. 179, 159 N.E. 305 (1927), *Grosh v. Acom,* 325 Ill. 474, 156 N.E. 485 (1927), and *Jones v. Worth,* 319 Ill. 235, 149 N.E. 793 (1925). However, when kindness and affection result in overcoming the testator's free agency and essentially reflect the wishes of the beneficiary rather than the wishes of the testator, then this constitutes undue influence. *Kelley v. First State Bank of Princeton,* 81 Ill.App.3d 402, 401 N.E.2d 247, 36 Ill.Dec. 566 (3d Dist. 1980).

Undue influence usually is asserted in conjunction with a claim for lack of testamentary capacity. It has been held that when a testator's mind "is wearied and debilitated by long-continued and serious and painful sickness," the testator is easily susceptible to undue influence. *Sulzberger v. Sulzberger,* 372 Ill. 240, 23 N.E.2d 46, 49 (1939), quoting *England v. Fawbush,* 204 Ill. 384, 68 N.E. 526, 529 (1903). *See also Schmidt v. Schwear,* 98 Ill.App.3d 336, 424 N.E.2d 401, 405, 53 Ill.Dec. 766 (5th Dist. 1981). Less evidence is required to find the existence of undue influence when it is determined that the testator was in a feeble state of mind. *Sulzberger, supra,* quoting *England, supra,* and citing *Blackhurst v. James,* 304 Ill. 586, 136 N.E. 754 (1922), *Donnan v. Donnan,* 256 Ill. 244, 99 N.E. 931 (1912), and *Cheney v. Goldy,* 225 Ill. 394, 80 N.E. 289 (1907).

If a specific provision of a will is alleged to be the result of undue influence, it may be stricken. *Williams v. Crickman,* 81 Ill.2d 105, 405 N.E.2d 799, 39 Ill.Dec. 820 (1980). (In practice, it is extremely rare for a specific provision of a will to be invalidated.) The remainder of the will can stand as long as the testator's intent or testamentary scheme is not defeated. However, when the specific provisions resulting from undue influence cannot be determined or when the testator's intent would be destroyed by the removal of specific provisions being challenged, the entire will shall be invalidated. *Id.*

2. [1.15] Presumption

The existence of a fiduciary relationship is often used in an attempt to show undue influence. To raise a presumption of undue influence, the party contesting the will must establish the existence of the following elements: (a) a fiduciary relationship existed between the testator and a person who substantially benefits under the will; (b) the primary beneficiaries were in a position to dominate and control the dependent testator; (c) the testator reposed trust and confidence in these beneficiaries; and (d) the beneficiaries were instrumental in or participated in the procurement or preparation of the will. *In re Estate of Roeseler,* 287 Ill.App.3d 1003, 679 N.E.2d 393, 404, 223 Ill.Dec. 208 (1st Dist. 1997), citing *Tidholm v. Tidholm,* 391 Ill. 19, 62 N.E.2d 473 (1945), *Zachary v. Mills,* 277 Ill.App.3d 601, 660 N.E.2d 1301, 214 Ill.Dec. 352 (4th Dist. 1996), and *In re Estate of Ciesiolkiewicz,* 243 Ill.App.3d 506, 611 N.E.2d 1278, 183 Ill.Dec. 630 (1st Dist. 1993); *Pottinger v. Pottinger*, 238 Ill.App.3d 908, 605 N.E.2d 1130, 1139, 179 Ill.Dec. 116 (2d Dist. 1992). Proof of these facts alone and undisputed entitles the will contestant to a favorable ruling. *DeHart v. DeHart,* 2013 IL 114137, ¶30, 986 N.E.2d 85, 369 Ill.Dec. 136. However, a presumption of undue influence can be ultimately determined, at the earliest, only after the close of the plaintiff's case. 2013 IL 114137 at ¶29.

A power of attorney establishes a general fiduciary relationship as a matter of law. *Apple v. Apple,* 407 Ill. 464, 95 N.E.2d 334, 338 (1950); *White v. Raines,* 215 Ill.App.3d 49, 574 N.E.2d 272, 279, 158 Ill.Dec. 478 (5th Dist. 1991). However, the existence of a power of attorney for healthcare does not create a fiduciary relationship, which, as a matter of law, raises a presumption of undue influence in a financial transaction (*i.e.,* a deed transferring title to the agent under the healthcare power of attorney). *In re Estate of Stahling,* 2013 IL App (4th) 120271, 987 N.E.2d 1003, 370 Ill.Dec. 267. A fiduciary relationship does not necessarily exist as a matter of law between a parent and a child; rather, it must be proved by competent evidence. *Pepe v. Caputo,* 408 Ill. 321, 97 N.E.2d 260, 263 (1951), citing *O'Malley v. Deany,* 384 Ill. 484, 51 N.E.2d 583 (1943), and *Shuster v. Krueger,* 371 Ill. 543, 21 N.E.2d 729 (1939). Likewise, the presumption is applied carefully to the relationship of husband and wife. *In re Estate of Glogovsek,* 248 Ill.App.3d 784, 618 N.E.2d 1231, 188 Ill.Dec. 661, (1993); *In re Estate of Baumgarten,* 2012 IL App (1st) 112155, 975 N.E.2d 651, 363 Ill.Dec. 625.

However, this presumption can be rebutted by evidence showing that there was no undue influence. *Schmidt v. Schwear,* 98 Ill.App.3d 336, 424 N.E.2d 401, 53 Ill.Dec. 766 (5th Dist. 1981). A fiduciary to a testator that receives a benefit will not be guilty of unduly influencing the testator unless the fiduciary prepared the will or participated "in the preparation and execution of it." *Flanigon v. Smith,* 337 Ill. 572, 169 N.E. 767, 769 (1929), citing *Bailey v. Oberlander,* 329 Ill. 568, 161 N.E. 65 (1928), *Buerger v. Buerger,* 317 Ill. 401, 148 N.E. 274 (1925), and *Britt v. Darnell,* 315 Ill. 385, 146 N.E. 510 (1925). However, the presumption of undue influence that arises when a fiduciary drafts a will for the testator, leaving the fiduciary with a substantial benefit, can be refuted by evidence of the testator's clear state of mind at the time of the will's execution. *Franciscan Sisters Health Care Corp. v. Dean,* 95 Ill.2d 452, 448 N.E.2d 872, 69 Ill.Dec. 960 (1983). It has even been held that "absent a fiduciary relationship no presumption of undue influence can arise." *Belfield v. Coop,* 8 Ill.2d 293, 134 N.E.2d 249, 258 (1956). This holding overrules previous determinations that a weakened state of mind coupled with the active procurement of a will is sufficient to prevail in a will contest based on undue influence. *Id.*

3. [1.16] Pleading

A prima facie case for undue influence can be stated by facts demonstrating (a) that a fiduciary relationship existed between the testator and a beneficiary who received a substantial benefit from the will, (b) that the beneficiary was the dominant and the testator the dependent party, and (c) that the will was procured by and in favor of the fiduciary-beneficiary through the use of his or her dominant fiduciary or confidential relationship. *Belfield v. Coop,* 8 Ill.2d 293, 134 N.E.2d 249 (1956); *Swenson v. Wintercorn,* 92 Ill.App.2d 88, 234 N.E.2d 91, 97 (2d Dist. 1968).

The pleading alleging undue influence must contain "a specific recital of the manner in which the free will of the testator was impaired at the time the instrument was executed." *Bailey v. State Bank of Arthur,* 121 Ill.App.3d 17, 458 N.E.2d 1326, 1328, 76 Ill.Dec. 526 (4th Dist. 1983), quoting *Sterling v. Kramer,* 15 Ill.App.2d 230, 145 N.E.2d 757, 759 (1st Dist. 1957). A pleading that merely concludes that the testator was influenced by the persuasive or dominant nature of a beneficiary is insufficient. *Id.* Also, facts must be pleaded to show that the fiduciary "receive[d] a substantial benefit from the will[,] . . . the testator repose[d] trust and confidence in the devisee . . . or legatee, and . . . the will [was] prepared by or its preparation procured by such devisee or

legatee." *Herbolsheimer v. Herbolsheimer,* 60 Ill.2d 574, 328 N.E.2d 529, 530 (1975), quoting *Swenson, supra.* Review of the Illinois Pattern Jury Instructions — Civil (I.P.I. — Civil) for undue influence will assist in drafting the necessary allegations of a pleading. I.P.I. — Civil Nos. 200.03, 200.004.

B. Lack of Testamentary Capacity

1. [1.17] In General

The lack of mental or testamentary capacity is one of the most frequent grounds used to contest a decedent's will. When establishing the lack of testamentary capacity, it is necessary to prove that, at the time the will was executed, the testator lacked sufficient mental ability to (a) know and remember the natural objects of his or her bounty, (b) comprehend the kind and character of his or her property, and (c) make a disposition of his or her property according to some plan formed in the testator's mind. *In re Estate of Sutera,* 199 Ill.App.3d 531, 557 N.E.2d 371, 145 Ill.Dec. 601 (1st Dist. 1990). The testator must understand the nature, consequence, and effect of the act of executing a will. *DeHart v. DeHart,* 2013 IL 114137, ¶19, 986 N.E.2d 85, 369 Ill.Dec. 136. However, a testator is merely required to have the *capacity* to know or recall the natural objects of his or her bounty; the testator's ability to actually do so is irrelevant. *George v. Moorhead,* 399 Ill. 497, 78 N.E.2d 216 (1948). Regarding testamentary capacity in a will contest, I.P.I. — Civil No. 200.05 states:

> **A person has sufficient mental capacity to make a will if, at the time he executes the document, he has:**
>
> **(1) The ability to know the nature and extent of his property;**
>
> **(2) The ability to know the natural objects of his bounty; and**
>
> **(3) The ability to make a disposition of his property in accordance with some plan formed in his mind.**
>
> **It is not necessary that the person actually know these things. It is necessary only that he have the mental ability to know them.**

PRACTICE POINTER

✓ Will contests filed alleging lack of mental capacity are usually initiated simultaneously on other grounds, such as undue influence.

2. [1.18] Elements

The natural objects of the testator's bounty are usually the children and close family. However, the natural objects of the bounty of a decedent include, but are not limited to, immediate family through blood or marriage. The courts have held that proper jury instructions

may define the natural objects of the bounty of a decedent as "those who have some natural claim upon his benevolence, affection or consideration" and that "the natural objects of the bounty of a person making a will are not necessarily confined to her legal heirs but may be those, who by reason of kinship may reasonably be supposed to have some claim on her." *Hockersmith v. Cox,* 407 Ill. 321, 95 N.E.2d 464, 470 (1950). The *Hockersmith* court noted that the Illinois Supreme Court, in *Hutchinson v. Hutchinson,* 250 Ill. 170, 95 N.E. 143, 147 (1911), had stated that while the children of the testator in that case were natural objects of his bounty, they were not the only natural objects thereof, and the testator's brothers were included as the natural objects of his bounty. Therefore, the natural objects of a testator's bounty are not limited to heirs at law. Also, in *DeHart v. DeHart,* 2013 IL 114137, ¶23, 986 N.E.2d 85, 369 Ill.Dec 136, the testator's affirmative statement that he had "no children" (when in fact he had held out the plaintiff as his adopted son for over sixty years) was an indication that the testator lacked capacity to make a will. *See also In re Estate of Harn,* 2012 IL App (3d) 110826, 972 N.E.2d 1227, 362 Ill.Dec. 194.

3. [1.19] Insane Delusion

An insane delusion may be the basis to overturn a will. If it can be shown that a testator had an insane delusion pertaining to (a) the natural objects of his or her bounty, (b) the kind and character of his or her property, or (c) the ability to make a disposition of his or her property according to some plan formed in his or her mind, lack of mental capacity may be the appropriate finding. *In re Estate of Stuhlfauth,* 88 Ill.App.3d 974, 410 N.E.2d 1063, 43 Ill.Dec. 930 (3d Dist. 1980). The Illinois Supreme Court has held that lack of capacity exists when a testator knows the objects of his or her bounty but suffers from delusions regarding those objects. *Hockersmith v. Cox,* 407 Ill. 321, 95 N.E.2d 464 (1950). To invalidate a will, an insane delusion must affect the testamentary disposition of the property. *Pendarvis v. Gibb,* 328 Ill. 282, 159 N.E. 353, 357 (1927), citing *American Bible Soc. v. Price,* 115 Ill. 623, 5 N.E. 126 (1886), and *Owen v. Crumbaugh,* 228 Ill. 380, 81 N.E. 1044 (1907). As long as disinheritance is based on reasons, albeit bad reasons, an insane delusion does not exist. *Stuhlfauth, supra,* 410 N.E.2d at 1068 – 1069. A prejudice or dislike that a testator might have for a relative is not sufficient grounds to set aside a will, unless this prejudice can be explained only by an insane delusion of the testator. *Jackman v. North,* 398 Ill. 90, 75 N.E.2d 324, 329 – 330 (1947), citing *Blackhurst v. James,* 293 Ill. 11, 127 N.E. 226 (1920), and *Carnahan v. Hamilton,* 265 Ill. 508, 107 N.E. 210 (1914). To prove an insane delusion, the evidence must show that the belief of the testator was founded on a false premise. *Jackman, supra,* 75 N.E.2d at 330, citing *Bauchens v. Davis,* 229 Ill. 557, 82 N.E. 365 (1907).

4. [1.20] Adjudication of Disability Does Not Equal Lack of Capacity

The fact that a guardian has been appointed is not conclusive on the question of the testator's mental ability to make a will, but it is proper for it to be considered in connection with the other evidence in the case. *In re Estate of Letsche,* 73 Ill.App.3d 643, 392 N.E.2d 612, 615, 29 Ill.Dec. 915 (1st Dist. 1979), citing *Pendarvis v. Gibb,* 328 Ill. 282, 159 N.E. 353, 357 (1927). The Probate Act does not require a guardian to obtain court approval for a ward to execute a will. *Letsche, supra.* If a ward possesses the mental capacity to execute a will, then the ward may dispose of his or her property through a will without the involvement of his or her guardian or without court approval. *Id.* In *Pendarvis,* even when a testator had testified during guardianship

proceedings that he saw people in trees slaughtering animals, he was considered to have the requisite mental capacity to execute a will because he knew many of his relatives, he conducted regular business transactions prudently, and he had a plan to execute a will. Although the caselaw provides that the adjudication of disability is not conclusive on the issue of capacity, it may be helpful to review the guardianship pleadings on file for evidence in a will contest.

However, effective January 1, 2016, the Illinois legislature has provided for a statutory rebuttable presumption that a will or codicil is void if it was executed or modified after the testator was adjudicated disabled and either a plenary guardian was appointed or a limited guardian was appointed (and the court has found that the testator lacks testamentary capacity). 755 ILCS 5/4-1. The rebuttable presumption is overcome by clear and convincing evidence that the testator had capacity to execute the will or codicil at the time the will or codicil was executed. The rebuttable presumption applies only to wills or codicils executed after January 1, 2016, and does not apply if the will or codicil was created with prior court approval. *Id.*

5. [1.21] Pleading

Proper pleading for lack of testamentary capacity requires a specific recital of the manner in which the free will of the testator was impaired at the time the will was executed. Once this allegation is made, the only material question is whether the writing produced was in fact the product of an unsound mind and memory. Also, the cause of the unsoundness of the testator's mind and memory does not need to be alleged or proved. *Bailey v. State Bank of Arthur,* 121 Ill.App.3d 17, 458 N.E.2d 1326, 1329, 76 Ill.Dec. 526 (4th Dist. 1983), quoting *American Bible Soc. v. Price,* 115 Ill. 623, 5 N.E. 126, 129 (1886).

When an insane delusion is alleged, it must be specifically pleaded that the insane delusional conduct had an impact at the time the will was made. *In re Estate of Sutera,* 199 Ill.App.3d 531, 557 N.E.2d 371, 145 Ill.Dec. 601 (1st Dist. 1990).

C. [1.22] Intentional Interference with an Expectancy and Fraudulent Inducement

The tort of intentional interference with expectancy is another potential cause of action in Illinois. Although some of the evidence will overlap with a will contest proceeding, in order to recover under this theory, a plaintiff must prove the following elements: (1) the existence of expectancy; (2) the defendant's intentional interference with this expectancy; (3) the interference involving conduct tortious in itself, such as fraud, duress, or undue influence; (4) reasonable certainty that the devise to the plaintiff would have been received but for the defendant's interference; and (5) damages. *In re Estate of Ellis,* 236 Ill.2d 45, 923 N.E.2d 237, 337 Ill.Dec. 678 (2009), citing *Nemeth v. Banhalmi,* 99 Ill.App.3d 493, 425 N.E.2d 1187, 55 Ill.Dec. 14 (1st Dist. 1981).

The tort of fraudulent inducement arises when the defendant makes a false representation of material fact, knowing or believing it to be false and doing it for the purpose of inducing one to act. *Janowiak v. Tiesi,* 402 Ill.App.3d 997, 932 N.E.2d 569, 342 Ill.Dec. 442 (1st Dist. 2010); *DeHart v. DeHart,* 2013 IL 114137, ¶39, 986 N.E.2d 85, 369 Ill.Dec 136.

The tort of intentional interference with testamentary expectancy (or fraudulent inducement) may be pleaded in conjunction with a will contest in probate court but must be brought within the six-month time period from the admission to probate of the will if this cause of action is being used to attack probated assets. *In re Estate of Jeziorski,* 162 Ill.App.3d 1057, 516 N.E.2d 422, 114 Ill.Dec. 267 (1st Dist. 1987). The six-month time limitation has been imposed because the petitioner must show that the will is invalid, which would be a collateral attack on the will. *Robinson v. First State Bank of Monticello,* 97 Ill.2d 174, 454 N.E.2d 288, 73 Ill.Dec. 428 (1983). But when the remedies available through a will contest are not applicable or available, Illinois courts have held that the six-month time limitation does not apply. *Ellis, supra.* This cause of action can be used to provide a remedy for fraudulent inter vivos transfers procured from the decedent. (A will contest's remedy would merely be to set aside the will.) *Id.*

However, when these torts are used to go after nonprobate assets exclusively, the six-month statute of limitations does not apply. In the case of tortious interference, the court will not be interpreting, modifying, or even reviewing the validity of the trust or will. *Seay v. Dodge,* No. 95 C 3643, 1995 WL 557361 (N.D.Ill. Sept. 18, 1995). The judgment will not impact the distribution of the assets because the suit is against the defendant individually. *Id.*

Also, though the torts of intentional interference with testamentary expectancy and fraudulent inducement can be properly pleaded in conjunction with a will contest, the remedies available are different and may require the dismissal of one theory of recovery at the end of the trial. For example, the remedy for the tort actions is not the setting aside of the will, but a judgment against the defendant for the amount of the benefit tortuously acquired. However, if the will is successfully contested and set aside, there would be no damages from the defendant under a tort theory. It is proper for the court to hear all evidence on these related causes of action in one proceeding and then deal with the different claims accordingly. *DeHart, supra,* 2013 IL 114137 at ¶41.

D. [1.23] Fraud, Forgery, Compulsion, and Other Improper Conduct

Proof of fraud, forgery, compulsion, or other improper conduct constitutes additional grounds for seeking to invalidate a will in Illinois. *See Swirski v. Darlington,* 369 Ill. 188, 15 N.E.2d 856, 857 (1938); *Hall v. Eaton,* 259 Ill.App.3d 319, 631 N.E.2d 805, 807, 197 Ill.Dec. 583 (4th Dist. 1994). Fraud relates to "such conduct as a trick or devise by which a person may be induced to sign the [instrument] under the impression it is something else, or to the alteration of the will after it is signed, or the substitution of another paper for part of the will after it has been signed, and matters of like character." *Swirski, supra,* 15 N.E.2d at 857, quoting *Stuke v. Glaser,* 223 Ill. 316, 79 N.E. 105, 107 (1906). Proof of forgery serves as an additional method to seek the invalidation of a will as it nullifies the testator's signature, which is one of the formal requisites to a will's execution. *See Estate of Ragen,* 96 Ill.App.3d 1035, 422 N.E.2d 179, 184, 52 Ill.Dec. 498 (1st Dist. 1981). Together with the grounds above, conspiracy may also be grounds for seeking to invalidate a will in which more than one person benefits from the procurement or changes to a will. *Sterling v. Kramer,* 15 Ill.App.2d 230, 145 N.E.2d 757 (1st Dist. 1957).

E. [1.24] Revocation

Illinois also allows for will contests based on revocation. *In re Estate of Minsky,* 46 Ill.App.3d 394, 360 N.E.2d 1317, 1321, 4 Ill.Dec. 884 (1st Dist. 1977) ("Any ground which, if established by the proof, would have the effect of invalidating an instrument as a will may be made the basis of a will contest. . . . Revocation is one such ground which may be asserted in this manner." [Citation omitted.]). The contestant is required to prove some specific action probative of the testator's intent to revoke the instrument (such as tearing the will) and the testator's intent to revoke the instrument. *Id*. The appellate court in *Minsky* found the trial court's order invalidating a will based on revocation to have been supported by the evidence when the contestants had argued that although the will had been executed in triplicate, only two copies were accounted for at the hearing to admit the will to probate, and the contestants had introduced the testimony of witnesses that tended to prove that the testator had expressed to the witnesses an intent to revoke his will and then tore the papers he identified as his will. *Id*.

F. [1.25] Noncompliance with the Essential Formalities of Execution

After a will has been admitted to probate, it may be contested on any grounds, including the validity of a will due to noncompliance with the statutory requirements for the execution of the instrument. *Sternberg v. St. Louis Union Trust Co.,* 394 Ill. 452, 68 N.E.2d 892, 897 (1946); *Roeske v. First National Bank of Lake Forest,* 90 Ill.App.3d 669, 413 N.E.2d 476, 478, 46 Ill.Dec. 36 (2d Dist. 1980).

G. [1.26] Equitable Adoption and Contract To Adopt

Recent developments in the concept of "equitable adoption" may open the door for additional standing claims by potentially interested parties. *DeHart v. DeHart,* 2013 IL 114137, 986 N.E.2d 85, 369 Ill.Dec. 136. In *DeHart,* the Illinois Supreme Court recognized the theory of "equitable adoption" in a child's challenge to the will of the man he believed to be his father. The Illinois Supreme Court noted that "equitable adoption" is different from a claim of "contract to adopt." (For a discussion of "contract to adopt" claims, *see Monahan v. Monahan,* 14 Ill.2d 449, 153 N.E.2d 1 (1958).) Instead, to state a claim for equitable adoption, a claimant must show by clear and convincing evidence intent to adopt and that the decedent acted consistently with that intent by forming with the plaintiff a close and enduring familiar relationship. *DeHart, supra,* 2013 IL 114137 at ¶59.

III. DEFENSES TO WILL CONTESTS

A. [1.27] No-Contest Clauses

The general rule regarding no-contest or in terrorem clauses is that they are valid under Illinois law; however, from a practical standpoint, such clauses are frequently held unenforceable as against law and public policy. *In re Estate of Mank,* 298 Ill.App.3d 821, 699 N.E.2d 1103, 1107, 232 Ill.Dec. 918 (1st Dist.), *appeal denied,* 181 Ill.2d 572 (1998). In *Mank,* the court held it would be against public policy to uphold a no-contest clause that would have disinherited the

beneficiary, a disabled adult, after the disabled adult's guardian had filed a protective contest despite the no-contest clause. To the extent courts uphold no-contest clauses, they construe such clauses strictly, and, guided by the rule that equity does not favor forfeitures, they construct conditions in favor of the beneficiary. *In re Estate of Wojtalewicz,* 93 Ill.App.3d 1061, 418 N.E.2d 418, 420, 49 Ill.Dec. 564 (1st Dist. 1981).

B. [1.28] Doctrine of Election as a Bar to Will Contests

The doctrine of election generally bars a beneficiary or legatee who voluntarily accepts a bequest under a will from subsequently challenging the will. *See Remillard v. Remillard,* 6 Ill.2d 567, 129 N.E.2d 744, 746 (1955) (articulating that if person takes any beneficial interest under will, he or she is thereby held to confirm and ratify every other part of will). *See also Kyker v. Kyker,* 117 Ill.App.3d 547, 453 N. E.2d 108, 72 Ill.Dec. 803 (2d Dist. 1983).

While the doctrine of election is rarely utilized, it is still valid. The Illinois Supreme Court has recently clarified its position on the doctrine of election. *In re Estate of Boyar,* 2013 IL 113655, 986 N.E.2d 1170, 369 Ill.Dec. 534. Making a distinction from how other appellate courts had interpreted the doctrine, the Illinois Supreme Court held that the doctrine of elections currently applies to wills "only when there are two different benefits to which a person is entitled, the testator did not intend the beneficiary to take both benefits, and allowing the beneficiary to claim both would be inequitable to others having claims upon the same property or fund." 2013 IL 113655 at ¶28. Further, the court held that "when a person is presented with the choice between two inconsistent or alternative claims to property devised by the testator and elects to accept benefits pursuant to the provisions of the will, that person will then be estopped from challenging the will or any part of it." 2013 IL 113655 at ¶31.

The doctrine of election is subject to several exceptions. First, one may accept a bequest and remain free to challenge any provisions of the will that are contrary to public policy. *In re Estate of Joffe,* 143 Ill.App.3d 438, 493 N.E.2d 70, 72, 97 Ill.Dec. 588 (1st Dist. 1986). Second, acceptance of a bequest under a will must have been made with the full knowledge of the facts and circumstances surrounding the execution of the will, and acceptance of the benefit must not have been procured by fraud or mistake. *Id.* In addition, the doctrine of election is inapplicable to property held in joint tenancy when the testator does not clearly indicate that he or she intends to put the beneficiary to an election. *Estate of Williamson v. Williamson,* 275 Ill.App.3d 999, 657 N.E.2d 651, 657, 212 Ill.Dec. 450 (1st Dist. 1995), *appeal denied,* 166 Ill.2d 538 (1996). The facts of *Williamson* involved a testator whose will provided for giving his interest in real estate owned in joint tenancy with one son to his five other children, with the residue of the estate to be divided equally among his six children. The court carved out this exception to applicability of the doctrine to address the injustice that would result from "honor[ing] the deceased tenant's ignorance of the law [*i.e.,* the right of survivorship when property is held in joint tenancy] over the survivor's ignorance of the doctrine of election." 657 N.E.2d at 656.

IV. TRIAL AND APPEAL

A. [1.29] Applicable Rules

The Probate Act specifically provides that the Civil Practice Law, Article II of the Code of Civil Procedure, 735 ILCS 5/2-101, *et seq.,* and the Supreme Court Rules apply to proceedings under the Probate Act, unless otherwise specified by the Probate Act. 755 ILCS 5/1-6. A will contest proceeding, as a statutory proceeding under the Probate Act, is governed by the Civil Practice Law and the Illinois Supreme Court Rules. *See Estate of Ariola v. Ariola,* 69 Ill.App.3d 158, 386 N.E.2d 862, 868, 25 Ill.Dec. 388 (1st Dist. 1979). Furthermore, the Code of Civil Procedure provides that the Civil Practice Law applies to all matters of procedure not specifically regulated by another controlling statute, such as the Probate Act. 735 ILCS 5/1-108.

B. Proof of Facts and Burdens of Proof

1. [1.30] Undue Influence

In order to invalidate a will on the basis of undue influence, a will contestant has the burden to establish that the person benefiting from the will exercised improper persuasion over the testator such that the will of the testator was overpowered, and the testator was induced to dispose of his or her property in a manner that he or she would not have chosen without the improper persuasion. *See, e.g., In re Estate of Hoover,* 155 Ill.2d 402, 615 N.E.2d 736, 185 Ill.Dec. 866 (1993); *Wiszowaty v. Baumgard,* 257 Ill.App.3d 812, 629 N.E.2d 624, 196 Ill.Dec. 79 (1st Dist. 1994) (stating that to constitute undue influence sufficient to invalidate will, influence must operate to destroy the testator's free will concerning disposition of his or her estate and cause testator to dispose of his or her property according to plan of another person). Most important, the person charged with exercising undue influence must receive a substantial benefit as a legatee or beneficiary of the instrument. *In re Estate of Lemke,* 203 Ill.App.3d 999, 561 N.E.2d 350, 355, 149 Ill.Dec. 72 (5th Dist. 1990), citing *Brown v. Commercial National Bank of Peoria,* 42 Ill.2d 365, 247 N.E.2d 894, 897 (1969).

Proof of undue influence may be inferential, and there is no specific set of facts that must be proved. Rather, what constitutes undue influence depends on the circumstances of each case. *Hoover, supra,* 615 N.E.2d at 740. The will contestant may introduce circumstantial evidence; however, the will contestant must show that the undue influence was connected with the execution of the will and that the influence was directed toward procuring a will in favor of the beneficiary. *Hoover, supra,* 615 N.E.2d at 742. *See also Wiszowaty, supra,* 629 N.E.2d at 629 (stating that although undue influence sufficient to invalidate will may be exerted at any time, it must be directly connected with execution of will and operate at time will was made).

Evidence that the testator's mental capacity was diminished will lessen the quantum of proof required to show that the will was a product of undue influence. *In re Estate of Roeseler,* 287 Ill.App.3d 1003, 679 N.E.2d 393, 404, 223 Ill.Dec. 208 (1st Dist. 1997). This is because a testator suffering from diminished capacity is thought to be more susceptible to undue influence.

It is important to note that if the will contestant is able to show that a fiduciary relationship existed between the testator and the person alleged to have unduly influenced the testator, a presumption of undue influence arises, and the burden shifts to the defendant to rebut the presumption. To raise a presumption of undue influence, the will contestant must show that a fiduciary relationship existed between the testator and a person who substantially benefited under the will, that the person who benefited under the will was in a position to dominate and control the testator, and that the person who benefited from the will was instrumental or participated in the preparation, procurement, or execution of the will. *Wiszowaty, supra,* 629 N.E.2d at 629 – 630.

A fiduciary relationship may be found (a) as a matter of law in certain recognized relationships or (b) as a matter of fact based on the facts of a particular situation when there is trust reposed on one side resulting in superiority and influence on the other. As a matter of law, a fiduciary relationship exists as between attorney and client, guardian and ward, and trustee and beneficiary, as well as in other similar relationships. *Estate of Maher,* 237 Ill.App.3d 1013, 606 N.E.2d 46, 50, 179 Ill.Dec. 214 (1st Dist. 1992). Furthermore, a power of attorney creates a fiduciary relationship as a matter of law. *Zachary v. Mills,* 277 Ill.App.3d 601, 660 N.E.2d 1301, 1305, 214 Ill.Dec. 352 (4th Dist. 1996). However, when a fiduciary relationship does not exist as a matter of law and the will contestant attempts to establish a fiduciary relationship based on the particular facts of the case, the fiduciary relationship must be established by clear and convincing evidence. *Wiszowaty, supra.* Some factors that are to be considered in determining whether a fiduciary relationship exists based on the facts of the particular situation, rather than as a matter of law, are the degree of kinship; disparity in age, health, mental condition, and education; and the servient party's entrustment of business or financial affairs to the dominant party. *Maher, supra.*

However, Illinois courts have recognized certain relationships in which the presumption of undue influence should be applied with caution. For example, the relationship between spouses or the parent-child relationship is often marked by the characteristics of a fiduciary relationship, but due to the unique nature of these relationships, the presumption of undue influence should be applied with caution. In *In re Estate of Glogovsek,* 248 Ill.App.3d 784, 618 N.E.2d 1231, 1237, 188 Ill.Dec. 661 (5th Dist. 1993), the court stated that the presumption of undue influence must be applied with caution as to marital relationships because of the unique relationship between spouses and the importance of marriages in society. And in *In re Estate of Kline,* 245 Ill.App.3d 413, 613 N.E.2d 1329, 1339, 184 Ill.Dec. 737 (3d Dist. 1993), the court stated that a parent and child are not automatically in a fiduciary relationship.

Once a fiduciary relationship between the testator and the person alleged to have unduly influenced the testator is found to have existed, whether as a matter of law or fact, the burden shifts to the defendant to rebut the presumption of undue influence. *Pottinger v. Pottinger,* 238 Ill.App.3d 908, 1139, 601 N.E.2d 1130, 179 Ill.Dec. 116 (2d Dist. 1992). Illinois follows a "bursting-bubble" theory of presumptions with respect to a fiduciary relationship and undue influence. *See Franciscan Sisters Health Care Corp. v. Dean,* 95 Ill.2d 452, 448 N.E.2d 872, 877, 69 Ill.Dec. 960 (1983); *In re Estate of Pawlinski,* 407 Ill.App.3d 957, 942 N.E.2d 728, 735 – 739, 347 Ill.Dec. 525 (1st Dist. 2011). Once the presumption of undue influence is raised via the

existence of a fiduciary relationship, the defendant has the burden to rebut the presumption. However, once evidence contrary to the presumption is introduced by the defendant, the bubble bursts and the presumption vanishes. *Franciscan Sisters, supra,* 448 N.E.2d at 877; *Pawlinski, supra,* 942 N.E.2d at 736.

With regard to the procedural effect of the presumption, the rebuttable presumption creates a prima facie case that undue influence exists and thus has the practical effect of requiring the defendant to come forward with evidence to meet the presumption. *Franciscan Sisters, supra,* 448 N.E.2d at 876 – 877. However, once evidence opposing the presumption is introduced, the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed. *Id.*

With regard to the effect of the presumption on the burdens of proof, the ultimate burden of persuasion does not shift but always remains with the will contestant. However, the burden of production shifts to the defendant once the presumption of undue influence arises. The presence of a presumption of undue influence has the effect of shifting to the defendant the burden of going forward and introducing evidence to meet the presumption. If evidence is introduced that is contrary to the presumption, the presumption will cease to operate, and the burden of production shifts back to the will contestant. *Id.*

The amount of evidence that is required from the defendant to meet the presumption depends on the particular case. When the presumption arises as a matter of law, the presumption must be rebutted by clear and convincing evidence. *Franciscan Sisters, supra,* 448 N.E.2d at 878. However, when the presumption does not arise as a matter of law, a defendant simply may have to respond with some evidence or may have to respond with substantial evidence. Generally speaking, if a strong presumption arises, the weight of the evidence introduced to rebut it must be great. 448 N.E.2d at 877.

Although the will contestant has the ultimate burden of proof to show that the will was the product of undue influence, when a fiduciary relationship exists between the testator and the person alleged to have unduly influenced the testator, the will contestant's burden is lessened. Accordingly, the proofs required at trial are much more favorable to the will contestant when a fiduciary relationship is established.

Review of the Illinois Pattern Jury Instructions to contest a will based on undue influence may be a helpful guide for presentation of evidence at trial. I.P.I. — Civil Nos. 200.03, 200.04.

2. [1.31] Lack of Capacity

In a will contest on the ground of lack of capacity, the burden of proof rests with the party asserting that the testator lacked the requisite testamentary capacity. *In re Estate of Roeseler,* 287 Ill.App.3d 1003, 679 N.E.2d 393, 402, 223 Ill.Dec. 208 (1st Dist. 1997). In fact, there is a presumption that the testator was competent to execute the will, and the burden of proof is on the will contestant to rebut the presumption. *Id.*

Although the will contestant must prove that the testator lacked capacity at the time the will was executed, evidence of capacity reasonably near the time of the will execution can be introduced to support a finding of lack of capacity. *In re Estate of Dossett,* 159 Ill.App.3d 466, 512 N.E.2d 807, 811, 111 Ill.Dec. 418 (3d Dist. 1987). In *Dossett,* the court ruled that lack of testamentary capacity could be shown even though there was no evidence that the testator was disoriented or confused on the precise date that the will was executed. Rather, evidence that the testator suffered from diminished mental capacity both before and after the date that the will was executed could be introduced to support a finding of lack of testamentary capacity at or near the time the will was executed. *Id.*

A will contestant may introduce medical records of the testator to show lack of capacity. Pursuant to Supreme Court Rule 236, medical records are admissible in evidence as business records and thus are not prohibited as inadmissible hearsay.

Additionally, a will contestant may introduce expert testimony as to the testator's capacity. Like any other civil proceeding, S.Ct. Rule 213(f) governs the scope and disclosure requirements of expert testimony in a will contest proceeding. Importantly, the expert need not have physically examined or know the testator in order to render an expert opinion as to capacity. *In re Estate of Hoover,* 155 Ill.2d 402, 615 N.E.2d 736, 744, 185 Ill.Dec. 866 (1993). Illinois courts allow qualified psychiatric experts to testify based on retrospective "psychiatric autopsies." 615 N.E.2d at 745. Generally, in forming his or her opinion, the expert may rely on any available evidence, including evidence that would be inadmissible at trial, if the evidence is of the type reasonably relied on by experts in the particular field. *In re Estate of Justus,* 243 Ill.App.3d 737, 612 N.E.2d 89, 91, 183 Ill.Dec. 832 (3d Dist. 1993), citing *Wilson v. Clark,* 84 Ill.2d 186, 417 N.E.2d 1322, 1327, 49 Ill.Dec. 308 (1981). However, in *Justus,* the trial court's exclusion of expert testimony was upheld by the appellate court when the expert relied solely on statements made by persons who would be barred from testifying under the Dead-Man's Act, 735 ILCS 5/8-201, even when the statements relied on by the expert were of a type reasonably relied on by experts in his field.

Although a will contestant often introduces expert testimony as to the testator's capacity, a will contestant is not required to introduce expert testimony to prove lack of capacity. Rather, a lay witness may give an opinion regarding the testator's capacity as long as the lay witness had sufficient opportunity to interact with or witness the testator and formed his or her opinion after observing the testator around the time of the will execution. *Roeseler, supra,* 679 N.E.2d at 403.

The Illinois legislature has also taken new steps to protect individuals against exploitation by caregivers. Effective January 1, 2015, under the Probate Act, a new law for presumptively void transfers took effect, which creates a rebuttable presumption that an instrument transferring property to a nonfamily caregiver is void if the amount transferred exceeds $20,000. 755 ILCS 5/4a-10. The rebuttable presumption can be overcome by establishing, by clear and convincing evidence, that the transfer was not the product of fraud, duress, or undue influence or by establishing, by a preponderance of the evidence, that the transfer did not increase the gift that would have been received prior to becoming a caregiver. If the caregiver challenges the presumption and loses, the caregiver must bear the costs of the proceeding, including reasonable attorneys' fees. A two-year post-death statute of limitations applies to claims brought under this statute.

3. [1.32] Tortious Interference

In an action for tortious or malicious interference with inheritance expectancy, the plaintiff has the burden of proof and must sustain the burden with respect to each element of the cause of action. *Nemeth v. Banhalmi,* 99 Ill.App.3d 493, 425 N.E.2d 1187, 1191, 55 Ill.Dec. 14 (1st Dist. 1981). Thus, the plaintiff must prove the existence of an expectancy, that the defendant intentionally interfered with the expectancy, that the interference involved conduct tortious in itself, such as fraud, duress, or undue influence, that there is a reasonable certainty that the devise to the plaintiff would have been received but for the defendant's interference, and damages. *Id.*

C. [1.33] Evidentiary Issues: Dead-Man's Act

Commonly referred to as the "Dead-Man's Act," 735 ILCS 5/8-201 states in part:

> **In the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability.**

The Dead-Man's Act is intended to protect decedents' estates from being depleted by fraudulent claims. *See In re Estate of Sewart,* 274 Ill.App.3d 298, 652 N.E.2d 1151, 1157, 210 Ill.Dec. 175 (1st Dist. 1995) (operating from assumption that party is "prone to testify falsely when such testimony cannot be directly contradicted"), quoting *Fleming v. Fleming,* 85 Ill.App.3d 532, 406 N.E.2d 879, 883, 40 Ill.Dec. 676 (5th Dist. 1980). The Dead-Man's Act bars evidence that the protected party could have refuted. *In re Estate of Goffinet,* 318 Ill.App.3d 152, 742 N.E.2d 874, 877, 252 Ill.Dec. 336 (4th Dist. 2001).

To render a witness incompetent to testify pursuant to the Dead-Man's Act, all of the following requirements must be satisfied: (1) the witness must be considered an adverse party or a person with a direct pecuniary interest (*In re Estate of Hurst,* 329 Ill.App.3d 326, 769 N.E.2d 55, 63, 263 Ill.Dec. 853 (4th Dist. 2002)); (2) the witness must seek to testify in his or her own behalf (*Shanahan v. Bowen,* 59 Ill.App.3d 269, 375 N.E.2d 508, 512, 16 Ill.Dec. 635 (3d Dist. 1978) (testimony of directly interested witness is not disqualified when it is adverse to witness' own economic interest)); and (3) it is made by an adverse party suing or defending as a representative of a decedent or of a person under legal disability as to any conversation with the protected individual and as to any event taking place in the protected individual's presence (*Estate of Netherton v. Roulston,* 62 Ill.App.3d 55, 378 N.E.2d 800, 803, 19 Ill.Dec. 185 (3d Dist. 1978)).

The Dead-Man's Act applies during both trial and summary judgment proceedings. *See Groce v. South Chicago Community Hospital,* 282 Ill.App.3d 1004, 669 N.E.2d 596, 600, 218 Ill.Dec. 453 (1st Dist. 1996). The right to object that an adverse party or an interested person is barred by the Dead-Man's Act belongs to the representative of the decedent or the legally disabled individual. *Stewart, supra,* 652 N.E.2d at 1159. Failure to object on the grounds of

incompetency of a witness constitutes a waiver of the protection of the Dead-Man's Act. *Netherton, supra,* 378 N.E.2d at 803. The representative waives the protection of the Dead-Man's Act by offering testimony of a conversation with the decedent. *Wasleff v. Dever,* 194 Ill.App.3d 147, 550 N.E.2d 1132, 1136, 141 Ill.Dec. 86 (1st Dist.), *appeal denied,* 132 Ill.2d 555 (1990).

Section 8-201 provides four statutory exceptions to the Dead-Man's Act. First, pursuant to the provisions of §8-201(a), if a person testifies on behalf of the representative of the protected party as to a conversation with, or event in the presence of, the protected party, any adverse party or interested person may testify regarding the same conversation or event. 735 ILCS 5/8-201(a). This exception aims to promote the underlying policy of the Dead-Man's Act, which is to equalize the positions of the parties in the giving of testimony. *See Hoem v. Zia,* 159 Ill.2d 193, 636 N.E.2d 479, 483, 201 Ill.Dec. 47 (1994). Second, pursuant to the provisions of §8-201(b), if the representative of the protected party has admitted into evidence a deposition of the protected party, any adverse party or interested person, if otherwise competent, may testify to the same matters admitted into evidence. 735 ILCS 5/8-201(b). Third, pursuant to the provisions of §8-201(c), any testimony competent under §8-401 (relating to the admissibility of account books and records) is permitted under this exception. 735 ILCS 5/8-201(c). Fourth, 735 ILCS 5/8-201(d) permits the testimony as to any fact relating to the heirship of a decedent.

D. [1.34] Appeal

It is within the province of the trial court to evaluate the evidence presented, and unless the holding of the trial court is manifestly against the weight of the evidence, a reviewing court will not disturb the judgment of the trial court. *Estate of Netherton v. Roulston,* 62 Ill.App.3d 55, 378 N.E.2d 800, 802, 19 Ill.Dec. 185 (3d Dist. 1978).

In order to preserve a claimed error below, an appellant must provide a complete record. The appellant bears the burden of providing a complete record on appeal. *Estate of Jackson,* 354 Ill.App.3d 616, 821 N.E.2d 1199, 1203, 290 Ill.Dec. 625 (1st Dist. 2004). In the absence of a complete record, the reviewing court will presume that "the trial court's order had a sufficient factual basis and conformed with the law." *Id*. The reviewing court will resolve all doubts arising from the incompleteness of the record against the appellant. *Id.*

But beware. A party who appeals the decision of the trial court in a will contest does so at his or her own risk and cost. *See NC Illinois Trust Co. v. Madigan,* 351 Ill.App.3d 311, 812 N.E.2d 1038, 286 Ill.Dec. 23 (4th Dist. 2004), citing *Glaser v. Chicago Title & Trust Co.,* 401 Ill. 387, 82 N.E.2d 446, 449 (1948). See also §7.75 of this handbook. Further discussion of appellate issues is beyond the scope of this chapter.

2 Oral Contracts To Make Wills; Joint and Mutual Wills

JAMES R. CAREY
ROBIN DREY MAHER
Levin Schreder & Carey, Ltd.
Chicago

I. [2.1] INTRODUCTION

Under Illinois law, persons may enter into an enforceable agreement by which one party (the promisee) agrees to do or to forbear from doing something for the benefit of the other party (the promisor), in return for which the promisor agrees to make a bequest or other testamentary disposition of some portion or all of his or her estate. Upon satisfactory proof of the agreement and full performance by the promisee, such an agreement will be enforced by Illinois courts. There are many Illinois cases both enforcing and denying the enforcement of an agreement to make a will, and most often the agreements in question were oral contracts. This is commonly referred to as an "oral contract to make a will," which refers to an action to enforce a contract by which a testamentary bequest was promised, but not made. Although courts look with great suspicion on such oral contracts and scrutinize the evidence carefully, such oral contracts may be enforceable if the contract's existence and terms have been proved by clear, explicit, and convincing evidence that leaves no reasonable doubt (a) that the contract was made and (b) that there was a meeting of the minds as to all of its terms. *In re Estate of McLaughlin,* 1 Ill.App.3d 940, 274 N.E.2d 618, 620 (1st Dist. 1971). Additionally, the claim is not limited to wills but can involve nonprobate property as well. *Bergheger v. Boyle,* 258 Ill.App.3d 413, 629 N.E.2d 1168, 196 Ill.Dec. 324 (5th Dist.), *appeal denied,* 156 Ill.2d 555 (1994); *First United Presbyterian Church v. Christenson,* 64 Ill.2d 491, 356 N.E.2d 532, 1 Ill.Dec. 344 (1976). For simplicity, however, this chapter references the cause of action by its common label: an "oral contract to make a will."

Oral contracts to make a will, as well as written contracts involving the making of a will, involve an area of the law that is a meshing of contract, equity, probate, and (sometimes) real estate law. This chapter is divided between oral contracts to make a will on the one hand and, on the other, the issues arising in integrated estate plans commonly known as "joint and mutual wills," "joint wills" or "reciprocal wills," which in some circumstances may be contractually binding between the testators/settlors. The two areas have the common thread of arising from a contract entered into with respect to estate plans but have many differences springing from factual dissimilarities.

II. [2.2] ORAL CONTRACTS TO MAKE WILLS

In the case of an oral contract to make a will, the plaintiff seeks to prove that there was a contract, that the contract had specific terms, and that the plaintiff is entitled to relief because he or she performed his or her part of the contract in reliance on the promise of the promisor (usually deceased). The plaintiff claims that the promisor-decedent failed to follow through with the terms of the contract. In some cases the plaintiff was promised specific property, such as a farm, a bank account, or a stock portfolio, and in others the plaintiff claims he or she was promised all or a portion of the decedent's assets or estate.

In the typical case, the plaintiff learns that the promisor failed to fulfill his or her part of the bargain after the death of the promisor. The defendant in the case is usually the executor or administrator of the decedent's estate and usually will have no reason to believe that the decedent entered into such a contract. Indeed, in the case of an executor, typically a will has been admitted

to probate with a disposition of assets contrary to the claimed contract; therefore, the executor has every reason to oppose the claim. On occasion, the executor or administrator is not the defendant but rather persons to whom the assets in question have passed either by outright lifetime gifts or via joint tenancy. Usually this type of defendant will have even less reason to believe that an oral contract exists pertaining to the subject property.

The plaintiff may seek relief in the form of (a) an order requiring specific performance of the contract on the part of the executor or administrator of the decedent's estate, (b) damages for the injury suffered by the decedent's failure to fulfill his or her end of the bargain, or (c) the imposition of a constructive trust over the assets in question if they are in the possession of one or more third parties who have not purchased them for arm's-length consideration.

A. General Principles and Standards of Proof

1. [2.3] General Principles

Other than the statute of limitations applicable to actions to enforce a contract to make a will (see §2.43 below), Illinois law in this area is governed by the common law. Under the common law, a party may enter into a contract to dispose of property in a particular way after death as long as the contract is supported by sufficient consideration. *Scham v. Besse,* 397 Ill. 309, 74 N.E.2d 517 (1947). However, such contracts are not favored, and a court will be more strict in examining into the nature and circumstances of such agreements than with other contracts. *Kaiser v. Cobbey,* 400 Ill. 214, 79 N.E.2d 604 (1948). If the contract was made orally, it must be proved by clear, explicit, and convincing evidence in terms certain and unequivocal. *Laughlin v. France,* 241 Ill.App.3d 185, 607 N.E.2d 962, 180 Ill.Dec. 662 (2d Dist.), *appeal denied,* 151 Ill.2d 565 (1993).

When the plaintiff asks the court to deviate from a testator's apparent last wishes, the law is loath to grant relief unless the proof of the contract and full performance by the plaintiff are clear and convincing. *See, e.g., In re Estate of McLaughlin,* 1 Ill.App.3d 940, 274 N.E.2d 618 (1st Dist. 1971); *Greenwood v. Commercial National Bank of Peoria,* 7 Ill.2d 436, 130 N.E.2d 753 (1955); *Harper v. Kennedy,* 15 Ill.2d 46, 153 N.E.2d 801 (1958). This reluctance is not only because a will has often been admitted to probate, the terms of which are inconsistent with the alleged contract, but is also on an elemental level because courts are uncomfortable deviating from the decedent's apparent last wishes without a good basis. The action runs afoul of the axiom that a property owner has an absolute right to dispose of property during his or her lifetime in any manner he or she sees fit. *Kahn v. First National Bank of Chicago,* 216 Ill.App.3d 272, 576 N.E.2d 321, 325, 159 Ill.Dec. 652 (1st Dist. 1991); *In re Estate of Puetz,* 167 Ill.App.3d 807, 521 N.E.2d 1277, 118 Ill.Dec. 584 (2d Dist. 1988).

In the typical case involving a contract to make a will, the plaintiff pleads that he or she was to provide the decedent "services, support, and care." It is not sufficient proof of a contract, however, merely to bring evidence of the plaintiff's performance of the activities from which a contract must be inferred, and mere statements by the deceased of an intention to make a will or devise property are not sufficient proof to warrant the inference that a contract of any kind was made. *Kahn, supra.* The services or other performance by the plaintiff must be clearly referable to the contract entered into and cannot be capable of explanation apart from the contract. *Pocius v. Fleck,* 13 Ill.2d 420, 150 N.E.2d 106 (1958).

2. [2.4] Burden and Standards of Proof

The burden of proving the existence of the contract rests on the person who seeks enforcement of the contract. *Greenwood v. Commercial National Bank of Peoria,* 7 Ill.2d 436, 130 N.E.2d 753 (1955); *C. Iber & Sons, Inc. v. Grimmett,* 108 Ill.App.2d 443, 248 N.E.2d 131 (3d Dist. 1969). In an oral contract case, this means that every material term of the contract must survive clear and convincing scrutiny. *In re Estate of McLaughlin,* 1 Ill.App.3d 940, 274 N.E.2d 618 (1st Dist. 1971).

Courts of equity scrutinize with the most scrupulous care the evidence offered in support of such a contract. When there is a material conflict in the evidence as to the making or existence of a contract, or when there is a dispute as to the type of services performed, the court will not grant relief. *Rigolio v. Knopf,* 390 Ill. 258, 61 N.E.2d 56 (1945); *Greenwood, supra*. The evidence establishing the contract must be sufficiently definite to show the particular property involved and the promises on which the conveyance or devise was to be made. *Adkins v. Adkins,* 332 Ill. 422, 163 N.E. 823 (1928); *Weidler v. Seibert,* 405 Ill. 477, 91 N.E.2d 416 (1950).

B. Pleading Requirements and Proper Parties

1. [2.5] Proper Parties

If the subject assets are part of the probate estate, the claim may name the representative of the estate alone as a defendant. Additionally, a plaintiff may bring an action to enforce a contract to make a will against the decedent's "heirs [or] devisees." *Austin v. Kuehn,* 211 Ill. 113, 71 N.E. 841, 842 (1904).

If the claim requests the imposition of a constructive trust over specific assets that are already in the hands of third parties, the plaintiff should name as defendants those third parties in addition to the representative and all persons whose interests will be affected by the court's ruling. *Stansbury v. Home State Bank of Crystal Lake,* 42 Ill.App.3d 58, 355 N.E.2d 613 (2d Dist. 1976). If the assets are held by a trust, the trustee of the trust should be named as a defendant. *Keats v. Cates,* 100 Ill.App.2d 177, 241 N.E.2d 645 (1st Dist. 1968). If the decedent's estate is not probated but the executor holds assets under a small estate affidavit, the executor should also be named.

If the claim is brought prior to the promisor's death, the promisor is the proper defendant. However, a plaintiff attempting to assert a breach-of-contract-to-make-a-will case will likely face the defense that the promisor is not obligated to perform until death, and the plaintiff will have to show that the defendant has unlawfully taken steps making it impossible to perform, such as by evidence that the promisor-defendant has fired the plaintiff or otherwise has unilaterally declared a termination of the contract, or by the defendant rendering his or her own performance of the contract impossible, as by making completed gifts of the property promised. *Jordan v. Busch,* 285 Ill.App. 217, 1 N.E.2d 745 (1st Dist. 1936); *Hansen v. Johnston,* 111 Ill.App.2d 88, 249 N.E.2d 133 (2d Dist. 1969) (when performance of agreement is rendered impossible by willful acts of one of contracting parties, agreement to pay becomes absolute).

2. [2.6] Pleading

The rules of pleading relating to claims are expressly relaxed. 755 ILCS 5/18-2 ("Every claim filed must be in writing and state sufficient information to notify the representative of the nature of the claim or other relief sought."). In the case of a lawsuit or chancery action, however, the pleadings are governed by the general rules relating to pleading set forth in the Civil Practice Law, 735 ILCS 5/2-101, *et seq*. (*i.e.,* fact pleading). Nonetheless, the claim will be more persuasive if pleaded with some particularity as to the facts. Without overstating the evidence, the claim should state facts supporting each element of the cause of action, including specifically what the decedent promised and specifically what the claimant promised to do in return for the bequest.

a. [2.7] Elements of Cause of Action

One should approach the case in the same manner as in a typical contract case, *i.e.,* by showing (1) proof of a contract, (2) terms, (3) full performance by the plaintiff, (4) breach (which is typically pleaded as the failure to execute a will in conformity with the parties' agreement), and (5) damages. *Hickox v. Bell,* 195 Ill.App.3d 976, 552 N.E.2d 1133, 142 Ill.Dec. 392 (5th Dist.), *appeal denied,* 132 Ill.2d 545 (1990); *Thilman & Co. v. Esposito,* 87 Ill.App.3d 289, 408 N.E.2d 1014, 42 Ill.Dec. 305 (1st Dist. 1980).

b. [2.8] Pleading for Specific Performance

If seeking specific performance, the plaintiff must plead that he or she has no adequate remedy at law because the plaintiff is asking the court for an equitable remedy. The general rule is that specific performance will not be granted when there is an adequate remedy at law, such as money damages, unless there is some aspect of the facts demonstrating that relief at law would not be adequate, such as when the measure of damages resulting from nonperformance of the agreement is uncertain or difficult to ascertain (*George F. Mueller & Sons, Inc. v. Morales,* 25 Ill.App.3d 466, 323 N.E.2d 518 (1st Dist. 1974)) or when the services rendered are not easily compensable in money (*In re Niehaus' Estate,* 341 Ill.App. 454, 94 N.E.2d 525 (4th Dist. 1950)). See §§2.11 – 2.14 below regarding the remedy of specific performance.

c. [2.9] Answer

Even when the action to enforce an oral contract to make a will is pleaded as a claim, the defendant should file an answer explicitly admitting or denying each factual allegation of the claim. Although the pleading requirements for a claim are relaxed and the Illinois Supreme Court has held that explicit denial of the allegations of a claim is not required and a trial court has discretion under §18-7(a) of the Probate Act of 1975, 755 ILCS 5/1-1, *et seq.,* to demand that the plaintiff prove a claim even when an estate files a response neither admitting nor denying the claim, but demanding strict proof of it, a careful defendant will not leave this issue to the discretion of the trial court. *In re Estate of Andernovics,* 197 Ill.2d 500, 759 N.E.2d 501, 503, 259 Ill.Dec. 721 (2001).

C. [2.10] Remedies

When a promisee considers bringing an action to enforce the agreement made with the now-deceased promisor, the promisee must decide whether to demand the very assets contemplated in the contract, which is a specific performance action, or, if the contract did not call for an inheritance of the promisor's entire estate, to bring an action merely for damages, *i.e.,* a cash award satisfiable out of the decedent's estate.

1. [2.11] Specific Performance

In a specific performance action, the plaintiff invokes the court's equitable powers to enforce the agreement and seeks a distribution that is different from the disposition the decedent actually made of the assets (or if there is no will, different from the division under the descent and distribution statute, 755 ILCS 5/2-1, *et seq.*). Specific performance is not allowed as a matter of right but rests in the sound discretion of the court, to be determined from consideration of all of the facts and circumstances in evidence. *Yager v. Lyon,* 337 Ill. 271, 169 N.E. 222 (1929); *Tess v. Radley,* 412 Ill. 405, 107 N.E.2d 677 (1952); *Greenwood v. Commercial National Bank of Peoria,* 7 Ill.2d 436, 130 N.E.2d 753 (1955). To invoke the court's equitable powers, the court must find that no adequate legal remedy is available to the plaintiff.

The courts will specifically enforce such contracts only when the plaintiff cannot be made whole by damages. *Linder v. Potier,* 409 Ill. 407, 100 N.E.2d 602 (1951). The test is whether a gross fraud would be suffered by the plaintiff if specific performance were denied. *Pocius v. Fleck,* 13 Ill.2d 420, 150 N.E.2d 106 (1958); *Yager, supra; Estate of Johnson,* 39 Ill.App.3d 246, 350 N.E.2d 310, 317 (1st Dist. 1976). Oral contracts to devise property are enforced in equity in certain cases to furnish a more complete and fuller justice than that afforded by an action at law. *Edwards v. Brown,* 308 Ill. 350, 139 N.E. 618 (1923); *Tess, supra.*

a. [2.12] Adequate Remedy at Law

A court will not grant specific performance where there is an adequate remedy at law, such as money damages. *Estate of Johnson,* 39 Ill.App.3d 246, 350 N.E.2d 310 (1st Dist. 1976). If the plaintiff performed services for which compensation is calculable (*Byrne v. Mutual National Bank of Chicago,* 89 Ill.App.2d 464, 232 N.E.2d 528 (1st Dist. 1967); *Fierke v. Elgin City Banking Co.,* 366 Ill. 66, 7 N.E.2d 875 (1937)) or if the assets promised included personal property without any particular unique character (*Cohn v. Mitchell,* 115 Ill. 124, 3 N.E. 420 (1885)), the court will not order specific performance.

b. [2.13] Particular Cases Granting Specific Performance

Illinois courts have ruled that a showing that no adequate remedy is available was made by the plaintiff when, in addition to showing full performance, the plaintiff, in reliance on the contract, relocated to live near or with the promisor (*Anson v. Haywood,* 397 Ill. 370, 74 N.E.2d 489 (1947); *Holmes v. Ackley,* 400 Ill. 372, 81 N.E.2d 178 (1948); *Skurat v. Kellerman,* 53 Ill.App.3d 361, 368 N.E.2d 966, 11 Ill.Dec. 358 (5th Dist. 1977)), postponed plans to retire so as to move in with the promisor to carry out the requested assistance (*Wessel v. Eilenberger,* 2 Ill.2d

522, 119 N.E.2d 207 (1954)), accepted a less than competitive wage for the work performed in reliance on the promised inheritance (*Wurth v. Hosmann,* 410 Ill. 567, 102 N.E.2d 800 (1951)), postponed plans to marry to take care of the decedent (*In re Niehaus' Estate,* 341 Ill.App. 454, 94 N.E.2d 525 (4th Dist. 1950)), and undertook improvements to the property that had been promised as an inheritance (*Fouts v. Roof,* 171 Ill. 568, 50 N.E. 653 (1898); *Jatcko v. Hoppe,* 7 Ill.2d 479, 131 N.E.2d 84 (1955); *Skurat, supra*). In such cases, the courts recognized that an attempt to compensate the plaintiff in monetary damages was fairly impossible, and an award of specific performance was appropriate.

When real estate is a subject of the contract, the plaintiff does not face an argument over whether an adequate remedy at law exists because with the unique character of real estate, money damages are inadequate as a matter of law. *Hagen v. Anderson,* 317 Ill. 173, 147 N.E. 791, 793 (1925).

c. [2.14] Adequacy of Monetary Damages as Affected by Statute of Limitations

Whether an adequate legal remedy exists may depend, in part, on whether a recovery for some portion of the contract period is barred by the statute of limitations. 735 ILCS 5/13-205 (five-year limitation on unwritten contracts, etc.), 5/13-206 (ten-year limitation on written contracts, etc.). If contract recovery would be barred, specific performance may be available. *Gladville v. McDole,* 247 Ill. 34, 93 N.E. 86 (1910); *Weidler v. Seibert,* 405 Ill. 477, 91 N.E.2d 416 (1950). On the other hand, if the claim will not be affected by application of the statute of limitations, an adequate remedy at law may be said to be available and specific performance may be denied. *Fierke v. Elgin City Banking Co.,* 366 Ill. 66, 7 N.E.2d 875 (1937) (services were performed within three years next preceding death, and value of services could easily have been ascertained in dollars and cents). However, when the statute of limitations does not limit recovery under the facts, it does not necessarily follow as a matter of law that money damages will provide adequate compensation. Each case must be determined by its own facts, and adequate compensation can be difficult to measure in the context of a detrimental change of position in reliance on a contract. *Holmes v. Ackley,* 400 Ill. 372, 81 N.E.2d 178 (1948).

2. [2.15] Monetary Damages

If the plaintiff is limited to an action at law, the damages available to the plaintiff will be the value of the assets promised as of the date of death. *Downing v. Harris Trust & Savings Bank,* 318 Ill. 323, 149 N.E. 256 (1925). In the event of partial performance by the promisor, the damages are the difference between the date-of-death value of the property promised and the value of the property actually given. *Id*. But see §2.17 below regarding prejudgment interest.

3. Imposition of Constructive Trust

a. [2.16] Constructive Trust as Remedy

When the assets to be devised or bequeathed under the contract have been transferred to one or more third parties for less than arm's-length consideration, the request for specific performance should be made against those third parties as defendants, and the form of relief is the imposition

of a constructive trust. *Stansbury v. Home State Bank of Crystal Lake,* 42 Ill.App.3d 58, 355 N.E.2d 613 (2d Dist. 1976); *Keats v. Cates*, 100 Ill.App.2d 177, 241 N.E.2d 645 (1st Dist. 1968). If a plaintiff is able to trace assets in the possession of a third party to a transfer from the decedent, and otherwise is able to prove the case, a constructive trust may lie as a form of relief. *Sadacca v. Monhart,* 128 Ill.App.3d 250, 470 N.E.2d 589, 83 Ill.Dec. 463 (1st Dist. 1984). As long as the third party did not acquire the assets as a bona fide purchaser for value, the action may be maintained to recover the assets. *Whiton v. Whiton,* 179 Ill. 32, 53 N.E. 722 (1899); *LaBarbera v. LaBarbera,* 116 Ill.App.3d 959, 452 N.E.2d 684, 72 Ill.Dec. 431 (1st Dist. 1983).

The imposition of a constructive trust may be directed at the executor or administrator of the decedent's estate or the trustee of the decedent's trust if in possession of the subject asset, and if the claimant is successful, the court's order essentially makes the executor, administrator, or trustee, despite the terms of the last will or the decedent's trust agreement (or despite the laws of intestacy), the constructive trustee of the assets for the plaintiff's benefit.

b. [2.17] Prejudgment Interest

In a case in which the assets that were the subject of the contract have been transferred via inter vivos gifts or other transfers to individuals who did not purchase them for arm's-length consideration, in addition to awarding the assets, the trial court also has discretion to award prejudgment interest if there is a showing that the party holding the assets since death has had an unjust benefit attributable to the withholding of the promised estate. *LaBarbera v. LaBarbera,* 116 Ill.App.3d 959, 452 N.E.2d 684, 690, 72 Ill.Dec. 431 (1st Dist. 1983).

4. Alternate Theories

a. [2.18] Quantum Meruit

If the court finds the proof insufficient to establish an enforceable contract, this does not necessarily mean that the plaintiff is without a remedy. When the plaintiff, having failed to show clear and convincing evidence of a contract, has nonetheless performed valuable services for the decedent, remuneration may be available under a quantum meruit theory. *Moreen v. Carlson's Estate,* 365 Ill. 482, 6 N.E.2d 871, 876 (1937). To succeed in quantum meruit, the claimant must show the extent of his or her services and negate any presumption that his or her services were gratuitously performed. *Id*.

b. [2.19] Custodial Claim

In some instances in which the plaintiff is unable to establish an enforceable contract, the plaintiff may be able to seek remuneration through a statutory custodial claim. Section 18-1.1 of the Probate Act provides that "[a]ny spouse, parent, brother, sister, or child of a person with a disability who dedicates himself or herself to the care of the person with a disability by living with and personally caring for the person with a disability for at least 3 years shall be entitled to a claim against the estate upon the death of the person with a disability." 755 ILCS 5/18-1.1. Thus, certain relatives of a disabled person may be entitled to seek compensation for caring for the

decedent even when such a person is unable to prove an enforceable contract with the decedent for payment for such services or is unable to overcome the presumption that such services were provided gratuitously. See §2.45 below.

5. [2.20] Not a Will Contest

Although an action based on a contract to make a will appears in some sense to be a challenge to the will that has been admitted to probate or to a trust established by the decedent, in neither case is it a will contest or a trust contest. Rather, the proceeding is one for breach of a contract. Therefore, the relief to be given ordinarily does not include the setting aside of the decedent's last will, but rather a constructive trust may be imposed over the estate assets (*Keats v. Cates,* 100 Ill.App.2d 177, 241 N.E.2d 645 (1st Dist. 1968)), or an action may lie for specific performance of the contract despite the last will's terms (*Scham v. Besse,* 397 Ill. 309, 74 N.E.2d 517, 519 (1947)). Conversely, an instrument purporting to be a will may be enforced as a valid contract even if it is found to be invalid as a will. *Bonczkowski v. Kucharski,* 13 Ill.2d 443, 150 N.E.2d 144 (1958).

D. [2.21] Availability of Jury

In determining whether a plaintiff is entitled to a jury, the court must consider whether the action would have been triable by a jury under English common law at the time the 1970 Illinois Constitution was adopted. *Prodromos v. Everen Securities, Inc.,* 389 Ill.App.3d 157, 906 N.E.2d 599, 329 Ill.Dec. 401 (1st Dist. 2009); *Martin v. Heinold Commodities, Inc.,* 163 Ill.2d 33, 643 N.E.2d 734, 205 Ill.Dec. 443 (1994). Although no Illinois case has given detailed analysis to the availability of a jury in an action to enforce an oral contract to make a will under English common law, the Illinois Supreme Court has held that it was not error to try the issue without a jury. *Frese v. Meyer,* 392 Ill. 59, 63 N.E.2d 768, 770 (1945). But in *In re Estate of Basich,* 79 Ill.App.3d 997, 398 N.E.2d 1182, 35 Ill.Dec. 232 (1st Dist. 1979), the issue of whether the decedent entered into a contract to dispose of his property upon death was tried by a jury.

E. [2.22] Injunctive Relief

In the event that the plaintiff seeks specific performance, the plaintiff, in addition to filing the suit, should ascertain immediately what became of the assets and determine whether it is necessary to commence interlocutory injunctive proceedings, seeking a temporary restraining order or a preliminary injunction to freeze any consumption, transfer, or disposition of the res.

Although the standards governing the entry of a temporary restraining order and a preliminary injunction are similar, a temporary restraining order is entered to preserve the status quo for a specified duration or pending a hearing on a preliminary injunction (*American Federation of State, County, & Municipal Employees, Council 31 v. Ryan,* 332 Ill.App.3d 965, 773 N.E.2d 1196, 266 Ill.Dec. 126 (1st Dist. 2002)), whereas a preliminary injunction is entered to preserve the status quo pending decision on the merits of the cause (*Shodeen v. Chicago Title & Trust Co.,* 162 Ill.App.3d 667, 515 N.E.2d 1339, 114 Ill.Dec. 68 (2d Dist. 1987)). The entry of a temporary restraining order is governed by 735 ILCS 5/11-101 and the entry of a preliminary injunction by 735 ILCS 5/11-102.

Generally, four factors must be satisfied before an interlocutory injunction will be granted, namely that (1) a clearly ascertained right in need of protection exists, (2) irreparable harm will occur without the injunction, (3) there is no adequate remedy at law for the injury, and (4) success on the merits is likely. *Hartlein v. Illinois Power Co.,* 151 Ill.2d 142, 601 N.E.2d 720, 176 Ill.Dec. 22 (1992). For a fuller treatment of injunctive relief, see Hon. Richard A. Siebel, Ch. 4, *Injunctions,* CHANCERY AND SPECIAL REMEDIES (IICLE®, 2013).

F. [2.23] Evidentiary Requirements in Proof of Oral Contract

A contract to make a will may be proved by declarations and conduct of the parties not in the presence of each other. *In re Niehaus' Estate,* 341 Ill.App. 454, 94 N.E.2d 525 (4th Dist. 1950); *Willis v. Zorger,* 258 Ill. 574, 101 N.E. 963 (1913). Statements made by the promisor to third parties, out of the presence of the promisee, contrary to the alleged contract, after a substantial performance of the contract by the promisee, will not be allowed to avoid it. *Chambers v. Appel,* 392 Ill. 294, 64 N.E.2d 511 (1945); *Weidler v. Seibert,* 405 Ill. 477, 91 N.E.2d 416 (1950). If the evidence shows that the decedent admitted and reaffirmed the contract several times, proof of the particular date of entering into the contract is not material. *Estate of Sewart,* 236 Ill.App.3d 1, 602 N.E.2d 1277, 177 Ill.Dec. 105 (1st Dist. 1991); *Niehaus' Estate, supra*.

Although a comprehensive analysis of the application of the rules of evidence is beyond the scope of this chapter, certain evidentiary matters arise in this area fairly consistently.

1. [2.24] Dead-Man's Act

The plaintiff faces many obstacles in enforcing an oral agreement, including the difficulty in proving that there was an agreement and its specific terms in the face of the Dead-Man's Act, 735 ILCS 5/8-201. The Dead-Man's Act provides, in pertinent part:

> **In the trial of any action in which any party sues or defends as the representative of a deceased person . . . no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased . . . or to any event which took place in the presence of the deceased.** *Id*.

If the Dead-Man's Act is asserted, it will bar the plaintiff from testifying to the fact of the contract and to its terms if to do so he or she must personally testify to the decedent's words spoken to the plaintiff or if he or she must testify to an event, such as conversations or instances of the plaintiff's performance, that occurred in the presence of the decedent. Generally, the Dead-Man's Act will bar that testimony if the defendant is the executor or an heir, legatee, or other party with interests derivative of the decedent's estate. *Dempski v. Dempski,* 27 Ill.2d 69, 187 N.E.2d 734, 737 (1963).

a. [2.25] Scope of Dead-Man's Act Application

The reasoning behind the Dead-Man's Act is that the decedent is not present to testify, and courts are concerned with false and fabricated claims first asserted after the death of the party to be charged. *In re Estate of Knight,* 51 Ill.App.2d 198, 200 N.E.2d 916 (1st Dist. 1964); *Moreen v. Carlson's Estate,* 365 Ill. 482, 6 N.E.2d 871 (1937).

A common misconception of the Dead-Man's Act is that if it applies to the plaintiff's case, the plaintiff is barred not only from testifying concerning conversations with the decedent and events in the presence of the decedent but also from taking the witness stand at all. While this used to be the case prior to the October 1, 1973, amendment to the Dead-Man's Act, it is currently not the case. Although the plaintiff will be unable to testify related to conversations with the decedent and/or events taking place between the plaintiff and the decedent outside the presence of others, the plaintiff will be able to testify to many areas of background information. *Vazirzadeh v. Kaminski,* 157 Ill.App.3d 638, 510 N.E.2d 1096, 110 Ill.Dec. 65 (1st Dist. 1987) (under Dead-Man's Act, interested party is barred from testifying to, but only to, matters that deceased could have refuted, but only unwitnessed conversations with decedent are off limits); *Manning v. Mock,* 119 Ill.App.3d 788, 457 N.E.2d 447, 454, 75 Ill.Dec. 453 (4th Dist. 1983) (present Dead-Man's Act, unlike previous statute, imposes no rule of general incompetency on adverse parties or interested persons to testify against decedent's estate and bars persons and parties only from testifying concerning conversations with decedent and events occurring in decedent's presence); *Bernardi v. Chicago Steel Container Corp.,* 187 Ill.App.3d 1010, 543 N.E.2d 1004, 135 Ill.Dec. 436 (1st Dist.) (Dead-Man's Act disqualifies testimony of adverse parties and interested persons only to extent it is concerning conversation with subsequently deceased individual or event that took place in presence of subsequently deceased individual), *appeal denied,* 128 Ill.2d 661 (1989); *Downs v. University of Illinois,* 50 Ill.Ct.Cl. 260 (1997).

In general, however, the plaintiff in these cases will be limited in his or her testimony, and counsel should prepare the case with that in mind. Except as to background information not violative of the Dead-Man's Act, the plaintiff must prove the case through testimony of third parties, and it becomes vitally important to ascertain the identities of all persons who might provide testimony. The plaintiff has the burden of proving by clear and convincing evidence not only the fact of a contract but also the terms and performance of the contract. See §2.4 above.

b. Exceptions to Application of Dead-Man's Act

(1) [2.26] Testimony introduced by representative and waiver

The Dead-Man's Act provides that "[i]f any person testifies on behalf of the representative to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability, any adverse party or interested person, if otherwise competent, may testify concerning the same conversation or event." 735 ILCS 5/8-201(a).

Under the Dead-Man's Act, waiver is limited to the "same conversation or event" as the testimony introduced by the representative. *Manning v. Mock,* 119 Ill.App.3d 788 457 N.E.2d 447, 75 Ill.Dec. 453 (4th Dist. 1983). General testimony or testimony related to one conversation or event in the presence of the decedent should not open the door to testimony about other conversations or events. *In re Estate of Konow,* 154 Ill.App.3d 744, 506 N.E.2d 450, 453 – 454, 106 Ill.Dec. 74 (3d Dist. 1987) (general testimony offered by estate regarding alleged contract to will did not open door to testimony regarding any specific conversation or event that took place in decedent's presence); *In re Estate of Phillips*, 359 Ill.App.3d 114, 833 N.E.2d 895, 295 Ill.Dec.

689 (1st Dist. 2005) (testimony about one event did not open door to testimony regarding events determined to be separate event). Nonetheless, the representative should exercise caution in introducing testimony because courts have not consistently limited the waiver of the Dead-Man's Act.

(2) [2.27] Defense by nonrepresentative

The Dead-Man's Act does not apply when the defendants in the case are not named due to their status as executor, legatee, devisee, heir at law, or other representative of an estate. The individual is, rather, being named due to his or her status as a donee, a survivor in a joint tenancy, or some other transferee status that does not give rise to the possibility that the plaintiff's action will impair an estate. *Wurth v. Hosmann,* 410 Ill. 567, 102 N.E.2d 800 (1951); *Digman v. Johnson,* 18 Ill.2d 424, 164 N.E.2d 34 (1960); *Fleming v. Mills,* 182 Ill. 464, 55 N.E. 373 (1899); *Seaton v. Lee,* 221 Ill. 282, 77 N.E. 446 (1906).

(3) [2.28] Defense by trustee of trust

In the event that the decedent has funded a trust with virtually all of his or her assets and there will be no probate estate opened, the primary party named as a defendant is the trustee of the decedent's trust. The caselaw is not entirely clear as to whether the Dead-Man's Act should apply when the party to assert it is the trustee of the decedent's trust. Applying a technical interpretation to the Dead-Man's Act as it arises in this kind of litigation, the conclusion would be that the Dead-Man's Act applies only if, without its application, a decedent's estate might be impaired. *Rose v. St. Louis Union Trust Co.,* 99 Ill.App.2d 81, 241 N.E.2d 16 (5th Dist. 1968), *aff'd,* 43 Ill.2d 312 (1969); *Mortimer v. Mortimer,* 6 Ill.App.3d 217, 285 N.E.2d 542 (1st Dist. 1972); *Fleming v. Mills,* 182 Ill. 464, 55 N.E. 373 (1899).

There is authority, however, applying the Dead-Man's Act liberally to interpret "estate" to include a trust estate and to include a trustee among the category of persons defined in the Dead-Man's Act as "representatives" (despite the explicit enumeration of included individuals listed in the Dead-Man's Act). If a trustee is defending the trust estate, then that is an estate that might be impaired by disallowing the objection. *Morrison v. Nugent,* 311 Ill.App. 411, 36 N.E.2d 581 (1st Dist. 1941).

2. [2.29] Circumstantial Evidence

The typical oral contract, although not written, is considered an express contract. Express contracts may be proved not only by direct evidence of an actual agreement and the express words used by the parties but also by circumstantial evidence. *In re Burke's Estate,* 303 Ill.App. 235, 25 N.E.2d 99, 102 (3d Dist. 1940). When the facts, including the acts of the parties, raise a convincing implication that the contract was actually made and satisfy the court that its terms and provisions are sufficient to justify its enforcement, it should be upheld. *Id. Accord Willis v. Zorger,* 258 Ill. 574, 101 N.E. 963 (1913) (direct proof of acceptance of contract by claimant not essential); *Fleming v. Dillon,* 370 Ill. 325, 18 N.E.2d 910 (1938); *Weidler v. Seibert,* 405 Ill. 477, 91 N.E.2d 416 (1950).

In defending, direct evidence disproving the decedent's purported declarations is rarely possible, and circumstantial evidence is frequently the only way to present a defense. Because of the inability of a defendant to bring evidence contradicting alleged statements attributed to a decedent, courts have ruled that even uncontradicted testimony of a decedent's declarations may be rejected if inherently weak, if lacking credibility, or if considerations of bias or prejudice might apply to the witness. *Moreen v. Carlson's Estate,* 365 Ill. 482, 6 N.E.2d 871 (1937); *In re Estate of Knight,* 51 Ill.App.2d 198, 200 N.E.2d 916 (1st Dist. 1964). Bias alone, however, will not constitute grounds for the rejection of the testimony if, under the circumstances, the evidence must come from those in the most immediate contact with the contracting parties (*i.e.,* interested parties). *Weidler, supra,* 91 N.E.2d at 419.

3. [2.30] Admissible Hearsay; Hearsay Exceptions

At trial, even if the plaintiff demonstrates that the Dead-Man's Act should not apply, that in itself may not be enough to admit the plaintiff's testimony of the decedent's promises. Much of the plaintiff's testimony will constitute hearsay and will not be admissible absent the application of a recognized exception.

a. [2.31] Hearsay Evidence of Intent, Motive, Design, or Plan

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) is not excluded by the hearsay rule. Illinois Rule of Evidence 803(3). Thus, statements by the decedent may be admissible as evidence of the decedent's intent, plan, motive, or design. In *Lee v. Central National Bank & Trust Company of Rockford, Illinois,* 56 Ill.2d 394, 308 N.E.2d 605 (1974), the Supreme Court considered a hearsay objection made to the presentation of a letter of the decedent in a joint and mutual will case. The court determined that the letter was hearsay because the "letter was an out-of-court statement offered to prove the truth of matters asserted in it . . . but we think it was admissible to prove the existence and terms of the oral agreement under that kindred group of exceptions to the hearsay rule which permit hearsay evidence of intent, motive, design or plan." 308 N.E.2d at 609. *See also Laurence v. Laurence,* 164 Ill. 367, 45 N.E. 1071 (1896) (in reversing trial court's determination that plaintiff was lawful surviving spouse of decedent, Supreme Court determined, inter alia, that it was error to exclude decedent's letters to plaintiff, as letters were authenticated to be authored by decedent and would have shed light on decedent's state of mind, providing probative evidence of nature of their relationship).

b. [2.32] Admissions of Party Opponent; Statements Against Interest

A statement offered against a party that is the party's own statement, in either an individual or a representative capacity, is not hearsay. Ill.R.Evid. 801(d)(2). Thus, statements of a decedent may be admissible as admissions of a party opponent. *In re Estate of Rennick,* 181 Ill.2d 395, 692 N.E.2d 1150, 229 Ill.Dec. 939 (1998). Statements against interest, of course, are another frequently used exception to hearsay when the declarant in question has some bias or interest in the outcome of the action. *Frazier v. Burks,* 95 Ill.App.2d 51, 238 N.E.2d 78 (1st Dist. 1968).

4. [2.33] Evidence of Performance; Detrimental Reliance

It is not enough merely to establish a contract. Performance ordinarily must be shown by evidence not only that the plaintiff fulfilled all obligations under the contract, but that the services took place over a long period of time, and the plaintiff must be shown to have relied on the decedent's promise to his or her detriment. *Yager v. Lyon,* 337 Ill. 271, 169 N.E. 222 (1929) (contract not enforceable when claimant undertook to perform contract only three weeks before decedent's death, made no improvements to real estate, and performed few if any services); *Anson v. Haywood,* 397 Ill. 370, 74 N.E.2d 489 (1947); *Donnelly v. Naum,* 105 Ill.App.2d 340, 245 N.E.2d 537 (1st Dist. 1969). Proof of performance is often cast in terms of "detrimental reliance" sufficient to justify disregarding the provisions of the decedent's lawful testamentary scheme. *Fouts v. Roof,* 171 Ill. 568, 50 N.E. 653, 655 (1898).

There are, however, scenarios in which the plaintiff's performance or consideration need not involve proof of great, prolonged, substantial effort sufficient to justify an order of specific performance. In some cases, the consideration is shown in the plaintiff's having parted with something of substantial value in reliance on the promise of the decedent, and in those cases a clear and convincing showing of what the plaintiff has given up is sufficient. *Smith v. Smith,* 340 Ill. 34, 172 N.E. 32 (1930) (contract enforceable when children, at father's request, deeded him their intestate shares of deceased mother's undivided interest in real estate; in return, father agreed to leave fee simple title to children); *Brust v. Brust,* 405 Ill. 132, 89 N.E.2d 897 (1950) (contract enforceable when son agreed to make payments on father's mortgage as they came due; in return, father agreed to make out will devising subject real estate); *Scham v. Besse,* 397 Ill. 309, 74 N.E.2d 517 (1947) (similar facts to *Brust, supra,* on this issue).

5. [2.34] Adequacy of Consideration

Under general contract law, a court will not look behind a contract to evaluate the sufficiency of the consideration exchanged unless the lack of consideration would constitute a fraud on the other party or would shock the conscience of the court. *In re Estate of Cohan,* 59 Ill.App.3d 963, 376 N.E.2d 628, 17 Ill.Dec. 482 (1st Dist. 1978); *Goodwine State Bank v. Mullins,* 253 Ill.App.3d 980, 625 N.E.2d 1056, 192 Ill.Dec. 901 (4th Dist. 1993); *Hurd v. Wildman, Harrold, Allen & Dixon,* 303 Ill.App.3d 84, 707 N.E.2d 609, 236 Ill.Dec. 482 (1st Dist. 1999).

However, in the case of an oral contract to make a will, courts are more likely to inquire as to the sufficiency of the consideration. *Cain v. Hougham,* 116 Ill.App.2d 439, 253 N.E.2d 137 (4th Dist. 1969); *In re Estate of Spaulding,* 187 Ill.App.3d 1031, 543 N.E.2d 980, 135 Ill.Dec. 412 (1st Dist. 1989); *Bonczkowski v. Kucharski,* 13 Ill.2d 443, 150 N.E.2d 144 (1958); *Davier v. Kaiser,* 280 Ill. 334, 117 N.E. 420, 422 (1917). *But see Brust v. Brust,* 405 Ill. 132, 89 N.E.2d 897 (1950). The court's willingness to examine the sufficiency of consideration in this area is because the proof of the existence of a contract is one of the key disputes and is obviously not laid to rest (as in the usual commercial contract case) by the admission into evidence of a signed written document constituting the contract (because there typically is none). Therefore, the court examines all relevant circumstances before determining whether there is an agreement to enforce.

Additionally, courts look closely at each element because the plaintiff seeks specific performance against a promisor's estate, contrary to the terms of a will, which is a cause of action generally disfavored in the law. *Laughlin v. France,* 241 Ill.App.3d 185, 607 N.E.2d 962, 180 Ill.Dec. 662 (2d Dist.), *appeal denied,* 151 Ill.2d 565 (1993); *Monninger v. Koob,* 405 Ill. 417, 91 N.E.2d 411 (1950).

By contrast, in the case of a written contract signed by the parties, the extent of the consideration agreed on is not an issue of immediate concern to the court. The parties have already agreed on the consideration, presumably entering the contract with "eyes open." *Gavery v. McMahon & Elliott,* 283 Ill.App.3d 484, 670 N.E.2d 822, 219 Ill.Dec. 144 (1st Dist. 1996). Thus, when the contract to make a will is based on a written agreement, the court will not closely evaluate the sufficiency of the consideration because the law permits wide latitude in determining from case to case what constitutes sufficient consideration for a contract. *Brust, supra* (written contract); *Scham v. Besse,* 397 Ill. 309, 74 N.E.2d 517 (1947); *Hickey v. Hickey,* 374 Ill. 614, 30 N.E.2d 423 (1940); *Smith v. Smith,* 340 Ill. 34, 172 N.E. 32 (1930).

6. [2.35] Inconsistent Conduct

The court will consider whether the conduct of both the decedent and the plaintiff is consistent with the existence of a contract. For example, conduct by the decedent that is inconsistent with the presence of a contract is admissible to show that no contract existed. *In re Estate of Konow,* 154 Ill.App.3d 744, 506 N.E.2d 450, 106 Ill.Dec. 743 (3d Dist. 1987). *Accord Estate of Kucharski,* 3 Ill.App.3d 32, 278 N.E.2d 221 (1st Dist. 1971); *Estate of Baskin v. Baskin,* 93 Ill.App.2d 445, 236 N.E.2d 296 (1st Dist. 1968). In *Konow,* contrary to the kind of behavior to be expected by a party believing himself to be under the obligations of a contract, the decedent, while allegedly under such obligations, entered into a prenuptial agreement with his fiancée that purported to dispose of the property in question in a manner contradictory to the agreement. Furthermore, he later executed a will that was also incompatible with the presence of a contract to make a will favoring the claimants. The long-standing attorney for the decedent also testified that the decedent never mentioned the contract to him. Such conduct, inconsistent with the frame of mind of one under a contract, was a factor negating the proof of the contract.

Similarly, conduct by the plaintiff may be considered. As the court stated in *Moreen v. Carlson's Estate,* 365 Ill. 482, 6 N.E.2d 871, 875 (1937), "Not only may the life, dealings, and admissions of the promisee, prior to the death of the promisor, be inquired into, but the conduct and admissions of the promisee subsequent to the death of the decedent, may throw light upon the integrity of the challenged claim." *See also Fierke v. Elgin City Banking Co.,* 366 Ill. 66, 7 N.E.2d 875 (1937). In *Fierke,* the claimant, following the decedent's death, filed a claim for unpaid monthly wages, which was allowed; thereafter, the claimant joined with her husband in filing a claim on an alleged oral contract to make a will. The claimant's conduct in filing a claim for wages impeached her assertion that an agreement for further compensation was due. *Accord Linder v. Potier,* 409 Ill. 407, 100 N.E.2d 602 (1951) (claimant's retention of separate apartment, where she continued to keep most of her belongings, at same time as she allegedly had permanently relocated to live with and care for decedent at decedent's specific request, constituted conduct belying her intent to devote herself entirely to care of decedent; hence, there was insufficient demonstration of detrimental reliance to justify specific performance).

7. [2.36] Facts Reasonably Explainable by Another Theory

Illinois courts have ruled that if the facts might be reasonably explainable under any other theory, the claim should be denied. *In re Estate of Konow,* 154 Ill.App.3d 744, 506 N.E.2d 450, 106 Ill.Dec. 743 (3d Dist. 1987); *Hutton v. Busaytis,* 326 Ill. 453, 158 N.E. 156 (1927); *Davier v. Kaiser,* 280 Ill. 334, 117 N.E. 420, 422 (1917) ("Where evidence is as consistent with one state of facts as another, it has no tendency to prove either as against the other.").

G. Illustrative Cases

1. [2.37] Cases in Which Proof of Contract Was Clear and Convincing

In the typical case in which the plaintiff prevails, the proof consists of testimony of persons who had awareness not merely that the parties had discussed compensation through some testamentary legacy, and not merely that the promisor had stated on numerous occasions how indebted he or she was to the plaintiff, but that the plaintiff was performing services because the parties had an agreement. Typically, a witness' knowledge was gained from conversations with the decedent or because the decedent had openly acknowledged the agreement on frequent occasions. *Chambers v. Appel,* 392 Ill. 294, 64 N.E.2d 511 (1945); *Dempski v. Dempski,* 27 Ill.2d 69, 187 N.E.2d 734 (1963); *Tess v. Radley,* 412 Ill. 405, 107 N.E.2d 677 (1952); *Weidler v. Seibert,* 405 Ill. 477, 91 N.E.2d 416 (1950); *Wurth v. Hosmann,* 410 Ill. 567, 102 N.E.2d 800 (1951).

2. Cases in Which Proof of Contract Was Insufficient

a. [2.38] Precatory Statements

In the common case in which the evidence falls short on the issue of whether there was a contract, the testimony of the witnesses includes recollections of conversations with the promisor-decedent that involved precatory statements or other general statements of intention, such as, "I should really do something for her," or, "Without him, I don't know where I would be right now," or, "I really owe it to them to do something, and I intend to change my will," or other comments from the decedent that expresses only a moral indebtedness. These are routinely characterized as nonbinding statements of future intent. *Greenwood v. Commercial National Bank of Peoria,* 7 Ill.2d 436, 130 N.E.2d 753 (1955); *Harper v. Kennedy,* 15 Ill.2d 46, 153 N.E.2d 801 (1958); *In re Estate of Knight,* 51 Ill.App.2d 198, 200 N.E.2d 916 (1st Dist. 1964).

The court in *Knight* explained the problems with proof that goes no further than to recall a decedent's precatory statements:

> **In [**a**] case of this kind it is easy for a claimant to believe that chance conversations with the deceased and terms of affection and expressions of gratitude constitute agreements to perform services to be compensated for by a devise or legacy. [**Claimants'**] moving into the deceased's apartment in itself presented rewards, advantages and hopes to the stepson and his wife which are compatible with the**

> **estate's contention that while the deceased was interested in his stepson and intended to do something for him in his will, he made no agreement with the [**wife**] for any devise or bequest to her.** 200 N.E.2d at 918.

Once again, when this constitutes the extent of the plaintiff's evidence, an additional count sounding in quantum meruit may be the only available source of relief. That relief, however, would be limited to reasonable compensation for services rendered in performance of the contract. *In re Estate of Etherton,* 284 Ill.App.3d 64, 671 N.E.2d 364, 219 Ill.Dec. 450 (4th Dist. 1996); *In re Estate of Milborn,* 122 Ill.App.3d 688, 461 N.E.2d 1075, 78 Ill.Dec. 241 (3d Dist. 1984).

b. [2.39] Decedent's Last Will Departing from Contract

Furthermore, the courts consider a will drawn after the date of the alleged contract that varies from the terms of the alleged contract to be evidence that the decedent did not consider himself or herself to be under the obligations of a contract. *Fierke v. Elgin City Banking Co.,* 366 Ill. 66, 7 N.E.2d 875 (1937); *Weidler v. Seibert,* 405 Ill. 477, 91 N.E.2d 416 (1950); *In re Estate of Konow,* 154 Ill.App.3d 744, 506 N.E.2d 450, 106 Ill.Dec. 743 (3d Dist. 1987). Courts will presume, until contrary evidence is brought, that the decedent's execution of a will in derogation of the terms of the alleged contract was an honest reflection of the decedent's state of mind on the subject. Courts make this presumption because the burden of proof is on the claimant. The claimant, therefore, will need to bring evidence addressing how it could be that the decedent would have signed a will contrary to the terms of the alleged contract. *See, e.g., Anson v. Haywood,* 397 Ill. 370, 74 N.E.2d 489 (1947). In the ordinary case in which the claim is established, the explanation comes down to the simple fact that the decedent has, in breach of the contract, simply changed his or her mind after substantial performance by the plaintiff. *Weidler, supra*.

c. [2.40] Other Instruments as Evidence of No Contract

In ascertaining the precise intent of the decedent, the court is not limited to consideration of the will that was admitted to probate but also may contemplate other wills executed, or attempted, after the time when the oral contract was made. *In re Estate of Nelson,* 103 Ill.App.3d 640, 431 N.E.2d 1103, 59 Ill.Dec. 346 (1st Dist. 1981) (in plaintiff's suit for specific performance, trial court properly allowed into evidence unexecuted will that testator's attorney drew up shortly before death that was never signed, but that was out of harmony with alleged oral contract to make will); *In re Estate of Konow,* 154 Ill.App.3d 744, 506 N.E.2d 450, 106 Ill.Dec. 743 (3d Dist. 1987).

d. [2.41] Intestacy as Evidence of No Contract

It is not merely in those situations in which the alleged contract disrupts a later-prepared will, however, that the law looks with suspicion on the allegations. Even when the decedent died intestate, the court still "scrutinize[s] with scrupulous care the evidence offered to prove an oral contract to make a different disposition of the property of a decedent, from that prescribed by the laws of descent." *Hickey v. Hickey,* 374 Ill. 614, 30 N.E.2d 423, 427 (1940). *See Yager v. Lyon,*

337 Ill. 271, 169 N.E. 222 (1929). This appears to be a reflection of just how reluctant the courts are to disrupt the status quo in favor of the purported contract, ordinarily first asserted after the death.

Most of the cases denying relief to a plaintiff do so on the basis that the plaintiff has simply failed to meet his or her burden of proving the existence of a contract, its terms (*Cain v. Hougham,* 116 Ill.App.2d 439, 253 N.E.2d 137 (4th Dist. 1969)), and/or full performance by the plaintiff such as to justify enforcement of the contract (*Kahn v. First National Bank of Chicago,* 216 Ill.App.3d 272, 576 N.E.2d 321, 159 Ill.Dec. 652 (1st Dist. 1991) (although evidence of some terms of contract may be missing or left to be agreed on, if proof of material terms is uncertain, there is no contract)).

H. [2.42] Motions for Summary Judgment

As with any other cause of action, in an appropriate case either the plaintiff or the defendant may move for summary judgment under 735 ILCS 5/2-1005. For a plaintiff, typically such a motion will be difficult to prove since, with the high burden of proof and the fact-intensive nature of the case, it is relatively easy to generate a genuine issue of material fact. For a defendant, such motions may be well taken. The defendant should establish in discovery the precise proof the plaintiff offers so as to show its insufficiency or, by establishing the incapacity of the plaintiff to testify under the Dead-Man's Act, the absence of any competent proof. *Kahn v. First National Bank of Chicago,* 216 Ill.App.3d 272, 576 N.E.2d 321, 159 Ill.Dec. 652 (1st Dist. 1991) (summary judgment entered when answers to interrogatories disclosed only two possible witnesses, and their testimony per their affidavits was so lacking that court had to agree that record did not disclose facts that would give rise to genuine issue of material fact). *See also In re Estate of Spaulding,* 187 Ill.App.3d 1031, 543 N.E.2d 980, 135 Ill.Dec. 412 (1st Dist. 1989).

I. Defenses

1. [2.43] Statute of Limitations

A suit related to a contract to make a will, if filed against an estate, is in the nature of a claim and must be filed within the six-month period following the date of first publication to creditors or, if the decedent's estate is not probated, within two years after the death of the decedent. 735 ILCS 5/13-221; 755 ILCS 5/18-3. The statute of limitations is found at 735 ILCS 5/13-221, which provides:

> **An action against the representative, heirs and legatees of a deceased person to enforce a contract to make a will, shall be commenced within 2 years after the death of the deceased person unless letters of office are applied for on his or her estate within 2 years after his or her death and the representative has complied with the provisions of Section 18-3 of the Probate Act of 1975, as amended, in regard to the giving of notice to creditors, in which case the action shall be commenced within and not after the time for presenting a claim against the estate of a deceased person as provided in the Probate Act of 1975, as amended.**

2. [2.44] Frauds Act

If real estate is a subject of the alleged contract, a common defense available against a complaint seeking specific performance of an oral contract is the Frauds Act, 740 ILCS 80/0.01, *et seq.,* formerly known as the "statute of frauds." As it pertains to real estate, §2 of the Frauds Act provides in pertinent part:

> **No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party. This section shall not apply to sales for the enforcement of a judgment for the payment of money or sales by any officer or person pursuant to a judgment or order of any court in this State.** 740 ILCS 80/2.

But when the court finds full performance by the plaintiff, *i.e.,* detrimental reliance, the Frauds Act will not necessarily bar the claim despite the fact that it relates to real estate. Courts have held that an oral contract, even for the future conveyance or devise of land, is not within the Frauds Act if it has been completely performed by one of the parties thereto. *Fleming v. Dillon,* 370 Ill. 325, 18 N.E.2d 910 (1938); *Loeb v. Gendel,* 23 Ill.2d 502, 179 N.E.2d 7 (1961); *Gladville v. McDole,* 247 Ill. 34, 93 N.E. 86 (1910) (when effect of interposing Frauds Act would be to accomplish fraud against promisee, court of equity will not listen to that defense). However, there is no bright-line standard to be applied in determining full performance so as to avoid the application of the Frauds Act, and it must be determined on a case-by-case basis. *Holmes v. Ackley,* 400 Ill. 372, 81 N.E.2d 178, 181 (1948).

The cases in this area repeatedly recite the qualifications to be met in avoiding the application of the Frauds Act to a claim for an oral contract to devise property, originally listed in *Linder v. Potier,* 409 Ill. 407, 100 N.E.2d 602, 604 – 605 (1951), as follows:

> **(1) Courts of equity accept with caution evidence offered in support of a contract to make disposition of the property of a deceased person different from that provided by law; (2) The contract to support it must be clear, explicit and convincing; (3) The contract may be based upon services, support and care, and if the value of such services may be estimated in money, or for which a recovery might be had, such performance will not take the contract out of the Statute of Frauds, except in case the statute of limitations bars recovery, or where services cannot be adequately compensated; (4) Specific performance is not a matter of right, but rests in the sound discretion of the court, to be determined from all of the facts and circumstances; (5) It is only on the principle that it is unjust and inequitable to permit a contract to remain unexecuted that a court of equity will grant relief, and where the promisee shows no substantial change for the worse in his position in consequence of the agreement, relief will be denied.**

These oft-cited maxims illustrate the courts' consideration of whether the plaintiff has truly relied on the agreement such that a gross fraud would be suffered if the court applied the Frauds Act's requirement of a writing. *Accord Greenwood v. Commercial National Bank of Peoria,* 7 Ill.2d 436, 130 N.E.2d 753 (1955).

Further, a plaintiff may avoid the Frauds Act by evidence that the plaintiff either has moved into the property and occupied it as a permanent relocation in reliance on the contract or that the plaintiff has completed substantial improvements on the real estate in the assumption that the property would ultimately be owned by the plaintiff. These improvements are usually described as "valuable in comparison with the value of the property and . . . something more than a tenant would make for his own comfort who expected to occupy the property for a number of years." *Skurat v. Kellerman,* 53 Ill.App.3d 361, 368 N.E.2d 966, 968, 11 Ill.Dec. 358 (5th Dist. 1977), quoting *Yager v. Lyon,* 337 Ill. 271, 169 N.E. 222, 224 (1929). In *Jatcko v. Hoppe,* 7 Ill.2d 479, 131 N.E.2d 84 (1955), the claimants, in reliance on the promises of their mother of a devise of the premises, immediately began significant improvements to the home with their own funds and thereafter rendered valuable improvements to the home over the next 15 years, demonstrating sufficient evidence of detrimental reliance such that it would be a virtual fraud not to enforce the contract.

3. [2.45] Presumption of Services Being Rendered Gratuitously

When family members (or in some cases nonfamily members with sufficiently close relationships) bring claims against their relative's estate, an initial presumption arises that the services were intended to be gratuitous when performed. *Estate of Kucharski,* 3 Ill.App.3d 32, 278 N.E.2d 221 (1st Dist. 1971); *In re Estate of Walsh,* 2012 IL App (2d) 110938, 972 N.E.2d 248, 361 Ill.Dec. 763. This presumption is rebuttable upon a clear and convincing showing that the services were not intended to be without compensation. *Dempski v. Dempski,* 27 Ill.2d 69, 187 N.E.2d 734 (1963) (daughter-claimant overcame presumption); *In re Estate of Wessels,* 203 Ill.App.3d 1080, 561 N.E.2d 1212, 149 Ill.Dec. 516 (3d Dist. 1990) (daughter overcame presumption).

4. [2.46] Equitable Defenses

Given the equitable nature of specific performance as a remedy, the defendant will have available the many other equitable defenses that may not be available in the case of an action purely for damages, such as laches, unclean hands, unconscionability, hardship, etc. For a fuller treatment of equitable defenses, see Lee M. Weisz and Michael A. Braun, Ch. 3, *Specific Performance,* CHANCERY AND SPECIAL REMEDIES (IICLE®, 2013).

III. JOINT AND MUTUAL/RECIPROCAL WILLS

A. [2.47] Joint Wills Distinguished from Mutual Wills

The leading case in Illinois on joint and mutual wills is *Curry v. Cotton,* 356 Ill. 538, 191 N.E. 307 (1934), in which the Illinois Supreme Court discussed the case history and distinctions

between joint wills, reciprocal wills, and joint and reciprocal wills. The court noted that a joint will is one document, signed by two or more persons, that is meant to be probated on the occasion of each signer's death:

> **A joint will may or may not be mutual or reciprocal. Mutual or reciprocal wills are the separate instruments of two or more persons, the terms of such wills being reciprocal, and by which each testator makes testamentary disposition in favor of the other. . . . A will that is both joint and reciprocal is an instrument executed jointly by two or more persons with reciprocal provisions, and shows on its face that the bequests are made one in consideration of the other. [**Citation omitted.**]** 191 N.E. at 309.

Mutual wills are therefore synonymous with reciprocal wills under this definition. *See In re Estate of Erickson,* 363 Ill.App.3d 279, 841 N.E.2d 1104, 299 Ill.Dec. 372 (4th Dist. 2006). Reciprocal wills, without evidence of intention to create a contract, simply are wills that contain similar or even identical provisions, which may be freely changed by either spouse at any time before or after the death of the first spouse to die. In this chapter, a will that is both joint and reciprocal or mutual is generally referred to as a joint and mutual will.

In the typical joint and mutual will case, spouses have each executed one or more documents that a third party attempts to enforce as a contract. Most of the cases dealing with joint and mutual wills involve disputes over a disposition, or a proposed disposition, by the surviving spouse, after the death of the first spouse, of the property that is the subject of the alleged agreement arising from the will or wills. Frequently, the beneficiaries named in the instruments executed by the spouses have initiated an action either to restrain a planned disposition or to rescind a completed disposition of the property by the surviving spouse. Typically, the surviving spouse (or the estate of the surviving spouse, or the third party recipient of the disputed property, depending on the procedural posture of the case) will take the position that he or she is not bound by any contractual arrangement over the property, or if he or she concedes the fact of a contract, that the challenged disposition of the property is not otherwise barred.

Illinois law recognizes the rights of persons to unite their wills into one instrument as the will of each if the instrument can be given effect upon the death of either. *Frazier v. Patterson,* 243 Ill. 80, 90 N.E. 216 (1909); *Peoria Humane Society v. McMurtrie,* 229 Ill. 519, 82 N.E. 319 (1907). A joint will contained in a single instrument is considered the will of each of the makers and at the death of the first may be probated as his or her will, and then be again probated at the death of the other as the will of the latter. *Frazier, supra*.

In the case of a joint will (a single instrument), the joint nature of the will is not, in and of itself, sufficient evidence of an enforceable contract between the testators so as to make the contract enforceable in equity by specific performance or quasi-specific performance through a declaration of trust. *Jacoby v. Jacoby,* 342 Ill.App. 277, 96 N.E.2d 362 (2d Dist. 1950). One must refer to the terms of the instrument and/or to other evidence bearing on the question of a contract.

When, however, the provisions of the will are reciprocal, and it appears that they are made in consideration of each other, the instrument is regarded as a joint and mutual will (enforceable as a

contract). *Frazier, supra*. Such a joint and mutual will may be irrevocable after the death of one of the parties when it has been proven by clear and convincing evidence that the will was executed pursuant to a contract between the parties and that each will is the consideration for the other. *Jordan v. McGrew,* 400 Ill. 275, 79 N.E.2d 622 (1948).

B. Form of Action; Remedies

1. [2.48] Specific Performance; Damages; Constructive Trust; Rescission

An action seeking to enforce a joint and mutual will, similar to a case involving an oral contract to make a will, may seek specific performance of the contract, damages for breach of the contract, the imposition of a constructive trust, or the rescission of the disposition of property. Generally, the same principles relating to specific performance and damages that apply to contracts to make a will also apply to oral contracts to make wills. See §§2.11 – 2.15 above.

Curry v. Cotton, 356 Ill. 538, 191 N.E. 307, 311 – 312 (1934), long ago settled the issue of the availability of these various remedies:

> **There remains the question as to whether the complainants are limited to an action at law for damages. Where a testator of a valid joint will undertakes to revoke the same by a subsequent will or breaches his contract, the same remedies exist in favor of the injured parties as in other cases of breach of contract to make a will; namely, an action on the contract or a remedy in equity against the parties taking title, by reason of the failure of the promisor to execute the will he contracted to make. . . . Where one of the parties to a joint will executed in pursuance of a contract, without the knowledge or consent of the other party to such will, undertakes secretly to revoke the will or dispose of his property contrary to the provisions of the will, and such subsequent will is probated, the property in the hands of the taker with notice of the first will, or in the hands of volunteers, is impressed with a constructive trust in favor of the beneficiaries under the joint will, and such trust may be enforced by a proceeding in equity. [**Citation omitted.**]**

The issue of enforcing these contracts may arise in virtually any proceeding that pertains to property that was the subject of the joint and mutual will. In *Moline National Bank v. Flemming,* 91 Ill.App.3d 398, 414 N.E.2d 936, 46 Ill.Dec. 883 (3d Dist. 1980), the surviving testator did not formally revoke the will executed by him but effectively accomplished the same result by making inter vivos gifts and establishing joint tenancies with the subject assets such that no assets were subject to probate. The nominated executor, Moline National Bank, nonetheless obtained admission of the will to probate, was issued letters of office, and initiated citation proceedings to recover the assets that it claimed were improperly disposed of by inter vivos gifts and joint tenancy arrangements. The appellate court affirmed the trial court's judgment setting aside the inter vivos transfers. 414 N.E.2d at 941.

2. [2.49] Procedural Posture of Enforcement

An action to enforce a contract under a joint and mutual will may be brought as a claim in a probate estate seeking specific performance against the estate or damages for breach of contract or as an equitable action for specific performance in chancery. Alternatively, in cases in which the contract has been contravened through inter vivos gifts and/or joint tenancy arrangements, an action to recover the subject property through a recovery citation under §16-1 of the Probate Act, 755 ILCS 5/16-1, may be required. Such actions may be brought either by the intended third-party beneficiaries (see §2.54 below) or by the representative of the first testator to die (*Moline National Bank v. Flemming,* 91 Ill.App.3d 398, 414 N.E.2d 936, 46 Ill.Dec. 883 (3d Dist. 1980)).

3. [2.50] No Bar to Probating Inconsistent Will

The issues arising over the enforcement of contracts under joint and mutual wills are not to be determined in the context of a proceeding under §6-4 of the Probate Act, 755 ILCS 5/6-4, to admit a will to probate. In *In re Estate of Marcucci,* 54 Ill.2d 266, 296 N.E.2d 849 (1973), the Supreme Court determined that questions of the enforcement of a joint and mutual will that had been revoked are not appropriate subjects in a Probate Act §6-4 hearing. The court affirmed the trial court's probate of the will of a testator that was last in time and otherwise met the requirements of §§6-4 and 4-3 of the Probate Act despite the existence of a prior joint and mutual will. The court ruled that issues of the enforceability of an alleged contract embodied in a joint and mutual will should not be adjudicated before appointment of an executor. The court recognized the ambulatory nature of a person's will, determining essentially (in agreement with the dissenting appellate court opinion) that a person always has the right to revoke a prior will, though revoking the prior will may be shown to be in breach of a binding contract. By admitting the last will to probate, an executor — an indispensable party to claims such as the enforcement of a joint and mutual will — would be in place.

4. [2.51] Powers and Rights of Promisor in Res

The question of what rights and powers the parties to a joint and mutual have to transfer, use, or otherwise dispose of the property subject to the contract often arises. For example, whether the survivor may give away or sell assets that are subject to the agreement is often disputed. If the proof of the contract includes proof of an express promise by the decedent not to dispose of the subject assets, then it is simply a question of the promisee enforcing those rights. In the vast majority of cases, however, the proof of the contract, and the enforceability of the contract, will not easily dispose of the question of what rights the survivor continued to have as to the use and disposal of the res of the contract prior to death.

The Illinois Appellate Court in *Thomas v. First National Bank of Chicago,* 134 Ill.App.3d 192, 479 N.E.2d 1014, 89 Ill.Dec. 8 (1st Dist. 1985), discussed the issue in some detail. In *Thomas,* the court focused on whether the surviving life tenant had a "power of sale," which was defined as a disposition "by sale, *inter vivos* gift or appointment." 479 N.E.2d at 1025, quoting *First United Presbyterian Church v. Christenson,* 64 Ill.2d 491, 356 N.E.2d 532, 536, 1 Ill.Dec. 344 (1976). The court determined that if no power of sale was expressly provided to the survivor

in the agreement governing their rights, the survivor would not have the right to dispose of the assets. The court, citing *Christenson,* stated:

> **Where no power of sale is [**expressly**] accorded to the life tenant, courts have traditionally set aside any attempted conveyance . . . or have imposed a constructive trust upon the proceeds of the sale for the benefit of the vested remaindermen. [**Citations omitted.**]** 356 N.E.2d at 536.

The *Thomas* court, quoting *Moline National Bank v. Flemming,* 91 Ill.App.3d 398, 414 N.E.2d 936, 941, 46 Ill.Dec. 883 (3d Dist. 1980), then described the limitations that apply even when a power of sale is allowed under the governing documents:

> **On the other hand, where the power of sale is granted the life estate tenant, the courts have nevertheless recognized that this power may not be exercised capriciously nor may it be exercised in a manner which contradicts the terms of the conveyance. . . . This rule was recently recognized in *Moline National Bank v. Flemming* (1980), 91 Ill.App.3d 398, 46 Ill.Dec. 883, 414 N.E.2d 936, in which the court held that a life estate tenant who was granted the power of sale acted beyond this authority when he placed the property in jointly held accounts or trust accounts for an individual other than the remaindermen named in the will. The court stated (91 Ill.App.3d 398, 405, 46 Ill.Dec. 883, 414 N.E.2d 936):**
>
> > **"The power of the surviving spouse Albert over the property he obtained upon the death of Eva is described in 97 C.J.S. *Wills* §1367(2), at 307 – 09 (1957), which states:**
> >
> > > **'Where an agreement as to mutual wills does not define the survivor's power over the property, but merely provides as to the disposition of the property at his death, the survivor may use not only the income but reasonable portions of the principal, for his support and for ordinary expenditures, and he may change the form of the property by reinvestment and the like; but he may not give away any considerable portion of it or do anything else with it that would be inconsistent with the spirit or the obvious intent and purpose of the agreement.' " [**Citations omitted.**]** *Id.*

Thus, when the parties have failed to specifically address in their contract what disposition the survivor may make of the res, the survivor should not be permitted to make a disposition of the property that eviscerates the "spirit of the obvious intent and purpose of the agreement." *Moline National Bank, supra,* 414 N.E.2d at 941, quoting 97 C.J.S. *Wills* §1367(2) (1957). Further, even when the survivor has retained rights to make gifts, he or she cannot do so capriciously so as to defeat the benefit of the bargain. *Thomas, supra*. *See also Tontz v. Heath,* 20 Ill.2d 286, 170 N.E.2d 153 (1960) (provision of life estate to survivor in joint and mutual will, with remainder interests going to third parties, indicated that inter vivos transfers by survivor were not contemplated); *Jusko v. Grigas,* 26 Ill.2d 92, 186 N.E.2d 34 (1962); *Freese v. Freese,* 49

Ill.App.3d 1041, 364 N.E.2d 983, 7 Ill.Dec. 692 (4th Dist. 1977); *Estate of Schwebel v. Sheets,* 133 Ill.App.3d 777, 479 N.E.2d 500, 88 Ill.Dec. 887 (5th Dist. 1985); *In re Estate of Arnold,* 142 Ill.App.3d 258, 491 N.E.2d 458, 96 Ill.Dec. 412 (5th Dist. 1986).

Although not specifically addressed by any case, these joint and mutual will cases likely also apply, by analogy, to oral contracts to make a will, at least when the contract fails to address the powers, rights, and liabilities placed on the promisor with respect to the res of the contract.

5. [2.52] Duty To Account and Right to Accounting

Absent an express provision in the contract requiring an accounting or evidence of fraud, waste, or other efforts to defeat the interests of the remainderpersons, a life tenant has no present duty to account to the remainderpersons. *Thomas v. First National Bank of Chicago,* 134 Ill.App.3d. 192, 479 N.E.2d 1014, 89 Ill. Dec. 8 (1st Dist. 1985).

C. [2.53] Statute of Limitations

The statute of limitations governing joint and mutual wills is the same as the statute of limitations governing oral contracts to make a will and is found at 735 ILCS 5/13-221. See §2.43 above. Note that the Illinois Supreme Court has ruled that the statute of limitations related to the admission of the will on the first death cannot then be used as a shield to prevent a later attack against efforts by the survivor to wrongly revoke such will. *Helms v. Darmstatter,* 34 Ill.2d 295, 215 N.E.2d 245 (1966).

D. [2.54] Parties

A joint and mutual will may be enforced by the third parties who stand to benefit under the contract. *In re Edwards' Estate,* 3 Ill.2d 116, 120 N.E.2d 10 (1954); *Frazier v. Patterson,* 243 Ill. 80, 90 N.E. 216 (1909). The action may be initiated against the surviving testator (*Thomas v. First National Bank of Chicago,* 134 Ill.App.3d 192, 479 N.E.2d 1014, 89 Ill.Dec. 8 (1st Dist. 1985)) or his or her probate estate following death (*Helms v. Darmstatter,* 34 Ill.2d 295, 215 N.E.2d 245 (1966)), or, if no probate estate is opened or damages would be an insufficient remedy against the estate, a direct action may lie in equity against third parties who are not bona fide purchasers for value (*Neurauter v. Reiner,* 117 Ill.App.2d 141, 254 N.E.2d 66 (1st Dist. 1969)). In addition, the executor under the will may initiate citation proceedings in probate to recover assets from the third parties who received assets that were transferred in violation of the contract by the survivor. *Moline National Bank v. Flemming,* 91 Ill.App.3d 398, 414 N.E.2d 936, 46 Ill.Dec. 883 (3d Dist. 1980).

E. Burden of Proof

1. [2.55] Joint and Mutual Wills

The standard of proof in an action to enforce the contract in a joint and mutual will is the same as that of other contracts to make wills, *i.e.,* clear and convincing evidence. *Jordan v. McGrew,* 400 Ill. 275, 79 N.E.2d 622 (1948) (to render mutual wills operative as made in

consideration of each other and irrevocable as joint wills made under contract, contract must be certain and definite in all parts, founded on adequate consideration, and established by clearest and most convincing evidence). The burden of proof lies with the party asserting the existence of the contract, and he or she must establish that the will is contractual as well as testamentary in character. This burden is not sustained by proof that permits an inference either way. *Jacoby v. Jacoby,* 342 Ill.App. 277, 96 N.E.2d 362 (2d Dist. 1950).

2. [2.56] Mutual or Reciprocal Wills

In proving the enforceability of a contract pertaining to mutual wills (separate documents with reciprocal provisions), the proof of the contract, unless explicitly stated in the wills, must be derived from outside the language of the wills. *Campbell v. Cowden,* 18 Ill.App.3d 500, 309 N.E.2d 601 (4th Dist. 1974); *Jordan v. McGrew,* 400 Ill. 275, 79 N.E.2d 622 (1948). The cases involving wills that are merely mutual or reciprocal in their provisions but are not joint generally require clear and convincing evidence that they were executed as the result of a binding contract to be irrevocable. *In re Edwards' Estate,* 3 Ill.2d 116, 120 N.E.2d 10 (1954). This is so even when the separate reciprocal wills are executed on the same day. *Proctor v. Handke,* 116 Ill.App.3d 742, 452 N.E.2d 742, 72 Ill.Dec. 489 (2d Dist. 1983) (mutual and reciprocal wills of husband and wife were not of themselves sufficient evidence of contract, and no other evidence was adduced that would support agreement to make irrevocable contract).

F. [2.57] Two-Pronged Analysis: Existence of Contract and Revocability

The first decision the trial court must make in determining the rights of the parties is whether the governing documents or other evidence establishes a contract. It is not enough, in reviewing the terms of the instruments, merely to have reciprocal provisions. *Jacoby v. Jacoby,* 342 Ill.App. 277, 96 N.E.2d 362 (2d Dist. 1950); *Curry v. Cotton,* 356 Ill. 538, 191 N.E. 307 (1934); *Frazier v. Patterson,* 243 Ill. 80, 90 N.E. 216 (1909); *In re Edwards' Estate,* 3 Ill.2d 116, 120 N.E.2d 10 (1954). The provisions must have been made in consideration of each other.

If the evidence establishes a contract, the next question for the court typically will be whether the contract was revocable by either party under the circumstances. If so, whether it is a single joint will on the one hand or, on the other, separate wills with reciprocal provisions, the party wishing to revoke (absent language in the contract addressing the issue) may do so only upon notice to the other during lifetime, but only as long as the non-revoking party has not fulfilled duties under the contract going beyond the mere exchange of promises between spouses. In such a case, absent the consent of the other, the contract becomes irrevocable. *Curry, supra,* 191 N.E. at 310.

G. Specific Probative Evidence

1. [2.58] Declarations

The evidence admissible to prove the contract may take various forms, "such as the instrument itself, or the competent testimony of competent witnesses as to the declaration of the testators or as to relevant facts and circumstances." *Estate of Schwebel v. Sheets,* 133 Ill.App.3d

777, 479 N.E.2d 500, 507, 88 Ill.Dec. 887 (5th Dist. 1985); *Bonczkowski v. Kucharski,* 13 Ill.2d 443, 150 N.E.2d 144, 150 (1958). When the will itself specifically purports to dispose of property held in joint tenancy between the testators, this is evidence that the parties intended to bind themselves to assure that the survivor would dispose of the property as reflected in the will. *Bonczkowski, supra*.

A court will not look to single words or phrases to determine whether a contract exists and how it should be interpreted. Instead, as with any contract (or will or trust agreement), a court will consider the agreement as a whole. *In re Estate of Erickson,* 363 Ill.App.3d 279, 841 N.E.2d 1104, 1108, 299 Ill.Dec 372 (4th Dist. 2006) ("the term 'absolute' or 'absolutely' does not give the surviving spouse free reign to disrupt the agreed upon dispositional scheme").

2. [2.59] Circumstantial Evidence

As with the typical oral contract to make a will, circumstantial evidence is recognized as a fully acceptable (and at times the only available) form of proof, not only in bringing an action, but also in defending. *In re Estate of Konow,* 154 Ill.App.3d 744, 506 N.E.2d 450, 106 Ill.Dec. 743 (3d Dist. 1987). Most of the same evidentiary considerations addressed in §§2.23 – 2.36 above relating to the proof or defense of the case involving a contract to make a will also apply in a joint and mutual will case.

3. [2.60] Parol Evidence

The parol evidence rule and the exceptions thereto that commonly arise in breach-of-contract litigation do not apply. "Our supreme court has implicitly condoned the consideration of evidence outside the will in disposing of [the determination of whether a will was executed pursuant to the testators' agreement not to revoke]." *Estate of Schwebel v. Sheets,* 133 Ill.App.3d 777, 479 N.E.2d 500, 506, 88 Ill.Dec. 887 (5th Dist. 1985).

4. [2.61] Failed Joint Will as Evidence of Agreement To Bequeath

Although an instrument may be determined invalid as a joint will (*e.g.,* drafting deficiencies may result in the instrument being denied admission to probate), it may nonetheless have effect as a contract enforceable in equity. It may be sufficient, despite technical flaws, to establish a contract for the testamentary disposition it purports to make. When it is established that the instrument is contractual in nature, equity holds that the survivor is estopped to dispose of the property otherwise than as contemplated in the agreement, and the contract may be enforced by third-party beneficiaries. *Bonczkowski v. Kucharski,* 13 Ill.2d 443, 150 N.E.2d 144 (1958).

5. [2.62] Probative Factors

In *Rauch v. Rauch,* 112 Ill.App.3d 198, 445 N.E.2d 77, 67 Ill.Dec. 785 (4th Dist. 1983), in considering the appropriate factors to be weighed on the issue of whether a contract is present in a given case, the court concluded that five particular characteristics commonly arise in joint and mutual wills:

a. the "label" used by the testators in referring to the will (445 N.E.2d at 80, citing *Bonczkowski v. Kucharski,* 13 Ill.2d 443, 150 N.E.2d 144 (1958));

b. the presence of reciprocal provisions in the will: whether one testator made a disposition of his or her entire estate in favor of the other (445 N.E.2d at 80, citing *Helms v. Darmstatter,* 34 Ill.2d 295, 215 N.E.2d 245 (1966));

c. a pooling of the testators' interests (whether the property is owned by them separately, jointly, or in common) into one fund (445 N.E.2d at 80, citing *Tontz v. Heath,* 20 Ill.2d 286, 170 N.E.2d 153 (1960));

d. a common dispositive scheme under which the parties dispose of the common fund by bequeathing it to their heirs in approximately equal shares (445 N.E.2d at 80, citing *Helms, supra*); and

e. the use of common plural terms such as "we" and "our" as further evidence of the testators' intent to make a joint and mutual will (445 N.E.2d at 80, citing *Bonczkowski, supra*).

Additionally, a court will look to the distributive provisions to determine whether the will places restrictions on the power of the survivor over the property, such as by granting merely a life estate to the survivor. *Tontz, supra; Jacoby v. Jacoby,* 342 Ill.App. 277, 96 N.E.2d 362 (2d Dist. 1950). If so, this is a strong indication that a binding contract was intended.

The court will also consider whether there was a prior will that accomplished essentially the same testamentary goals. If so, and the prior instrument was not contractual in nature, that fact tends to negate the conclusion that a contract abides in the subject instrument because there is a failure of new consideration. *Jacoby, supra*. The court will look to the testimony of persons who were involved, such as the drafting attorney, the witnesses to the will or wills, and people who naturally should have knowledge. *Id*.

6. [2.63] Conduct of the Testators

A court will also examine whether the first to die of the testators abided by the contract and took no action to invade the pooled assets or otherwise to depart from the contract. If so, this will be persuasive evidence as to the issue of the revocability of the agreement following the death of the first testator. *Moline National Bank v. Flemming,* 91 Ill.App.3d 398, 414 N.E.2d 936, 940, 46 Ill.Dec. 883 (3d Dist. 1980) ("We are, however, cognizant of the fact that during her lifetime Eva made no attempt to raid or plunder the joint accounts, even though as a joint tenant she could have done so. She lived up to her agreement as set forth in the will and contract.").

H. [2.64] Dead-Man's Act

As in an action to enforce a contract to make a will, the Dead-Man's Act applies to an action to enforce a joint or mutual will anytime the party bringing or defending the action is "the representative of a deceased person," *e.g.,* the executor or administrator of a decedent's estate or

an heir or legatee. 735 ILCS 5/8-201. See §§2.24 – 2.28 above. *Estate of Schwebel v. Sheets,* 133 Ill.App.3d 777, 479 N.E.2d 500, 507, 88 Ill.Dec. 887 (5th Dist. 1985). In an action related to joint or mutual wills, one of the best ways for a plaintiff to prove the case in the face of the Dead-Man's Act, which applies only to testimony of persons directly interested in the action, is through the testimony of the drafting attorney. *See, e.g., In re Estate of Briick,* 24 Ill.App.2d 77, 164 N.E.2d 82 (2d Dist. 1959).

I. [2.65] Consideration

If the court finds that the parties entered into a contractual arrangement involving a joint will or mutual wills, the enforcement of its irrevocability will then require a showing of adequate consideration. Historically, the "mutual love and respect" of a husband and wife was considered sufficient consideration. *Rauch v. Rauch,* 112 Ill.App.3d 198, 445 N.E.2d 77, 79, 67 Ill.Dec. 785 (4th Dist. 1983). Mutual promises are also sufficient to support the agreement. *Estate of Schwebel v. Sheets,* 133 Ill.App.3d 777, 479 N.E. 2d 500, 504, 88 Ill.Dec 887 (5th Dist. 1985).

J. [2.66] Frauds Act

Defense under the Frauds Act, either as it relates to oral contracts pertaining to real estate or to contracts not to be performed within the space of a year, ordinarily applies in oral contracts to make wills unless substantial performance on the part of the promisee exists to avoid it, or the promisee has parted with something of value in reliance on the promise. See §§2.43 – 2.46 above.

The application of the Frauds Act in the case of a contract arising under a joint and mutual will is rare for the reason that more often such a contract is written or at least a writing exists that, though by itself not a contract, nonetheless embodies the material terms of the agreement. Frequently, a joint and mutual will itself contains evidence of a contract. For that reason, there is in fact a writing that avoids the Frauds Act. *Curry v. Cotton,* 356 Ill. 538, 191 N.E. 307 (1934). On other occasions, there is a separate contract signed that is outside the four corners of the will but that clearly references the will and therefore it is a writing, avoiding the Frauds Act. It is conceivable, however, for example, in separate but mutual will cases, that when the contract is entirely oral, the Frauds Act might have application, in which case the promisee would be required to show detrimental reliance or substantial performance of his or her part of the contract to avoid application of the Frauds Act.

3 Trust Contests

JOHN T. BROOKS
JENA L. LEVIN
Foley & Lardner LLP
Chicago

The contributions of Samantha Weissbluth to prior editions of this chapter are gratefully acknowledged.

III. Tortious Interference

I. [3.1] SCOPE OF CHAPTER

Trust litigation matters generally fall into one of three broad categories: actions directed at the trust instrument, such as construction suits or reformations; actions directed at the trustee, such as suits for an accounting or for an alleged breach of fiduciary duty; and trust contests, which are actions to rescind the trust.

Other chapters of this handbook deal with many of the possible types of trust litigation. Trust constructions are covered in Chapter 6, and modifications of charitable trusts by application of cy pres or equitable deviation are described in Chapter 14. The various duties and potential liabilities of the trustee are covered in Chapter 7. The rights of creditors (to terminate a trust, to open an estate, to bring a citation proceeding to attack a transfer) are discussed in Chapter 5. Therefore, this chapter is devoted to trust contests.

II. TRUST CONTESTS

A. [3.2] Parties

As with will contests, an heir or other person who would have been entitled to receive the trust property had the trust not been created may bring an action to set aside the trust. *In re Estate of Keener,* 167 Ill.App.3d 270, 521 N.E.2d 232, 118 Ill.Dec. 164 (3d Dist.), *appeal denied,* 122 Ill.2d 575 (1988). Previously, there was some confusion in the will contest context over whether a contestant had standing if there were intervening instruments under which the contestant was also disinherited. An Illinois Supreme Court case resolved this ambiguity as to wills by holding that an heir may bring such an action even if prior wills disinherit him or her. *In re Estate of Schlenker,* 209 Ill.2d 456, 808 N.E.2d 995, 283 Ill.Dec. 707 (2004) (holding that under 755 ILCS 5/1-2.11, appellee's status as heir was adequate to provide her standing to contest will, and what she stood to receive under challenged will or any prior wills was irrelevant). At this time, there is no case applying this proposition to trusts. However, the authors see no reason why it would not apply.

For some time now, Illinois guardianship courts have been in the business of estate planning for disabled wards, allowing the guardian of the estate to petition the court to determine the wishes of the ward as best as they can be determined. 755 ILCS 5/11a-18. Guardianship and chancery courts have also entertained challenges to executed wills and trusts on the basis of undue influence or lack of capacity while the settlor or testator is still living. The law in this area is still evolving. At this point, it appears that beneficiaries under an existing revocable trust have standing to defend or challenge any change to their status (*see In re Estate of Michalak,* 404 Ill.App.3d 75, 934 N.E.2d 697, 343 Ill.Dec. 373 (1st Dist. 2010)), but beneficiaries under a will do not (*see Estate of Henry v. Wemple,* 396 Ill.App.3d 88, 919 N.E.2d 33, 335 Ill.Dec. 512 (1st Dist. 2009)). *See also In re Estate of Ostern,* 2014 IL App (2d) 131236, ¶27, 23 N.E.3d 391, 387 Ill.Dec. 699 (while beneficiary has no interest in will until testator dies, beneficiary of trust has interest moment trust is created); *Trzop v. Hudson,* 2015 IL App (1st) 150419, 43 N.E.3d 178, 397 Ill.Dec. 851 (disinherited beneficiaries under amendment to inter vivos trust had standing to bring action against current beneficiary during settlor's lifetime challenging validity of amendment). On January 20, 2016, the Illinois Supreme Court granted leave to appeal in *Trzop,* suggesting that additional clarity is on the horizon addressing this important standing question.

Illinois courts have yet to rule on whether the outcome of such trust contest litigation will bar parties by collateral estoppel or res judicata upon the ward's death insofar as those issues were or could have been litigated in the guardianship court. Perhaps the Illinois Supreme Court in *Trzop* will provide some guidance. For an interesting case on this issue holding that the parties to the lifetime litigation were barred from further challenges following the ward's death, *see Murphy v. Murphy,* 164 Cal.App.4th 376, 78 Cal.Rptr.3d 784 (2008).

The general rule is that the trustee and all possible beneficiaries should be made parties in order to bind them all by the judgment. *Schlosser v. Schlosser,* 218 Ill.App.3d 943, 578 N.E.2d 1203, 161 Ill.Dec. 557 (1st Dist. 1991). However, beneficiaries are not necessary parties if their interests are represented by others so that they receive actual and efficient representation, or if they are so numerous that the delay and expense of naming them would be oppressive and burdensome. 578 N.E.2d at 1205. Moreover, a beneficiary is not a necessary party when litigation will not affect his or her interest. *See Godfrey v. Kamin,* 194 F.R.D. 627 (N.D.Ill. 2000) (income beneficiary was not necessary party in suit against former trustee for breach of fiduciary duty because compensatory damages sought would not alter beneficiary's interest). The court may appoint one or more guardians ad litem to represent the interests of possible unborn beneficiaries. 735 ILCS 5/2-501. The Probate Act of 1975, 755 ILCS 5/1-1, *et seq.,* governs the procedure for appointing guardians for minors. See 735 ILCS 5/2-502; 755 ILCS 5/11-13.

In the alternative, the court may determine under the common-law doctrine of representation that the adult parties before the court can adequately represent and protect the interests of any minor or unborn beneficiaries because such adult parties stand in the same position as the minors or unborn beneficiaries. *See Longworth v. Duff,* 297 Ill. 479, 130 N.E. 690 (1921); *Wolf v. Uhlemann,* 325 Ill. 165, 156 N.E. 334 (1927). Note also the availability of statutory "virtual representation" in the case of trust settlement agreements. 760 ILCS 5/16.1. This statute is intended to promote settlements without the necessity of a court finding that common-law representation applies.

B. [3.3] State Court: Venue and Proper Forum

Venue is proper in (1) the circuit court of the county of residence of any defendant joined in good faith, (2) the circuit court of the county in which the transaction or some part of it occurred, or (3) the circuit court of any county if all defendants are nonresidents of Illinois. 735 ILCS 5/2-101.

In Cook County, the Probate Division is the proper forum for actions touching on a will or a related trust if such actions are filed during the administration of a decedent-settlor's estate or a guardianship estate. At all other times, the Chancery Division will hear contests to set aside a trust. See Cook County Circuit Court Rule 12.1(c); Cook County Circuit Court General Order 2.1. Practitioners should consult local rules to determine the proper forum in other counties.

C. [3.4] Federal Jurisdiction

Federal courts will exercise diversity jurisdiction pursuant to 28 U.S.C. §1332 provided that certain requirements are met. However, the judiciary has created an important exception to the

courts' exercise of federal diversity jurisdiction, placing matters of probate and estate administration outside the federal courts' reach. *Thrivent Financial for Lutherans v. Liefer,* No. 09-cv-483-JPG, 2009 WL 1884620 (S.D.Ill. June 30, 2009); *Jones v. Brennan,* 465 F.3d 304 (7th Cir. 2006); *Dragan v. Miller,* 679 F.2d 712 (7th Cir.), *cert. denied,* 103 S.Ct. 378 (1982); *Bleecker v. Krantz,* No. 05 C 7309, 2006 WL 2859621 (N.D.Ill. Sept. 27, 2006); *Seay v. Dodge,* No. 95 C 3643, 1995 WL 557361 (N.D.Ill. Sept. 18, 1995). *See also In re Estate of Lewis,* 128 F.Supp.2d 573, 574 (N.D.Ill. 2001) (recognizing that court's absence of jurisdiction over probate proceedings and administration is "one of the oldest judicial exceptions to what might otherwise come within the purview of the federal courts"); *Downey v. Keltz,* No. 11-cv-1323, 2012 WL 280716 (N.D.Ill. Jan. 31, 2012). The rationales for this so-called "probate exception" are the encouragement of legal certainty, the preservation of judicial resources, and the recognition of the relative expertise that state courts possess. *Storm v. Storm,* 328 F.3d 941, 944 (7th Cir. 2003). Although the strict confines of this exception had been unclear, the United States Supreme Court in *Marshall v. Marshall,* 547 U.S. 293, 164 L.Ed.2d 480, 126 S.Ct. 1735 (2006), clarified the scope of the exception. Prior to *Marshall,* the last time the United States Supreme Court reviewed a case involving the probate exception to federal jurisdiction was in *Markham v. Allen,* 326 U.S. 490, 90 L.Ed. 256, 66 S.Ct. 296 (1946). As explained in *Markham,* "federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." 66 S.Ct. at 298, quoting *Waterman v. Canal-Louisiana Bank & Trust Co.,* 215 U.S. 33, 54 L.Ed. 80, 30 S.Ct. 10, 12 (1909).

The Court in *Marshall, supra,* articulated the probate exception as follows:

> **[**T**]he probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.** 126 S.Ct. at 1748.

Matters that are " 'ancillary' to the administration of the estate are also included within the probate exception because 'allowing [the claim] to be maintained in federal court would impair the policies served by the probate exception.' " *Fischer v. Hartford Life Insurance Co.,* 486 F.Supp.2d 735, 739 (N.D.Ill. 2007), quoting *Jones v. Brennan,* 465 F.3d 304, 308 (7th Cir. 2006). According to the Seventh Circuit in *Jones,* in the interest of judicial economy, the federal court "should not try to elbow its way into the fight" over property already under state court control. 465 F.3d at 307. *But see Marshall, supra* (tortious interference action was not barred by probate exception); *Taylor v. Feinberg,* No. 08-cv-5588, 2009 WL 3156747 (N.D.Ill. Sept. 28, 2009) (probate exception did not bar tort claim for misappropriation of assets).

It is important to note that federal courts do not strictly limit the probate exception to will contests, and the exception extends to "will substitutes" such as inter vivos trusts, although the involvement of such will substitutes will not automatically make the probate exception available. *Georges v. Glick,* 856 F.2d 971 (7th Cir. 1988). For more information on the probate exception to federal diversity jurisdiction, see 13E Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE §3610 (2009), and *Rice v. Rice Foundation,* 610 F.2d 471, 475 (7th Cir. 1979).

D. Pleadings

1. [3.5] State Court

Illinois is a fact-pleading state. Fact pleading requires that a complaint contain a plain and concise statement of the plaintiff's cause of action with "substantial allegations of fact." 735 ILCS 5/2-601. A plaintiff must plead facts that bring the claim within a legally recognized cause of action. *Ritchey v. Maksin,* 71 Ill.2d 470, 376 N.E.2d 991, 17 Ill.Dec. 662 (1978). For a complaint to withstand a motion to dismiss for failure to state a cause of action under §2-615 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.,* the plaintiff must plead adequate facts, not conclusory statements, to satisfy each and every element of the cause of action in question. 735 ILCS 5/2-615.

Code of Civil Procedure §2-616(a) states that at any time before final judgment, the court may allow amendments on just and reasonable terms. Section 2-616(b) further states:

> **The cause of action . . . in any amended pleading shall not be barred by lapse of time . . . if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading grew out of the *same transaction or occurrence* set up in the original pleading. [**Emphasis added.**]** 735 ILCS 5/2-616(b).

Illinois courts liberally allow amendments to complaints. However, a court may hold that an amended complaint wandering too far afield from the facts originally alleged is time-barred for not relating back to the same transaction or occurrence originally pleaded. *In re Estate of Casey,* 222 Ill.App.3d 12, 583 N.E.2d 83, 164 Ill.Dec. 529 (1st Dist. 1991); *Yette v. Casey's General Stores, Inc.,* 263 Ill.App.3d 422, 635 N.E.2d 1091, 200 Ill.Dec. 752 (4th Dist. 1994); *Digby v. Chicago Park District,* 240 Ill.App.3d 88, 608 N.E.2d 116, 181 Ill.Dec. 43 (1st Dist. 1992).

2. [3.6] Federal Court

Federal Rules of Civil Procedure 8(a) and 8(b) require that all pleadings be stated in "short and plain" language. This requirement is otherwise known as "notice pleading." As noted by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 167 L.Ed.2d 929, 127 S.Ct. 1955, 1964 (2007), which involved a Fed.R.Civ.P. 12(b)(6) motion to dismiss, the Federal Rules of Civil Procedure require only " 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.' " Quoting *Conley v. Gibson,* 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99, 103 (1957). The Court in *Twombly* went on to abrogate the frequently questioned language from *Conley* that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 127 S.Ct. at 1968, quoting *Conley, supra,* 78 S.Ct. at 102. According to the *Twombly* Court, this "phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." 127 S.Ct. at 1969.

E. [3.7] Grounds for Trust Contests

Thorough treatment of the various grounds for trust contests first requires a brief discussion of the different categories of trusts as well as the standards that apply to these trust categories. Thus, basic definitions are discussed in §3.8 below, applicable standards in §3.9 below, and transfers for value and contracts in §3.10 below before discussion of the grounds in §§3.11 – 3.18 below.

1. [3.8] Definitions

This chapter refers to two broad categories of property dispositions that affect the applicable standards and grounds for contest:

a. "Testamentary trusts and transfers" include all trusts or transfers in which the settlor or transferor does not part with the entire interest in the property during life. This category includes (1) trusts created under a will, (2) revocable trusts (sometimes referred to as "living" trusts and usually combined with a pourover will), and (3) any other property transfer in which the transferor retains certain interests (such as a deed with a retained life estate).

b. "Inter vivos trusts," as used in this chapter, include any trusts in which the settlor does not retain an interest in the property transferred.

While the law and elements of the various causes of action are often quite similar regardless of whether the contest involves a testamentary trust or transfer or an inter vivos trust, §§3.9 – 3.18 below attempt to highlight the differences in the law to the extent such differences exist.

2. [3.9] Standards

The standards applied to the concepts of fraud, duress, undue influence, and lack of capacity for will contests also apply to testamentary trusts. 3 Robert S. Hunter, ESTATE PLANNING AND ADMINISTRATION IN ILLINOIS §225.10 (3d ed. 1998) (Hunter). Specifically, Illinois courts have held that transfers of property with certain retained interests are testamentary in nature such that Illinois law with respect to wills applies, and practitioners may refer to the Illinois Pattern Jury Instructions — Civil (I.P.I. — Civil) (available on the Illinois Supreme Court's website at www.illinoiscourts.gov/circuitcourt/civiljuryinstructions/default.asp) with respect to will contests. *Kelley v. First State Bank of Princeton,* 81 Ill.App.3d 402, 401 N.E.2d 247, 36 Ill.Dec. 566 (3d Dist. 1980). *See also Citizens National Bank of Paris v. Pearson,* 67 Ill.App.3d 457, 384 N.E.2d 548, 23 Ill.Dec. 754 (4th Dist. 1978).

Illinois courts judge the validity of inter vivos trusts by applying the same standards applicable to outright gifts or deeds with no retained interest. Therefore, a plaintiff may set aside a gratuitous transfer of property to a trust on the same grounds as an outright gift of the property. These grounds include fraud, duress, mistake, undue influence, and the settlor's lack of capacity. Hunter §225.10. Such transfers can be set aside regardless of whether the improper conduct was that of the beneficiary or a third party. See also RESTATEMENT (SECOND) OF TRUSTS §333 (1959). As discussed in §§3.13 – 3.18 below, courts often apply higher standards to inter vivos trusts than to testamentary trusts.

3. [3.10] Transfers for Value and Contracts

When a property owner receives consideration for a transfer in trust, the law of transfers for value and contracts applies. Under contract law, detrimental reliance by an innocent beneficiary may preclude rescission. Further discussion of contract remedies and reliance is beyond the scope of this chapter.

4. [3.11] Fraud, Duress, and Forgery

In the trust litigation context, "fraud" generally refers to fraud in the execution. This means obtaining the settlor's signature by trick or device on an instrument represented to be something other than a will or trust, alteration of the will or trust after it is signed, or the substitution of unintended pages of the document. *See Swirski v. Darlington,* 369 Ill. 188, 15 N.E.2d 856 (1938); *In re Estate of Garner,* 8 Ill.App.2d 41, 130 N.E.2d 219 (1st Dist. 1955). "Duress" refers to actual constraint, threats, or pressure, physical or otherwise, by a beneficiary or third person to compel execution of the instrument against the settlor's will. *Buerger v. Buerger,* 317 Ill. 401, 148 N.E. 274 (1925); *In re Estate of King,* 91 Ill.App.2d 342, 235 N.E.2d 276 (1st Dist. 1968). Note that while there are few reported cases in the trust contest context, practitioners can refer to the cited will contest cases.

As to forgery, a contestant must show that the maker of the will or trust could not have been present at the time and place the document was allegedly signed, that attesting witnesses are not credible, or that the document was not signed in the maker's handwriting. *Sellers v. Kincaid,* 303 Ill. 216, 135 N.E. 429 (1922).

When contesting a trust on forgery grounds, a plaintiff should obtain genuine handwriting samples and signatures of the decedent, such as canceled checks or other documents. See 735 ILCS 5/8-1501. The contestant may introduce these handwriting "standards" into evidence only after notice is served on the opposing parties as required by Code of Civil Procedure §8-1502 and after the opponent has had a reasonable opportunity to examine them. 735 ILCS 5/8-1502, 5/8-1503. Moreover, a contestant who suspects that the settlor's signature has been forged or a proponent whose instrument is alleged to be a forgery should consider engaging a handwriting expert.

In *Jones v. Jones,* 406 Ill. 448, 94 N.E.2d 314 (1950), the court held that expert testimony is useful when it can be corroborated by definite facts or when it is connected with facts that may be substantiated, but such testimony cannot prevail over the uncontradicted and unimpeached testimony of disinterested witnesses. *See also Heideman v. Kelsey,* 19 Ill.2d 258, 166 N.E.2d 596 (1960). However, in *McClallen v. Village of Morton,* 21 Ill.2d 374, 172 N.E.2d 763 (1961), the court denied admission of a will to probate, holding that expert testimony, when augmented by other circumstances, can overcome the testimony of the attesting witnesses. *See also Estate of Ragen,* 96 Ill.App.3d 1035, 422 N.E.2d 179, 52 Ill.Dec. 498 (1st Dist. 1981); *In re Estate of Waters,* 2014 IL App (1st) 131262-U, citing *Oliver v. Oliver,* 340 Ill. 445, 172 N.E. 917 (1930).

5. [3.12] Mistake

The general rule is that if the words of a trust instrument are written pursuant to the parties' intent at the time the instrument was signed, then no matter how mistaken those parties may be as to the meaning, no court can grant relief either at law or in equity. *Pernod v. American National Bank & Trust Company of Chicago,* 8 Ill.2d 16, 132 N.E.2d 540, 542 (1956). *See also Estate of Kraus v. Commissioner,* 875 F.2d 597 (7th Cir. 1989).

When the settlor seeks to revoke his or her own trust, courts often deem the settlor's testimony to be unreliable. Moreover, because courts do not easily overturn solemn written instruments, a settlor must produce strong corroboration of his or her testimony in order to warrant rescission. RESTATEMENT (SECOND) OF TRUSTS §332, cmt. c (1959). For a list of factors tending to prove or disprove the settlor's intention to include a power to amend or revoke the trust purportedly omitted by mistake, see RESTATEMENT §332 and comments thereto. *See also Mortimer v. Mortimer,* 6 Ill.App.3d 217, 285 N.E.2d 542 (1st Dist. 1972).

6. Undue Influence

a. [3.13] In General

Influence is "undue" when it prevents a testator or settlor from exercising his or her own free will regarding the disposition of his or her property. No one factor is necessarily dispositive. In each case, the question is whether the trust was created under such circumstances that it would be inequitable to allow it to stand. 1 Mark L. Ascher and Austin W. Scott et al., SCOTT AND ASCHER ON TRUSTS §4.6.2 (5th ed. 2006). Even kindness and affection can constitute undue influence if they destroy the testator's free agency. *Nemeth v. Banhalmi,* 125 Ill.App.3d 938, 466 N.E.2d 977, 81 Ill.Dec. 175 (1st Dist. 1984); *Kelley v. First State Bank of Princeton,* 81 Ill.App.3d 402, 401 N.E.2d 247, 36 Ill.Dec. 566 (3d Dist. 1980). Fraud in the inducement requires proof of the same elements and is essentially another name for undue influence. *In re Estate of Hoover,* 155 Ill.2d 402, 615 N.E.2d 736, 185 Ill.Dec. 866 (1993). *See also DeHart v. DeHart,* 2013 IL 114137, ¶¶23 – 43, 986 N.E.2d 85, 369 Ill.Dec. 136.

b. [3.14] Inter Vivos Trusts

RESTATEMENT (SECOND) OF TRUSTS §333, cmt. c (1959), lists the following factors to be considered in determining whether an inter vivos trust is the product of undue influence:

> **(1) whether and to what extent a fiduciary or confidential relationship existed at the time of the creation of the trust between the settlor and the person persuading him to create the trust; (2) whether it was the trustee, the beneficiaries or a third person who persuaded the settlor to create the trust; (3) the improvidence of the settlor in creating the trust; (4) whether the settlor when he created the trust had independent legal advice; (5) the age, health, business competence, intelligence of the settlor; (6) whether the trust is of such a character that it would be natural for a person in the position of the settlor to create it when not unduly influenced by others.**

The party seeking to set aside the instrument must prove by a preponderance of the evidence that it in fact resulted from undue influence. *Williams v. Ragland,* 307 Ill. 386, 138 N.E. 599 (1923). However, when a fiduciary relationship exists, and a transaction occurs by which the dominant party appears to gain at the expense of the dependent party, the court will deem the transaction presumptively fraudulent and will set it aside unless the one in whom trust and confidence are reposed (the dominant party) establishes the transaction's fairness by clear and convincing proof. *Brown v. Commercial National Bank of Peoria,* 94 Ill.App.2d 273, 237 N.E.2d 567, 570 – 571 (3d Dist. 1968), citing *Clark v. Clark,* 398 Ill. 592, 76 N.E.2d 446 (1947), and *Works v. McNeil,* 1 Ill.2d 47, 115 N.E.2d 320 (1953).

As to the "gain" element, the Illinois Supreme Court, in affirming the appellate decision in *Brown, supra,* held that merely receiving a fee for acting as trustee is not the type of gain required. *Brown v. Commercial National Bank of Peoria,* 42 Ill.2d 365, 247 N.E.2d 894, 896 – 897 (1969). Rather, one must receive a "substantial benefit as a legatee or beneficiary." 247 N.E.2d at 897, citing *Turner v. Black,* 19 Ill.2d 296, 166 N.E.2d 588 (1960). *See also In re Estate of Lemke,* 203 Ill.App.3d 999, 561 N.E.2d 350, 149 Ill.Dec. 72 (5th Dist. 1990).

c. [3.15] Testamentary Trusts

Proof of undue influence in the case of testamentary trusts is quite similar to that discussed in §3.14 above for inter vivos trusts. The guidelines laid out in I.P.I. — Civil No. 200.04 with respect to wills also apply to testamentary trusts (as defined in §3.8 above). *Kelley v. First State Bank of Princeton,* 81 Ill.App.3d 402, 401 N.E.2d 247, 36 Ill.Dec. 566 (3d Dist. 1980). A plaintiff can demonstrate undue influence in one of two ways. First, the plaintiff may introduce evidence of specific conduct allegedly constituting undue influence, such as a pattern of physical or psychological dominance asserted against a frail or infirm decedent. Second, the plaintiff can raise a rebuttable presumption of undue influence by demonstrating that a fiduciary relationship existed between the settlor and the defendant.

A rebuttable presumption arises when the plaintiff proves (1) the existence of an attorney-client relationship or other fiduciary relationship between the decedent and the beneficiary such that the beneficiary is the dominant party, (2) that the decedent reposed trust and confidence in the beneficiary, (3) that the beneficiary prepared or procured the preparation of the purported will or trust, and (4) that the beneficiary would receive a substantial benefit under the document. See I.P.I. — Civil No. 200.04; *Tidholm v. Tidholm,* 391 Ill. 19, 62 N.E.2d 473 (1945). *Accord In re Estate of Berry,* 277 Ill.App.3d 1088, 661 N.E.2d 1150, 214 Ill.Dec. 705 (5th Dist. 1996); *In re Estate of Glogovsek,* 248 Ill.App.3d 784, 618 N.E.2d 1231, 188 Ill.Dec. 661 (5th Dist. 1993). *But see In re Estate of Stahling,* 2013 IL App (4th) 120271, 987 N.E.2d 1033, 370 Ill.Dec. 267 (healthcare power of attorney does not raise presumption).

d. [3.16] Fiduciary Relationships

Courts do not limit the scope of fiduciary relationships in the context of undue influence to those relationships that exist as a matter of law, such as attorney-client or guardian-ward. A fiduciary relationship can also arise out of an informal relationship that is "moral, social, domestic or even personal in its origin." *Swenson v. Wintercorn,* 92 Ill.App.2d 88, 234 N.E.2d 91,

97 (2d Dist. 1968). Accordingly, courts have found fiduciary relationships between an elderly or infirm testator and a devisee or legatee who was taking care of the testator or who was handling the testator's financial affairs at the time the testator executed the will or trust. *See In re Estate of Roeseler,* 287 Ill.App.3d 1003, 679 N.E.2d 393, 223 Ill.Dec. 208 (1st Dist. 1997); *Estate of Maher,* 237 Ill.App.3d 1013, 606 N.E.2d 46, 179 Ill.Dec. 214 (1st Dist. 1992).

Additionally, effective January 1, 2015, the Probate Act was amended to make certain transfers to unrelated caregivers presumptively void. See 755 ILCS 5/4a-5, *et seq.* The new law creates a rebuttable presumption that an instrument transferring property to a nonfamily caregiver is void if the amount transferred exceeds $20,000. 755 ILCS 5/4a-10(a). The rebuttable presumption can be overcome by establishing, by clear and convincing evidence, that the transfer was not the product of fraud, duress, or undue influence or by establishing, by a preponderance of the evidence, that the transfer did not increase the gift that would have been received prior to becoming a caregiver. 755 ILCS 5/4a-15. However, if the caregiver challenges the presumption and loses, then the caregiver will be required to bear the costs of the proceeding, including reasonable attorneys' fees. 755 ILCS 5/4a-25. A two-year post-death statute of limitations applies to claims brought under this statute. 755 ILCS 4/a-10(b).

The new statutory presumption regarding transfers to caregivers does not apply to family members — defined as a spouse, child, grandchild, sibling, aunt, uncle, niece, nephew, first cousin, or parent of the person receiving the caregiver's assistance. However, transfers to family members are still subject to various common-law presumptions. 755 ILCS 5/4a-20.

In the parent-child context, the mere fact that an aging parent and child share mutual trust and confidence, and the child takes care of the parent in the parent's later years, does not give rise to a fiduciary relationship. *In re Estate of Rothenberg,* 176 Ill.App.3d 176, 530 N.E.2d 1148, 125 Ill.Dec. 739 (1st Dist. 1988). When a fiduciary relationship does not exist as a matter of law, the plaintiff must establish such a relationship by proof that is "clear, convincing, and so strong, unequivocal, and unmistakable as to lead to but one conclusion." *Swenson, supra,* 234 N.E.2d at 97; *In re Estate of Feinberg,* 2014 IL App (1st) 112219, 6 N.E.3d 310, 379 Ill.Dec. 233.

However, when a parent defers to and relies on the child, and when the child handles the parent's financial matters, such that the child dominates the parent, a fiduciary relationship arises. *Krieg v. Felgner,* 400 Ill. 113, 79 N.E.2d 60, 64 (1948). *See also In re Estate of La Rue,* 53 Ill.App.2d 467, 203 N.E.2d 47, 51 (1st Dist. 1964); *Lemp v. Hauptmann,* 170 Ill.App.3d 753, 525 N.E.2d 203, 206, 121 Ill.Dec. 397 (5th Dist. 1988). In this context, if the child prepares or causes to be prepared an instrument that conveys the parent's property to him or to her as a gift or upon grossly inadequate consideration, the presumption arises that the child's undue influence caused the transfer. *Krieg, supra; Lemp, supra.*

In some situations, two potentially conflicting presumptions exist, such as when a parent transfers property to a child (presumption of donative intent) who occupies a fiduciary relationship vis-à-vis the parent (presumption of fraud). In such a scenario, the presumption of donative intent yields to the presumption of fraud or undue influence. *See, e.g., Lemp, supra,* 525 N.E.2d at 206 ("Defendant asserts that the law presumes that the transactions between the parent and child were intended as a gift. Defendant also contends that where two presumptions exist, the

presumption in favor of the undue influence yields to the presumption in favor of the gift. In this action, however, we do not have two presumptions, *since the fiduciary relationship between the parent and child defeats the presumption of a gift. . . . The parent-child relationship is irrelevant once the fiduciary relationship is established."* [Emphasis added.] [Citations omitted.]); *La Rue, supra,* 203 N.E.2d at 51 ("Where a fiduciary relationship exists, even as between parent and child, *a gift is never presumed,* but rather the burden of proof is on the party claiming there was a gift to establish a gift in fact existed." [Emphasis added.]). *See also In re Jarmuth's Estate,* 329 Ill.App. 619, 70 N.E.2d 336 (1st Dist. 1946) (holding that presumption of fraud controlled alleged gift from father to daughter who occupied common-law fiduciary relationship with him).

Once the plaintiff has raised the presumption of undue influence by establishing a fiduciary relationship, the burden of producing evidence to rebut the presumption shifts to the person standing in the fiduciary relationship to show that the transaction was fair. *Franciscan Sisters Health Care Corp. v. Dean,* 95 Ill.2d 452, 448 N.E.2d 872, 69 Ill.Dec. 960 (1983). If the facts established by the will contestant are undisputed, then he or she is entitled to a favorable ruling. *DeHart v. DeHart,* 2013 IL 114137, 986 N.E.2d 85, 369 Ill.Dec. 136. However, a presumption of undue influence cannot be determined until after the close of the plaintiff's case, at the earliest. *Id.* Additionally, the burden of persuasion remains with the plaintiff. *In re Estate of Kline,* 245 Ill.App.3d 413, 613 N.E.2d 1329, 184 Ill.Dec. 737 (3d Dist. 1993).

In the parent-child context, the burden rests on the child to show that the conveyance was the result of the parent's full and free deliberation. *Krieg, supra.* For a case discussing the procedural effect of rebuttal evidence on the presumption, *see In re Estate of Pawlinski,* 407 Ill.App.3d 957, 942 N.E.2d 728, 347 Ill.Dec. 525 (1st Dist. 2011). Similarly, courts are particularly careful in applying the presumption to married couples. *See In re Estate of Glogovsek,* 248 Ill.App.3d 784, 618 N.E.2d 1231, 188 Ill.Dec. 661 (5th Dist. 1993); *In re Estate of Baumgarten,* 2012 IL App (1st) 112155, 975 N.E.2d 651, 363 Ill.Dec. 625.

7. Lack of Capacity

a. [3.17] Inter Vivos Trusts

A settlor's mental incapacity at the time of trust execution, amendment, or revocation or at the time that the settlor transfers property into the trust will invalidate the trust or transfer. *Works v. McNeil,* 1 Ill.2d 47, 115 N.E.2d 320 (1953); *Horgan v. City Trust & Savings Bank of Kankakee,* 300 Ill.App. 613, 20 N.E.2d 809 (2d Dist. 1939) (abst.) (trust amendment); *Ptaszek v. Konczal,* 7 Ill.2d 145, 130 N.E.2d 257 (1955) (trust revocation). Illinois courts have variously described the requisite degree of capacity as the ability to transact ordinary business (*Ring v. Lawless,* 190 Ill. 520, 60 N.E. 881 (1901); *Greene v. Maxwell,* 251 Ill. 335, 96 N.E. 227 (1911)); the settlor's ability to understand, in a reasonable manner, the nature and effect of the act in which he or she is engaged (*Jackson v. Pillsbury,* 380 Ill. 554, 44 N.E.2d 537 (1942)); not whether the settlor was generally of sound mind, but whether the settlor had sufficient mental capacity to understand the trust he or she executed (*Coffey v. Coffey,* 179 Ill. 283, 53 N.E. 590 (1899)); and the ability to "understand" the trust, which, however, does not require "that a person setting up a trust be able to explain every technical term used in the instrument" (*Brown v.*

Commercial National Bank of Peoria, 42 Ill.2d 365, 247 N.E.2d 894, 897 (1969), citing *Pernod v. American National Bank & Trust Company of Chicago,* 8 Ill.2d 16, 132 N.E.2d 540 (1956)).

As to the relevance and admissibility of evidence regarding adjudications of disability or incompetence, *see Citizens National Bank of Paris v. Pearson,* 67 Ill.App.3d 457, 384 N.E.2d 548, 23 Ill.Dec. 754 (4th Dist. 1978), *Redmon v. Borah,* 382 Ill. 610, 48 N.E.2d 355 (1943), *Greene, supra,* and *Lewandowski v. Zuzak,* 305 Ill. 612, 137 N.E. 500 (1922).

b. [3.18] Testamentary Trusts and Transfers

Illinois courts apply the lesser standard of testamentary capacity when evaluating the validity of trusts or transfers of property in trust that are essentially testamentary in nature, usually meaning transfers with a reserved life estate. See §3.9 above; *Kelley v. First State Bank of Princeton,* 81 Ill.App.3d 402, 401 N.E.2d 247, 36 Ill.Dec. 566 (3d Dist. 1980); *Mount v. Dusing,* 414 Ill. 361, 111 N.E.2d 502 (1953); *Akerman v. Trosper,* 95 Ill.App.3d 1051, 420 N.E.2d 1148, 51 Ill.Dec. 590 (3d Dist. 1981); *Citizens National Bank of Paris v. Pearson,* 67 Ill.App.3d 457, 384 N.E.2d 548, 23 Ill.Dec. 754 (4th Dist. 1978). As the *Akerman* court stated:

> **Generally, a higher degree of mental capacity is required to make a valid deed than to execute a will. . . . "However, no greater mental capacity is required to make a deed of voluntary settlement reserving a life estate than is required to make a will." [**Citation omitted.**]** 420 N.E.2d at 1151, quoting *Pearson, supra,* 384 N.E.2d at 550.

In ruling on objections to jury instructions in the case of a challenged revocable trust, the *Kelley* court stated that "the trust and the pour-over will were both testamentary dispositions, executed together on the same day and forming one dispositional scheme. Under the circumstances, the standard to be applied, as the instructions [I.P.I. — Civil No. 200.04] correctly stated, was that of the testamentary capacity to make a will." 401 N.E.2d at 261.

Unlike the capacity to execute a valid deed, testamentary capacity does not require the ability to transact ordinary business. *McGlaughlin v. Pickerel,* 381 Ill. 574, 46 N.E.2d 368 (1943). Illinois courts describe testamentary capacity as the testator's having "sufficient mental ability to know and remember who are the natural objects of his bounty, to comprehend the kind and character of his property and to make disposition of the property according to some plan formed in his mind." *Beyers v. Billingsley,* 54 Ill.App.3d 427, 369 N.E.2d 1320, 1328, 12 Ill.Dec. 306 (3d Dist. 1977). *See In re Estate of Dossett,* 159 Ill.App.3d 466, 512 N.E.2d 807, 811, 111 Ill.Dec. 418 (3d Dist. 1987). *See also Sloger v. Sloger,* 26 Ill.2d 366, 186 N.E.2d 288 (1962); I.P.I. — Civil No. 200.05. The fact that a guardian has been appointed is therefore not conclusive on the issue of testamentary capacity. However, under an amendment to the Probate Act effective January 1, 2016, an adjudication of disability and appointment of a plenary guardian now raises a rebuttable presumption that the will is void. See 755 ILCS 5/4-1(b). If a limited guardian has been appointed, however, then the presumption does not apply unless the court also found that the ward lacked testamentary capacity. *Id.* The rebuttable presumption applies only to wills and codicils executed or modified after January 1, 2016, and it does not apply if a court has authorized the guardian to retain independent counsel for the ward in order for the ward to execute a will in accordance with 755 ILCS 5/11a-18(d-5) (eff. Jan. 1, 2016).

F. [3.19] No-Contest Clauses

Sometimes referred to as "in terrorem clauses," no-contest clauses are void as against public policy in some jurisdictions. In Illinois, such clauses are valid but strictly construed: "Illinois courts are . . . guided by 'the well-established rule that equity does not favor forfeitures, and in construing conditions . . . a reasonable construction must be given in favor of the beneficiary.'" *In re Estate of Mank,* 298 Ill.App.3d 821, 699 N.E.2d 1103, 1107, 232 Ill.Dec. 918 (1st Dist. 1998), quoting *Clark v. Bentley,* 398 Ill. 535, 76 N.E.2d 438, 441 (1947). *See also In re Estate of Wojtalewicz,* 93 Ill.App.3d 1061, 418 N.E.2d 418, 49 Ill.Dec. 564 (1st Dist. 1981).

Given courts' predisposition toward strict construction of no-contest clauses, "the proper disposition of a given case may not lie in a 'purely lexicographical approach' to the in terrorem clause at issue but, rather, in the court's examination of the clause in relation to the peculiar position of the parties." *Mank, supra,* 699 N.E.2d at 1107, quoting *Oglesby v. Springfield Marine Bank,* 25 Ill.2d 280, 184 N.E.2d 874, 878 (1962). Thus, the courts will look beyond the language of the clause and the parties' conduct and instead focus on "whether, under the particular facts and circumstances of this case, application of the clause to the conduct would be contrary to the law or to the public policy of Illinois." 699 N.E.2d at 1107. Despite the *Mank* court's lip service to the validity of in terrorem clauses, the decision illustrates that, in Illinois, such clauses are rarely enforced when they proceed to litigation. This rarity of enforcement is illuminated by the fact that the circuit court in *Mank* recommended that a guardian bring a protective suit in disregard of the in terrorem clause. *Id.*

G. Procedure

1. [3.20] Nature of Proceeding

An action to set aside a trust is an equitable proceeding. Thus, in contrast to will contests, there is no right to a jury trial. But see 735 ILCS 5/2-1111 (at judge's discretion, jury may be empaneled in action seeking equitable relief). However, in certain cases, a trust contest may be joined with a will contest. Under those circumstances, the judge will decide all issues of fact and law with respect to the trust contest portion of the case, while a jury, if one is requested, will decide questions of fact with respect to the will contest. See Illinois Supreme Court Rule 232(b); *Akerman v. Trosper,* 95 Ill.App.3d 1051, 420 N.E.2d 1148, 51 Ill.Dec. 590 (3d Dist. 1981). In addition, the Dead-Man's Act, 735 ILCS 5/8-201, excludes certain evidence from the jury in the will contest portion of the trial but not from the judge in the trust contest. See further discussion of the Dead-Man's Act in §3.25 below. This partial exclusion creates the awkward possibility that the respective triers of fact could find the will to be valid and the trust invalid (or vice versa) even though both instruments were executed by the same individual contemporaneously.

2. [3.21] Trustee's Duty To Defend

Although Illinois law requires an executor to defend a proceeding to contest the validity of the will (755 ILCS 5/8-1(e)), the Trusts and Trustees Act, 760 ILCS 5/1, *et seq.,* contains no provision as to the duty of trustees in trust contests. However, Illinois courts have indicated that, in some circumstances, a trustee has a duty to defend the validity of the trust.

RESTATEMENT (SECOND) OF TRUSTS §178 (1959) states that "[t]he trustee is under a duty to the beneficiary to defend actions which may result in a loss to the trust estate, unless under all the circumstances it is reasonable not to make such defense." Illinois courts also have considered the probability of success and the cost of litigation in determining the reasonableness of defending a trust. *See People's Bank of Bloomington v. Trogden,* 355 Ill. 367, 189 N.E. 370, 371 (1934).

In *Disher v. Information Resources, Inc.,* 691 F.Supp. 75, 85 (N.D.Ill. 1988), the court concluded that a trustee has the duty to reasonably defend a trust against a suit for rescission. In another case, the court held that the trustee had the "obligation and right to maintain the trust" against a suit to terminate the trust filed by one of the trust's beneficiaries. *Stein v. LaSalle Nat. Bank,* 328 Ill.App. 3, 65 N.E.2d 216, 217 (1st Dist. 1946). *See also Union Bank of Chicago v. Wormser,* 256 Ill.App. 291 (1st Dist. 1930); George Gleason Bogert et al., THE LAW OF TRUSTS AND TRUSTEES §581 (2d ed. rev. 1980).

However, courts do not clearly impose the duty to defend the trust under all circumstances, and certain courts have indicated that the trustee is merely a stakeholder whose proper response is to file a counterclaim in interpleader. Therefore, practitioners may want to consider a motion for direction from the court before proceeding to defend, lest the trustee run the risk of being denied attorneys' fees.

For cases calling into question a trustee's duty to defend, *see Bornstein v. First United,* 232 Ill.App.3d 623, 597 N.E.2d 870, 874, 173 Ill.Dec. 896 (1st Dist. 1992), *In re Estate of Szorek,* 194 Ill.App.3d 750, 551 N.E.2d 697, 141 Ill.Dec. 510 (1st Dist. 1990), and *Chicago Title & Trust Co. v. Czubak,* 42 Ill.App.3d 349, 356 N.E.2d 118, 1 Ill.Dec. 118 (1st Dist. 1976). Regarding a trustee's duty to appeal, one court noted that the "trustee's duty to appeal a trust's termination may well vary depending on the type of trust involved." *NC Illinois Trust Co. v. Madigan,* 351 Ill.App.3d 311, 812 N.E.2d 1038, 1042, 286 Ill.Dec. 23 (4th Dist. 2004).

Generally, the trust will bear all costs and attorneys' fees incurred when the trustee properly brings or defends a proceeding for the benefit of the trust estate. 3 Austin W. Scott and William F. Fratcher, THE LAW OF TRUSTS §188.4 (4th ed. 1988). However, "counsel fees should be rejected when the legal services rendered are not in the interest of or do not benefit the estate." *In re Estate of Minsky,* 59 Ill.App.3d 974, 376 N.E.2d 647, 651, 17 Ill.Dec. 501 (1st Dist. 1978). *See also In re Estate of Bitoy,* 395 Ill.App.3d 262, 917 N.E.2d 74, 334 Ill.Dec. 477 (1st Dist. 2009).

H. Time Limitations

1. [3.22] In General

In general, due to the equitable nature of a trust contest, the only time limitation for bringing the action is the doctrine of laches. The applicability of laches varies with the circumstances and depends on the degree of prejudice, if any, to the defendants as a result of the plaintiff's delay in filing.

2. [3.23] Pourover Will

In the increasingly common case in which a decedent leaves a will that "pours over" to his or her revocable trust, 735 ILCS 5/13-223 provides:

> **An action to set aside or contest the validity of a revocable inter vivos trust agreement or declaration of trust to which a legacy is provided by the settlor's will which is admitted to probate, shall be commenced within and not after the time to contest the validity of a will as provided in the Probate Act of 1975 as amended.**

See also §8-1(f) of the Probate Act, 755 ILCS 5/8-1(f).

Contrary to the contest period for a will, the trust contest period is not jurisdictional; thus, the court can extend the period under proper circumstances. *Anderson v. Marquette National Bank,* 164 Ill.App.3d 626, 518 N.E.2d 196, 115 Ill.Dec. 671 (1st Dist. 1987). *But see In re Estate of Luccio,* 2012 IL App (1st) 121153, 982 N.E.2d 927, 367 Ill.Dec. 777 (noting that it will be necessary to revisit analysis underlying holding in *Anderson* now that testamentary trusts are included in statutory organization of Probate Act). Defense counsel should be aware that a refusal to provide copies of the final dispositive instruments in question to a potential contestant may extend the contest period.

I. Special Evidentiary Issues

1. [3.24] Attorney-Client Privilege

Generally, the attorney-client privilege survives the death of the client. *See Swidler & Berlin v. United States,* 524 U.S. 399, 141 L.Ed.2d 379, 118 S.Ct. 2081 (1998). However, a clear exception exists, often called the "testamentary exception." See Edna S. Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE, pp. 752 – 756 (5th ed. 2007). As Epstein describes it:

> **Although the privilege attaches to communications between a testator and the testator's counsel, the privilege may be breached upon the testator's death if litigation ensues between the testator's heirs, legatees, devisees, or any other parties claiming under the deceased client.**
>
> **The rationale for this exception lies in the assumption that the only way to protect the intention of the deceased is to permit the attorney to testify as to the wishes communicated by the deceased. Only by revealing confidential communications can the testator's intent be fulfilled. Obviously, the law assumes that were the testator alive, the testator would speak. Because the testator's mouth is forever sealed, that of the testator's agent — the attorney — will be unsealed.** Epstein, p. 752.

The *Swidler* court mentioned this exception in dicta: "[T]he general rule with respect to confidential communications . . . is that such communications are privileged during the testator's lifetime and, also, after the testator's death *unless sought to be disclosed in litigation between the testator's heirs.*" [Emphasis added.] 118 S.Ct. at 2085, quoting *United States v. Osborn,* 561 F.2d 1334, 1340 (9th Cir. 1977).

Illinois courts have followed suit. *See DeHart v. DeHart,* 2013 IL 114137, 986 N.E.2d 85, 369 Ill.Dec. 136; *Hitt v. Stephens,* 285 Ill.App.3d 713, 675 N.E.2d 275, 221 Ill.Dec. 368 (4th Dist. 1997); *Lamb v. Lamb,* 124 Ill.App.3d 687, 464 N.E.2d 873, 878, 80 Ill.Dec. 8 (4th Dist. 1984), citing *Wilkinson v. Service,* 249 Ill. 146, 94 N.E. 50, 52 (1911) ("While such [attorney-client] communications might be privileged if offered by third persons to establish claims against the estate, when the contest is between the heirs or next of kin of the testator the rule is otherwise."); Michael H. Graham, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE §505.7 (9th ed. 2009) ("While upon the death of the client, the privilege survives . . . it does not apply to a communication relevant to an issue between parties who claim through the same deceased client."). *But see Brunton v. Kruger,* 2015 IL 117663, 32 N.E.3d 567, 392 Ill.Dec. 259 (testamentary exception to attorney-client privilege may not be used to defeat accountant privilege codified under Public Accounting Act).

2. [3.25] Dead-Man's Act

The purposes of the Dead-Man's Act, 735 ILCS 5/8-201, are to protect decedents' estates from fraudulent claims and equalize the positions of the parties in regard to the giving of testimony. *Gunn v. Sobucki,* 216 Ill.2d 602, 837 N.E.2d 865, 869, 297 Ill.Dec. 414 (2005). *See also Fredrich v. Wolf,* 383 Ill. 638, 50 N.E.2d 755 (1943). Hence, unless otherwise waived, the Dead-Man's Act prohibits interested parties from testifying on their own behalf as to conversations with a decedent or as to events that took place in the decedent's presence when the interested party is adverse to the decedent's representative. The definition of "representative" includes an executor, administrator, heir, or legatee. *Brownlie v. Brownlie,* 351 Ill. 72, 183 N.E. 613 (1932). The Dead-Man's Act does not apply to a person who sues or defends as a trustee or as a beneficiary of a trust. Therefore, the Dead-Man's Act applies to will contests, but unless a representative brings or defends a trust contest, the outcome of which could impair the decedent's estate, the Dead-Man's Act will not exclude the testimony of interested parties. *See Mortimer v. Mortimer,* 6 Ill.App.3d 217, 285 N.E.2d 542 (1st Dist. 1972); *Ziarko v. Ziarko,* 22 Ill.App.3d 520, 318 N.E.2d 1 (1st Dist. 1974).

3. [3.26] Secret Influences and Psychiatric Autopsies

Unlike contests based on lack of capacity in which there are usually provable facts concerning a settlor's physical and mental health or witness testimony regarding a settlor's behavior, proof of undue influence may be wholly inferential and circumstantial. *In re Estate of Hoover,* 155 Ill.2d 402, 615 N.E.2d 736, 185 Ill.Dec. 866 (1993), citing *Cheney v. Goldy,* 225 Ill. 394, 80 N.E. 289 (1907). *See also DeHart v. DeHart,* 2013 IL 114137, 986 N.E.2d 85, 369 Ill.Dec. 136; *In re Estate of DiMatteo,* 2013 IL App (1st) 122948, 995 N.E.2d 420, 374 Ill.Dec. 281. Moreover, subtle insidious misrepresentations or concealment of facts may overpower a settlor's will in so-called "secret influences" cases. *See Sterling v. Kramer,* 15 Ill.App.2d 230, 145 N.E.2d 757 (1st Dist. 1957); *Hoover, supra,* 615 N.E.2d at 744 – 745.

Illinois law does not require an expert witness to physically examine or personally know a patient in order to render an expert opinion in a case. Therefore, courts may allow expert psychiatric testimony on the effect of so-called secret influences in undue influence cases. Courts refer to such evidence, whether by testimony or affidavit, as "retrospective 'psychiatric autopsies.'" *Hoover, supra,* 615 N.E.2d at 745.

4. [3.27] Mental Health and Developmental Disabilities Confidentiality Act

When counsel seeks information regarding the mental health of a trust settlor, in addition to the requirements of Illinois S.Ct. Rule 204(c), which governs the taking of physicians' depositions, counsel must consider the requirements of the Mental Health and Developmental Disabilities Confidentiality Act (MHDDCA), 740 ILCS 110/1, *et seq.*

The MHDDCA generally makes communications between an individual seeking treatment and the "therapist" (broadly defined), including records made in connection therewith, privileged from disclosure. Because of the MHDDCA's broad scope, counsel must try to fit particular case facts under one of the Act's permissible exceptions.

If the settlor is living and claims a lack of mental capacity at the time he or she executed the trust or transferred property to the trust, or if the settlor's court-appointed guardian so claims, the MHDDCA functions much like S.Ct. Rule 215: *i.e.,* if the individual put his or her mental state at issue, the court will deem the privilege waived. 740 ILCS 110/10(a).

If the settlor of the trust is deceased, the MHDDCA provides:

> **Records or communications may be disclosed in a civil proceeding after the recipient's death when the recipient's physical or mental condition has been introduced as an element of a claim or defense by any party claiming or defending through or as a beneficiary of the recipient, provided the court finds, after in camera examination of the evidence, that it is relevant, probative, and otherwise clearly admissible; that other satisfactory evidence is not available regarding the facts sought to be established by such evidence; and that disclosure is more important to the interests of substantial justice than protection from any injury which disclosure is likely to cause.** 740 ILCS 110/10(a)(2).

Further discussion of the MHDDCA is beyond the scope of this chapter.

5. [3.28] Health Insurance Portability and Accountability Act

Counsel seeking information regarding the mental health of a trust settlor might face obstacles under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub.L. No. 104-191, 110 Stat. 1936, and the regulations issued thereunder (see generally the HIPAA "Privacy Rules," which are codified at 45 C.F.R. pts. 162 and 164). The HIPAA rules, which became fully effective in April 2003, established privacy standards in order to protect medical records and other individually identifiable health information. Under the rules, a healthcare provider may disclose "protected health information" (PHI) under HIPAA if the patient

authorizes the release of the PHI or a court orders release of the PHI. If counsel seeks health information pursuant to a subpoena that is not accompanied by court order, counsel must provide the healthcare provider "satisfactory assurance" that "reasonable efforts" have been made (a) to ensure that the person who is the subject of the record request has been given notice of the request or (b) to secure a qualified protective order that satisfies the requirements of the HIPAA regulations. See 45 C.F.R. §164.512(e). 45 C.F.R. §164.512(e)(1)(v) describes the specific requirements of the qualified protective order.

Although further discussion of HIPAA is beyond the scope of this chapter, counsel seeking medical information should be aware that under HIPAA the procurement of such information has become significantly more complicated. Healthcare providers have every incentive to strictly comply with the HIPAA requirements due to the potentially substantial civil and criminal penalties for violations of the HIPAA rules. See 42 U.S.C. §1320d-6.

6. [3.29] Presumptions — Procedural Effect

For most presumptions, Illinois has adopted the "Thayer-Wigmore bursting-bubble" theory. *Klaskin v. Klepak,* 126 Ill.2d 376, 534 N.E.2d 971, 128 Ill.Dec. 526 (1989); *Franciscan Sisters Health Care Corp. v. Dean,* 95 Ill.2d 452, 448 N.E.2d 872, 69 Ill.Dec. 960 (1983); *In re Estate of Shea,* 364 Ill.App.3d 963, 848 N.E.2d 185, 302 Ill.Dec. 185 (2d Dist. 2006); *In re Estate of Lewis,* 193 Ill.App.3d 316, 549 N.E.2d 960, 962, 140 Ill.Dec. 309 (4th Dist. 1990). Accordingly, in order to raise the presumption in question, the plaintiff must produce evidence on each of the presumed facts' requisite elements. *Powell v. Weld,* 410 Ill. 198, 101 N.E.2d 581 (1951). Upon such a production, the burden shifts to the defendant, who can attack either the proof of the necessary elements, the presumed fact, or both.

If the defendant attacks only the proof of the necessary elements, then the trier of fact must decide whether the plaintiff has sufficiently proved the elements necessary to be entitled to the presumption.

If the defendant attacks the presumed fact, then the court will decide whether the defendant has overcome the presumption as a matter of law. If so, the "bubble bursts," and the presumption disappears from the case. *In re Estate of Kline,* 245 Ill.App.3d 413, 613 N.E.2d 1329, 184 Ill.Dec. 737 (3d Dist. 1993); *In re Estate of Berry,* 170 Ill.App.3d 454, 524 N.E.2d 689, 120 Ill.Dec. 659 (4th Dist. 1988). The plaintiff must then rely on specific evidence of the presumed fact, and the jury is told nothing about the presumption. See I.P.I. — Civil No. 200.03, *et seq.,* and comments thereto. For a case discussing the procedural effect of rebuttal evidence on the presumption, *see In re Estate of Pawlinski,* 407 Ill.App.3d 957, 942 N.E.2d 728, 347 Ill.Dec. 525 (1st Dist. 2011).

As for the new statutory presumption that a ward lacks testamentary capacity after being adjudicated disabled under 755 ILCS 5/11a-1, *et seq.,* the Probate Act specifies that the rebuttable presumption is overcome by clear and convincing evidence that the testator had the capacity to execute the will or codicil at the time of execution. 755 ILCS 5/4-1(b).

J. [3.30] Attorneys' Fees

The usual practice is that attorneys' fees of a trust contestant are the responsibility of the contestant. As to defense of the trust, however, expenses incident to the preservation of a trust or for the benefit thereof are properly chargeable against and reimbursable from the trust estate. *Wool v. LaSalle National Bank,* 89 Ill.App.3d 560, 411 N.E.2d 1135, 44 Ill.Dec. 769 (1st Dist. 1980); *Brown v. Commercial National Bank of Peoria,* 94 Ill.App.2d 273, 237 N.E.2d 567 (3d Dist. 1968).

Assuming that a trustee's defense of a trust is proper under the circumstances (see §3.21 above), the trust should pay the legal fees incurred in the defense. According to the Trusts and Trustees Act, "[t]he trustee shall be reimbursed for all proper expenses incurred in the management and protection of the trust." 760 ILCS 5/7. Trustees are entitled to be reimbursed for legal fees. *Patterson v. Northern Trust Co.,* 286 Ill. 564, 122 N.E. 55, 56 (1919) (ruling that fees and expenses of trustee in defending trust against groundless lawsuits are to be paid out of trust); *Union Bank of Chicago v. Wormser,* 256 Ill.App. 291, 303 – 304 (1st Dist. 1930) (holding that trustee is to be reimbursed for legal fees incurred in defense of trust). However, the Illinois Supreme Court has held that should a trustee feel the need to litigate beyond the court of original jurisdiction, the trustee must do so at his or her own risk and costs, even if the trustee prevails on appeal. *Glaser v. Chicago Title & Trust Co.,* 401 Ill. 387, 82 N.E.2d 446, 448 – 449 (1948). *See also NC Illinois Trust Co. v. Madigan,* 351 Ill.App.3d 311, 812 N.E.2d 1038, 286 Ill.Dec. 23 (4th Dist. 2004). The NC Illinois Trust court held that "[w]hen a trustee . . . brings a reasonable but unsuccessful appeal, we see no reason why the cost of that appeal should be allocated to the estate instead of to the trustee." 812 N.E.2d at 1042. Note that this rule apparently does not apply to a beneficiary who may be entitled to reimbursement of fees for a successful appeal. *Landmark Trust Co. v. Aitken,* 224 Ill.App.3d 843, 587 N.E.2d 1076, 167 Ill.Dec. 461 (5th Dist. 1992).

As to the amount of fees properly charged against the trust, courts look to a number of factors in determining whether attorneys' fees are "reasonable" under the circumstances. See the factors listed in *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 115 Ill.Dec. 899 (1st Dist. 1987). *Estate of Price v. Universal Casualty Co.,* 334 Ill.App.3d 1010, 779 N.E.2d 384, 268 Ill.Dec. 770 (1st Dist. 2002).

As to possible fee shifting as a result of frivolous or vexatious suits and appeals, see S.Ct. Rules 137 and 375(b). *See also Brown, supra; Chicago City Bank & Trust Co. v. Pick,* 235 Ill.App.3d 252, 602 N.E.2d 484, 176 Ill.Dec. 830 (1st Dist. 1992).

K. [3.31] Sample Complaint

IN THE CIRCUIT COURT OF _____ COUNTY

_____,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. _____**
	)	
[_____ Bank and Trust Company**], as Trustee of the [**name of trust**] Trust dated [**date of trust**]; and [**name of beneficiary**], Individually and as a beneficiary of the [**name of trust**] Trust,**	)	
	)	
Defendants.	)	

COMPLAINT IN EQUITY

Plaintiff, _____, by and through his attorneys, _____, states by way of Complaint against the defendants, [_____ Bank and Trust Company**], as Trustee of the [**name of trust**] Trust, and, [**name of beneficiary**], individually and as beneficiary of the [**name of trust**] Trust, as follows:**

NATURE OF CASE

This is an action to rescind a trust created by [name of settlor**], now deceased, on the basis of undue influence on the part of Defendant beneficiary _____ or, in the alternative, to rescind the trust because the settlor lacked the mental capacity to create a valid trust.**

PARTIES

1. Plaintiff, _____, is and at all times relevant to this action was a resident of the State of Illinois.

2. Defendant [_____ Bank and Trust Company**] is and at all times relevant to this action was a trust company doing business in the State of Illinois.**

3. Defendant [name of beneficiary**] is and at all times relevant to this action was a resident of _____ County, Illinois.**

JURISDICTION AND VENUE

4. This Court has jurisdiction over Defendants pursuant to §§2-209(a)(1), 2-209(a)(13), and 2-209(b)(2) of the Illinois Code of Civil Procedure because Defendants reside in and/or transact business in the State of Illinois and the Trust is governed by Illinois law.

5. This Court is the proper venue pursuant to §2-101 of the Illinois Code of Civil Procedure because Defendant [name of beneficiary**] resides in _____ County, Illinois, and the transactions at issue occurred in _____ County, Illinois.**

COMMON ALLEGATIONS OF FACT

6. On [date of trust**], [**name of settlor**], the decedent, allegedly created the Defendant Trust (Trust) for the benefit of Defendant [**name of beneficiary**], naming [**_____ Bank and Trust Company**] as Trustee.**

7. On the same date, the decedent purported to transfer approximately $2 million of assets to [_____ Bank and Trust Company**] as Trustee by signing certain stock power documents.**

8. On the date of these alleged transactions, the decedent was 92 years old and in ill health. The decedent died within one month after allegedly creating the Trust.

9. Defendant [name of beneficiary**] was the decedent's nurse for approximately six months prior to his death and cared for him at his home in _____, Illinois.**

10. The decedent suffered from dementia resulting from Alzheimer's disease, clinical depression, and hypertension.

11. Prior to his death, the decedent was receiving prescription narcotics and sedatives, all administered by Defendant [name of beneficiary**].**

12. Upon information and belief, not only was the decedent dependent on Defendant [name of beneficiary**] for food and medical care, but Defendant [**name of beneficiary**] also handled his financial affairs, depositing checks and writing out checks for the decedent to sign.**

13. Upon information and belief, at some time prior to execution of the Trust and stock powers, Defendant [name of beneficiary**] contacted attorney [**name of beneficiary's attorney**] and described the terms of the Trust, which she stated the decedent wished to establish.**

14. On [date**], Defendant [**name of beneficiary**] drove the decedent to attorney [**name of beneficiary's attorney**]'s office, where the decedent executed the Trust and various stock powers necessary to fund the Trust. Defendant [**name of beneficiary**] was present in the room when the decedent signed the papers.**

15. On [date of settlor's death**], the decedent died intestate, leaving Plaintiff as the decedent's only heir at law.**

COUNT I

RESCISSION FOR LACK OF CAPACITY

1 – 15. Plaintiff incorporates by reference paragraphs 1 through 15 above as though fully set forth herein.

16. As a result of his dementia, depression, and various medications, the decedent was sometimes unable to hold a conversation with visitors, was confused as to time and place, and often failed to recognize neighbors and friends who visited the decedent.

17. As a result of these mental conditions, the decedent lacked the capacity to transact ordinary business or to know and appreciate the act of creating the Trust or the effect of transferring the stocks that constituted almost his entire estate into the Trust.

18. The decedent was apparently unaware of the transfer he had allegedly made, subsequently telling several visitors that if anything happened to him, his son, Plaintiff, would be a rich man.

WHEREFORE, Plaintiff respectfully requests:

A. That this Court rescind the Trust based on the decedent's lack of mental capacity; and

B. That this Court grant such other and further relief as may be equitable.

COUNT II

RESCISSION FOR UNDUE INFLUENCE

1 – 18. Plaintiff incorporates by reference paragraphs 1 through 18 of Count I as if fully set forth herein.

19. At some time following Defendant [name of beneficiary**]'s employment by the decedent but prior to execution of the Trust, Defendant [**name of beneficiary**] entered into a fiduciary relationship with the decedent in that the decedent was dependent on Defendant [**name of beneficiary**] for food, medical attention, hygienic care, and help with his financial affairs.**

20. On information and belief, Defendant [name of beneficiary**] often threatened to put the decedent "in the county home with no one to look after him."**

21. Defendant [name of beneficiary**] was the dominant party in the fiduciary relationship with the decedent, and the decedent reposed trust and confidence in Defendant [**name of beneficiary**].**

22. Prior to the execution of the Trust, the decedent had often expressed his intent that his son, Plaintiff, should inherit his property, but as a direct result of Defendant

[name of beneficiary**]'s breach of her fiduciary relationship with the decedent and her undue influence, he allegedly transferred almost 90 percent of his estate to the Trust.**

23. Through her undue influence, Defendant [name of beneficiary**] substituted her own intents and desires for the intents and desires of the decedent.**

24. The Trust substantially benefits Defendant [name of beneficiary**] to the detriment of the decedent's only son, who has a superior claim to the bounty of the decedent.**

WHEREFORE, Plaintiff respectfully requests:

A. That the Trust be set aside and rescinded as a result of Defendant's undue influence; and

B. That this Court grant such other and further relief as may be equitable.

Respectfully submitted,

_____, Plaintiff

By _____
One of [his**] [**her**] attorneys**

[attorney information**]**

III. TORTIOUS INTERFERENCE

A. [3.32] History and Nature of Action

Plaintiff's counsel should consider an action for tortious interference with an inheritance as an alternative to, or in conjunction with, a trust contest. The court in *Lowe Foundation v. Northern Trust Co.,* 342 Ill.App. 379, 96 N.E.2d 831 (1st Dist. 1951), first acknowledged this tort in 1951. However, it was not until 30 years later that an Illinois court expressly recognized and applied the concept in *Nemeth v. Banhalmi,* 99 Ill.App.3d 493, 425 N.E.2d 1187, 55 Ill.Dec. 14 (1981), *appeal after remand,* 125 Ill.App.3d 938 (1st Dist. 1984).

The RESTATEMENT (SECOND) OF TORTS §774B (1979) describes a tortfeasor's actions and associated liability as follows:

> **One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.**

The RESTATEMENT further defines "inheritance" as "any devise or bequest that would otherwise have been made under a testamentary instrument or any property that would have passed to the plaintiff by intestate succession." RESTATEMENT (SECOND) OF TORTS §774B, cmt. b.

While the RESTATEMENT's definition limits recovery to property passing through probate, Illinois courts have expanded the definition of "inheritance" to include many assets that pass outside the formal probate process. *See Prosen v. Chowaniec,* 271 Ill.App.3d 65, 646 N.E.2d 1311, 207 Ill.Dec. 224 (1st Dist. 1995). Therefore, tortious interference provides a remedy against defendants who wrongfully induce an individual to give or retitle assets during life, in trust or outright, or to amend a trust that otherwise would have benefited a plaintiff. *Estate of Jeziorski,* 162 Ill.App.3d 1057, 516 N.E.2d 422, 114 Ill.Dec. 267 (1st Dist. 1987).

B. [3.33] Elements

The elements necessary to prove tortious interference with an inheritance are

1. the existence of an expectancy;

2. an intentional interference;

3. tortious conduct (fraud, duress, or undue influence);

4. the plaintiff's reasonable certainty of inheritance but for the interference; and

5. damages.

See I.P.I. — Civil No. 205.02 and the sample complaint in §3.37 below.

C. [3.34] Venue, Forum, and Statute of Limitations

Venue is proper in the county in which the defendant resides or in which the conduct complained of occurred. 735 ILCS 5/2-101. Tortious interference is a tort seeking monetary damages, and therefore, unlike a trust contest, it is an action at law, not equity. In Cook County, such an action would normally be filed in the Law Division, unless the action is brought while the decedent-settlor's estate is being administered in the Probate Division. See Cook County General Order 2.1. As to federal jurisdiction, see §3.4 above.

A 2009 Illinois Supreme Court decision held that the six-month limitations period set out in §8-1 of the Probate Act (755 ILCS 5/8-1) did not apply to a claim for tortious interference with an inheritance expectancy. *In re Estate of Ellis,* 236 Ill.2d 45, 923 N.E.2d 237, 337 Ill.Dec. 678 (2009) (Probate Act did not apply when successful will contest would not have furnished relief sought by plaintiff in its tort action), *reh'g denied* (Jan. 25, 2010). The court distinguished *Robinson v. First State Bank of Monticello,* 97 Ill.2d 174, 454 N.E.2d 288, 73 Ill.Dec. 428 (1983), in which the court had refused to recognize the tort action when the plaintiffs had an opportunity to contest a probated will but chose not to do so and subsequently entered into an agreement to

take no further action. The *Ellis* court also discussed several ways in which a tort action for intentional interference with inheritance is distinct from a petition to contest the validity of a will, including the objective of the proceedings, the issues involved, the elements of the claims, and the remedies for each type of action.

For example, the tort action is not available when a will contest presents an available remedy and would provide the injured party with adequate relief. *Bjork v. O'Meara,* 2013 IL 114044, 986 N.E.2d 626, 369 Ill.Dec. 313. *See also In re Estate of Feinberg,* 2014 IL App (1st) 112219, 6 N.E.3d 310, 379 Ill Dec. 233. "This exception represents the essence of the doctrines of election and estoppel, both of which have long been applied in probate matters." *In re Estate of Luccio,* 2012 IL App (1st) 121153, 982 N.E.2d 927, 367 Ill.Dec. 777. The will contest period may still govern other cases.

D. [3.35] Advantages

As an alternative to a trust contest, a plaintiff may want to consider a complaint for tortious interference because of the availability of a jury as well as the possibility of punitive damages against the defendant in particularly egregious cases. See Nita Ledford, Note, *Intentional Interference with Inheritance,* 30 Real Prop.Prob. & Tr.J. 325 (1995); *In re Estate of Knowlson,* 204 Ill.App.3d 454, 562 N.E.2d 277, 149 Ill.Dec. 813 (1st Dist. 1990).

E. [3.36] Illinois Cases

In addition to the cases cited in §§3.32 – 3.35 above regarding tortious interference, practitioners may wish to consult the following Illinois cases: *In re Estate of Roeseler,* 287 Ill.App.3d 1003, 679 N.E.2d 393, 223 Ill.Dec. 208 (1st Dist. 1997); *In re Estate of Hoover,* 160 Ill.App.3d 964, 513 N.E.2d 991, 112 Ill.Dec. 382 (1st Dist. 1987); and *Simon v. Wilson,* 291 Ill.App.3d 495, 684 N.E.2d 791, 225 Ill.Dec. 800 (1st Dist. 1997).

F. [3.37] Sample Complaint

IN THE CIRCUIT COURT OF _____COUNTY

[name of plaintiff 1**] and**	)	
[name of plaintiff 2**],**	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. _____**
	)	
[name of beneficiary**], individually and as a**	)	
Beneficiary of the [name of trust**] Trust,**	)	
	)	
Defendant.	)	

COMPLAINT

Plaintiffs, [name of plaintiff 1**] and [**name of plaintiff 2**], by and through their attorneys, _____, and complaining of Defendant [**name of beneficiary**], state as follows:**

NATURE OF THE CASE

Plaintiffs are seeking actual and punitive damages from Defendant as a result of Defendant's tortious interference with Plaintiffs' inheritance expectancy. Specifically, Plaintiffs allege undue influence on the part of Defendant with respect to the decedent-settlor's execution of a [date of trust**] will and trust.**

JURISDICTION AND VENUE

1. This Court has jurisdiction over Defendant pursuant to §§2-209(a)(2), 2-209(a)(13), and 2-209(b)(2) of the Illinois Code of Civil Procedure because the tortious act complained of occurred in Illinois, Defendant is an Illinois resident, and the Trust is governed by Illinois law. This Court is the proper venue pursuant to §2-101 of the Illinois Code of Civil Procedure because Defendant resides in _____ County, Illinois, and the transactions at issue occurred in _____ County, Illinois.

BACKGROUND AND PARTIES

2. On [date of settlor's death**], the decedent, [**name of settlor**], died in _____, Illinois, at the age of 92.**

3. The decedent was predeceased by her husband, [name of settlor's husband**], who died in _____, Illinois.**

4. The decedent had two sons, [names of settlor's sons**] (Plaintiffs), and one daughter, [**name of settlor's daughter**] (Defendant).**

5. On [date first will executed**], the decedent executed a Will (Old Will), a genuine copy of which is attached hereto as Exhibit A.**

6. Article ____ of the Old Will divides the decedent's personal property and the residue of her estate into equal shares, with one share allocated for each of Plaintiffs and Defendant.

7. On [date new will executed**], the decedent executed a new Will (New Will), a Declaration of Trust (Trust), and an Illinois Statutory Short Form Power of Attorney for Property (Power of Attorney). Genuine copies of these documents are attached hereto as Exhibits B, C, and D respectively.**

8. The Power of Attorney became effective upon signing and named Defendant as the decedent's attorney-in-fact.

9. The New Will "pours over" into the Trust.

10. Article ____ of the Trust provides that Defendant shall receive the entire residue of the decedent's estate.

SPECIFIC ALLEGATIONS OF TORTIOUS INTERFERENCE WITH INHERITANCE EXPECTANCY

11. The decedent had an automobile accident in _____ and was hospitalized for a broken collarbone and hip and complications arising therefrom.

12. Following her discharge from the hospital, the decedent returned to her _____, Illinois, residence, where Defendant also resided.

13. Because of her injuries, the decedent's movement was restricted and she needed the assistance of a wheelchair.

14. The decedent's condition progressively deteriorated, resulting in several more subsequent hospitalizations.

15. By [date**], the decedent was completely bedridden and suffered from cataracts, causing severe vision impairment. The decedent also had progressive hearing loss.**

16. The decedent remained bedridden from [date settlor became bedridden**] until her death. She relied on Defendant for food and hygienic and medical care.**

17. Upon information and belief, Defendant administered various medications, including prescription narcotics and sedatives, to the decedent without a physician or nurse present.

18. Upon information and belief, Defendant handled the decedent's business and financial transactions and signed her name to checks and correspondence from at least [date**], until the decedent's death.**

19. Upon information and belief, Defendant repeatedly threatened the decedent with nursing home placement and sometimes withheld pain medication, thereby ensuring the decedent's physical and psychological dependence on Defendant.

20. Upon information and belief, Defendant cut off communications and visitation between the decedent and Plaintiffs, telling the decedent that Plaintiffs no longer cared for her.

21. Upon information and belief, in [date beneficiary contacted lawyer**] Defendant contacted a lawyer, _____, and instructed him to draft a Power of Attorney for Property naming Defendant as the decedent's attorney-in-fact and a new Will and Trust that would make Defendant the sole beneficiary and exclude Plaintiffs as residuary takers.**

22. Pursuant to Defendant's instructions, the attorney did in fact draft the documents, and on [date beneficiary forced settlor to execute new will**], Defendant, through her domination of the decedent, forced her to execute the New Will and Trust.**

23. Upon information and belief, Defendant paid the attorney's fee by signing the decedent's name to a check.

24. Defendant occupied a fiduciary relationship with the decedent both as her primary caregiver and as her attorney-in-fact.

25. Defendant was the dominant party in the relationship with the decedent, and the decedent reposed trust and confidence in Defendant. However, at times, the decedent also feared Defendant.

26. Prior to the execution of the New Will and Trust, the decedent expressed and manifested an intent to divide her estate equally among Plaintiffs and Defendant. Therefore, Plaintiffs had a clear inheritance expectancy.

27. Defendant intentionally interfered with Plaintiffs' inheritance expectancy by unduly influencing the decedent to sign the New Will and Trust through her dominant relationship with the decedent and by arranging for and procuring the New Will and Trust.

28. Absent Defendant's undue influence, the decedent would not have executed the New Will and Trust and would not have excluded Plaintiffs as residuary beneficiaries.

29. Defendant's undue influence, intimidation, and misrepresentations of facts stripped the decedent of her free will and substituted Defendant's own intent and desires for the decedent's intent and desires.

30. The New Will and Trust substantially benefited Defendant to the substantial detriment of Plaintiffs.

31. As compared to Defendant, each of Plaintiffs had an equal claim to the decedent's bounty.

32. But for Defendant's tortious conduct, Plaintiffs would have realized their expectancy.

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Find that but for Defendant's intentional tortious conduct, Plaintiffs would have received two thirds of the decedent's estate and trust assets;

B. Award Plaintiffs judgment in such amount, plus the amount of any prejudgment interest;

C. Award punitive damages in the amount of $_____ against Defendant; and

D. Award the attorney's fee plus any and all other relief that the Court deems fair and equitable.

Respectfully submitted,

[name of plaintiff 1**] and [**name of plaintiff 2**], Plaintiffs**

By _____
One of their attorneys

[attorney information**]**

4 Accounts in Estates and Trusts

JAMES W. HITZEMAN
LESLIE J. CARTER
Sidley Austin LLP
Chicago

This chapter includes material provided by Susan W. Drewke for previous editions of this handbook.

I. [4.1] INTRODUCTION

Illinois law imposes many duties on a fiduciary, requiring the fiduciary to act with "the highest degree of fidelity and utmost good faith" with respect to the beneficiaries. *Scanlan v. Eisenberg,* 669 F.3d 838, 843 (7th Cir. 2012). One such duty is the duty to communicate with the beneficiaries, keeping them informed of certain details relating to the property the fiduciary manages for their benefit. *See, e.g., Wylie v. Bushnell,* 277 Ill. 484, 115 N.E. 618, 622 (1917) (noting that "there can be no question as to the duty of a trustee to keep regular and accurate accounts during the whole course of his trusteeship"). The primary purpose of this duty to account is to allow the beneficiaries to confirm that the fiduciary has complied with its fiduciary duties. *In re Estate of Heater,* 266 Ill.App.3d 452, 640 N.E.2d 654, 203 Ill.Dec. 734 (4th Dist. 1994). Keeping the beneficiaries informed also gives those beneficiaries the opportunity to satisfy themselves that the fiduciary is meeting its fiduciary obligations and is appropriately managing the property under its care. Equitable title to the property lies with the beneficiaries, and therefore they should be afforded the opportunity to monitor the management of that property.

One way in which fiduciaries satisfy this obligation is to communicate with beneficiaries by providing periodic accountings that show the financial transactions that have occurred during the period covered by the accounting. Illinois statutory and common law contain requirements and guidelines applicable to these fiduciary accountings, which requirements and guidelines can depend both on the type of fiduciary relationship and the provisions of any written instruments that may govern that relationship.

This chapter provides an overview of these requirements and guidelines by considering the following questions:

a. Which parties are entitled to an accounting?

b. When should the fiduciary provide an accounting?

c. What information should the accounting contain?

d. How do beneficiaries object to accountings?

e. Can the rules for the provision of an accounting be modified?

Because there are multiple types of fiduciary roles, and the rules with respect to accountings can vary depending on those roles, this chapter considers the above questions in the context of the following fiduciary roles:

a. representative of a decedent's estate;

b. trustee of a testamentary or inter vivos trust;

c. agent administering or managing assets for the benefit of a principal under an Illinois power of attorney for property or other similar agency agreement; and

d. guardian of the estate of a minor or disabled person

The requirements and guidelines surrounding accountings are extremely important for many reasons. As mentioned above, the accountings are typically the main source of information that allows the beneficiaries to monitor the property in which they have an interest. However, beyond that, the accountings can be used either as a sword by the beneficiary or as a shield by the fiduciary and may take center stage in a dispute between the two. While a beneficiary may use an accounting to allege mismanagement of assets or breach of another fiduciary duty, the fiduciary may similarly request court approval of an accounting as a defensive mechanism in the face of a potential conflict. In either case, the story an accounting tells is central to the fiduciary relationship, and therefore both fiduciaries and those who represent them are best served by knowing the rules and guidelines applicable to such accountings.

II. ACCOUNTINGS OF AN ESTATE'S REPRESENTATIVE

A. [4.2] Which Parties Are Entitled to an Accounting?

The purpose of the fiduciary duty to account is to require the fiduciary to communicate certain information to the beneficiaries such that the beneficiaries can confirm that the fiduciary is properly managing the property for their benefit. Therefore, a crucial initial inquiry for any representative, and indeed for the attorney of the representative, is who is entitled to receive the account information?

The Illinois Probate Act of 1975, 755 ILCS 5/1-1, *et seq.,* provides rules for administering the estate of an Illinois decedent, including rules in Articles 24 and 28 specifically addressing accountings. 755 ILCS 5/24-1, *et seq.,* 5/28-1, *et seq.* The accounting rules can vary depending on whether the administration of the estate is supervised or independent. However, in either case, the class of persons entitled to an accounting or to notice thereof is the class of "interested persons."

The term "interested persons" is defined in §1-2.11 of the Probate Act, and generally includes those with a financial, property or fiduciary interest that may be affected by the estate administration process, including heirs, legatees, creditors, and those entitled to a spouse's or child's award. In general, if a trustee is considered to be an interested person, then the trustee should receive an accounting or notice of the accounting, but the beneficiaries of the corresponding trust need not receive an accounting or notice of an accounting in their capacity as beneficiaries. (The beneficiaries can pursue their own set of remedies with respect to a trustee who does not protect their interests based on information available to the trustee, including accounting information.) The term "interested person" may be used interchangeably with "interested party," "person interested," "party interested," "person in interest," or "party in interest." 755 ILCS 5/1-2.11.

PRACTICE POINTER

✓ As noted above, the general rule with respect to probate accountings and the related notice of accountings provided to trustees is that, if the trustee receives an accounting or notice thereof, then the beneficiaries of the corresponding trust need not also receive notice or an accounting in their capacity as beneficiaries. 755 ILCS 5/1-2.11. The Cook County Circuit Court Rules provide an exception to this general rule. In particular, Cook County Circuit Court Rule 12.13(c)(iii) provides the following:

> **If a part or all of the estate is distributable to the trustee or trustees of a trust of which each trustee is also a representative of the estate, in addition to the requirements of the Probate Act and unless notice is waived by the person entitled thereto, notice of the hearing on an account under Section 24-2 [755 ILCS 5/24-2] or notice of the filing of a final report under Section 28-11 [755 ILCS 5/28-11], as the case may be, shall be given to each beneficiary then entitled to receive or eligible to have the benefit of the income from the trust.**

This exception to the general rule is called the *Norris* rule, and it gets its name from *Norris v. Estate of Norris,* 143 Ill.App.3d 741, 493 N.E.2d 121, 97 Ill.Dec. 639 (1st Dist. 1986), which is discussed more fully in §4.7 below. The *Norris* rule aims to protect trust beneficiaries whose interests are being managed by a trustee who is also the representative of the estate. (If there are multiple representatives of the estate, the rule applies only if each representative is also a trustee of the trust in question.) The concern in such a situation is that the estate representative who is the trustee of a trust that is a beneficiary of that same estate would be in the position of approving its own accountings without any reliable outside check on the accuracy of those accountings, which would facilitate fraud by an unscrupulous representative.

Not all counties follow a rule like the *Norris* rule. Those counties that do not follow the *Norris* rule have presumably determined that the rights of the beneficiaries to review the accountings of the trustee through their own accounting rights provide sufficient protection to the beneficiaries.

The *Norris* rule serves as a helpful reminder that accounting rules and best practices may vary from court to court, and even from judge to judge. To the extent possible, fiduciaries and their representatives should familiarize themselves with these varying expectations.

B. [4.3] When Should the Fiduciary Provide an Accounting?

The frequency and timing of the accountings depend on whether the administration is supervised or independent.

1. [4.4] Supervised Administration

In a "supervised administration," the court supervises the representative's actions throughout the estate administration process. The Probate Act of 1975 sets forth the requirements for a supervised administration process, including the accounting requirements. 755 ILCS 5/24-1(a).

An initial accounting that covers the first 12 months of the administration period must be filed with the court within 60 days of the expiration of that 12-month period, unless the court extends the due date. *Id.* If all interested persons submit written consents to the court, and if the court approves, this initial accounting may be waived. 755 ILCS 5/24-1(b).

The estate representative in a supervised administration also has a duty to account on an interim basis if the court so orders. Interim accounts approved by the courts are binding in the same way a final account is binding, in that an order approving an interim account is considered a "determination of the rights of the parties" that binds all persons who received proper notice. *In re Estate of Neisewander,* 130 Ill.App.3d 1031, 474 N.E.2d 1378, 1380, 86 Ill.Dec. 181 (4th Dist. 1985) (interim account approved by court is appealable under Supreme Court Rule 304(b)(1)). *See also In re Estate of Brannan,* 210 Ill.App.3d 563, 569 N.E.2d 104, 155 Ill.Dec. 104 (3d Dist. 191) (interim account approved by court is binding as res judicata).

Nonetheless, despite the ability to approve interim accountings, it is not uncommon for trial courts to withhold the approval of certain aspects of the administration of an estate otherwise subject to approval in an interim account until the time of the final account. For example, in a supervised administration, a probate court might authorize the payment of interim attorneys' fees but be unwilling to assess the reasonableness of those fees until a later stage in the administration of the estate and may therefore withhold approval of those fees in an interim accounting. The court might instead wait to approve the accounting of those fees when they appear on a final accounting. Withholding the approval allows the court (and the heirs, legatees, and other interested persons) to view those fees in light of the full context of the administration process. Fees that seem reasonable (or unreasonable) at the time of payment may not seem reasonable (or unreasonable) when viewed in a broader context that may not be available until the completion of the administration process.

Last, a final accounting must be filed with the court upon final distribution of an estate. 755 ILCS 5/24-3(d). This final accounting must satisfy the requirements of §§5 and 6 of the Principal and Income Act, 760 ILCS 15/5 and 15/6. *Id.*

2. [4.5] Independent Administration

The independent administration process offers a streamlined approach to estate administration that attempts to speed up the process and reduce costs. The independent administration process does this by eliminating many of the formal requirements of supervised administration. 755 ILCS 5/28-1. Although the court will be involved in the opening and closing of the estate, and although interested persons can petition the court for hearings and orders, in general the administration process takes place without court supervision. 755 ILCS 5/28-5. In

particular, in an independent administration, the representative "need not present an account to the court unless an interested person requests court accounting as in supervised administration." 755 ILCS 5/28-11(a).

This language in §28-11(a) of the Probate Act of 1975, coupled with a general understanding of the streamlined independent administration process, can sometimes lead to misunderstandings by attorneys and fiduciaries. Sometimes in such cases, attorneys who have misinterpreted the duties of a representative in an independent administration fail to advise that representative of the representative's duty to account to interested persons. Although a representative in an independent administration need not file an account with the court unless an interested person requests it, this does not mean that the representative does not have a duty to account to the interested persons in an independent administration. In fact, the Probate Act makes clear that "[a]n independent representative is accountable to all interested persons for his administration and distribution of the estate." *Id.* Therefore, unless the representative obtains waivers from interested persons to obtain an order of discharge, the representative must deliver an accounting to all interested persons and file a verified final report with the court stating in part that the representative has provided an inventory and accounting to all interested persons. 755 ILCS 5/28-11(b).

In many cases, the representative in an independent administration will indeed obtain consents from all interested parties to provide a simplified or informal accounting, sometimes only account statements, where the interested persons wish to avoid the expense of the preparation of detailed accounts.

Finally, regardless of what information the representative provides to the court or the interested persons in an accounting, the courts have held that a representative must keep accurate records. The failure to do so creates a strong presumption against the propriety of the representative's actions. *In re Estate of Winston,* 99 Ill.App.3d 278, 425 N.E.2d 973, 981, 54 Ill.Dec. 756 (1st Dist. 1981).

C. [4.6] What Information Should an Accounting Contain?

Illinois law does not require a precise format for an accounting. Rather, Illinois provides generally that an accounting "shall state the receipts and disbursements of the representative since his last accounting and all real and personal estate which is on hand and shall be accompanied by such evidence of the disbursements as the court may require." 755 ILCS 5/24-1(a).

Illinois courts have approved as sufficient summary lists of assets and liabilities, with accompanying lists of the transactions related to each asset and liability, and accompanying lists of checks paid out of the account. *In re Estate of Thomson,* 139 Ill.App.3d 930, 487 N.E.2d 1193, 1998, 94 Ill.Dec. 316 (4th Dist. 1986).

Although there is no formal guidance in the Probate Act of 1975 about what precisely an accounting should include, attorneys should be careful to advise the representative to search for specific guidelines in the rules of the local court. For example, Cook County Circuit Court Rule 12.13 provides specific rules related to accounts in decedents' and minors' estates.

PRACTICE POINTER

✓ As a practical matter, in addition to following any specific local rules that may apply to an accounting, a representative should aim to make the accounting as easy to understand as possible for both the court and the interested persons. Because the rationale behind the duty to account is to allow beneficiaries to confirm that the assets are being properly managed for their benefit, as much as possible, a representative should tailor the accounting so it clearly communicates that management to the court and the interested persons. In cases when a judge or court has a particular preference for an accounting format, the representative should follow those preferences. If the judge or court does not have a known preferred format, or if there are otherwise no local rules that provide guidance, a representative can contact a local bank that often appears before the court and inquire about the form of accounting that bank uses.

D. How Do Beneficiaries Object to Accountings?

1. [4.7] Standing To Object

The Probate Act of 1975 does not explicitly indicate who may object to an accounting. *In re Estate of Provus,* 30 Ill.App.3d 378, 332 N.E.2d 759, 761 (1st Dist. 1975). However, Illinois courts have implied that at the very least those entitled to notice are also entitled to object. *Id.* The Probate Act itself specifically requires notice of an accounting be given to "unpaid creditors and to all other interested persons," thereby properly, albeit redundantly, including unpaid creditors who are already included in the definition of "interested person." 755 ILCS 5/24-2. Therefore, at the very least, any interested person, as one entitled to notice, has standing to object to an accounting.

As noted in §4.2 above, §1-2.11 of the Probate Act provides that no notice of an estate account (or any other action) is required to any trust beneficiary when the trustee receives notice. Therefore, a plain reading of the Probate Act indicates that such trust beneficiaries may not have standing to object to an accounting. Cook County is an exception to this rule, following the *Norris* rule instead, as discussed in §4.2 above. *See Norris v. Estate of Norris,* 143 Ill.App.3d 741, 493 N.E.2d 121, 97 Ill.Dec. 639 (1st Dist. 1986). Generally, under the *Norris* rule, if "each trustee is also a representative of the estate . . . notice . . . shall be given to each beneficiary then entitled to receive or eligible to have the benefit of the income from the trust." Cook County Circuit Court Rule 12.13(c). Thus, notwithstanding the statute, at least in Cook County, when the trustee and the representative are the same person, notice must be provided to the trust beneficiaries. This notice requirement therefore gives those beneficiaries standing, at least in trial court, to object to the representative's account.

If written consents of all interested persons are filed in the court, the court may excuse the preparation and presentation of accounts. 755 ILCS 5/24-1(b). Further, no notice is required to those persons from whom a written "receipt in full" is obtained and "exhibited" to the court. 755 ILCS 5/24-2. In the absence of written consents or receipts, §24-2 directs the type of notice to be

given to an interested person and the effect of this notice on all who receive it. Generally, the details of the notice are provided by the relevant local court. For example, Cook County Circuit Court requires ten days' notice. Cook County Circuit Court Rule 12.13(a)(vii).

2. [4.8] Filing an Objection

Neither the Probate Act of 1975 nor Illinois caselaw provides a specific procedure for objecting to an accounting. However, a party with standing to object typically does so by filing a pleading with the court, usually captioning the pleading as something like "Objection to Representative's Accounting." Furthermore, the objection will typically take the form of a response to particular items on the accounting.

Generally, these objections must be filed on or before the hearing date indicated on the notice or as otherwise provided by the trial court. Generally, an account approved by the trial court is binding on those persons who received proper notice of the account or final report. 755 ILCS 5/24-2. Courts have interpreted §24-2 as applying the general rules of res judicata and collateral attack to an estate accounting. Under res judicata, a final judgment bars subsequent litigation between the same parties on those issues raised, or those that could have been raised, as part of the prior cause of action before a court with proper jurisdiction. *Hooks v. Bonner,* 187 Ill.App.3d 944, 543 N.E.2d 953, 955, 135 Ill.Dec. 385 (1st Dist. 1989). Further, a final judgment may not be collaterally attacked more than 30 days after the date of that judgment (except on limited jurisdictional grounds). *Id.*

There are, however, at least three exceptions to the rule in §24-2 that an approval becomes binding on all parties who have received notice:

a. As expressly noted in §24-2, in the instance of "fraud, accident or mistake," the approval is not binding. For example, if the representative mistakenly or fraudulently omits certain assets from the accounting, the approval will not be binding. *Stade v. Stade,* 315 Ill.App. 136, 42 N.E.2d 631 (2d Dist. 1942).

b. Interested persons can use any procedural techniques otherwise available under the Illinois Civil Practice Law, 735 ILCS 5/2-101, *et seq.,* and Illinois Supreme Court Rules to attack an approval of accounts just as they can attack any other final judgment of a court. 755 ILCS 5/1-6. For example, a party who received notice may still object to the accounting within 30 days of the court's approval, as long as that objecting party follows the procedures applicable to vacating a default judgment under the Code of Civil Procedure. *See In re Estate of Moore,* 175 Ill.App.3d 926, 530 N.E.2d 635, 637, 125 Ill.Dec. 477 (4th Dist. 1988). Furthermore, a party that previously objected to the accounting may renew that objection within 30 days of the court's approval, as longs at that party follows the procedures applicable to making a motion for a rehearing, retrial or modification, or motion to vacate under 735 ILCS 5/2-1203(a). In *Moore,* the interested persons objected to the final report and account after the order approving it was entered but within 30 days of entry of the order. The court found that §24-2 barred only collateral attacks on orders approving accounts and did not bar otherwise permissible procedural attacks. *Moore, supra,* 530 N.E.2d at 637.

c. Under a variety of theories outlined in three cases below, *i.e., Norris v. Estate of Norris,* 143 Ill.App.3d 741, 493 N.E.2d 121, 97 Ill.Dec. 639 (1st Dist. 1986), *In re Estate of Winston,* 99 Ill.App.3d 278, 425 N.E.2d 973, 54 Ill.Dec. 756 (1st Dist. 1981), and *Kemper v. Kemper,* 178 Ill.App.3d 134, 532 N.E.2d 1126, 127 Ill.Dec. 297 (4th Dist. 1989), notice that is otherwise proper may not be binding if the representative makes an improper distribution to itself, whether outright or in trust.

In *Norris, supra,* discussed in §§4.2 and 4.7 above, the same person was the executor of the decedent's estate and trustee of the decedent's residuary testamentary trust. The court approved the executor's final account, closed the estate, and discharged the executor though the executor had not given notice of the final report and account to the residuary trust beneficiaries.

The executor argued that no notice to the beneficiaries was required because the trustee was the interested person as successor to title in the estate property. The trial court agreed and dismissed the beneficiaries' attempts to contest the executor's accounting. The appellate court reversed the trial court, finding that the beneficiaries were the true parties in interest, and, as such, were indeed entitled to notice of the account. *Norris* relied on *In re Estate of Provus,* 30 Ill.App.3d 378, 332 N.E.2d 759, 761 (1st Dist. 1975), in which the court held that trust beneficiaries have standing to object to estate accountings.

After *Norris,* the Illinois legislature amended §§1-2.11 and 24-2 of the Probate Act to relieve representatives of the statutory obligation to provide notice of accountings to trust beneficiaries when the trustee receives notice. Because the definition of "interested person" in §1-2.11 changed also, trust beneficiaries arguably do not have standing to object to accountings, even when they do have notice of the proceeding. As noted above in the discussion of *Norris,* however, this rule can change based on jurisdiction.

Regarding the amended §24-2, one court has held that it applies only to accounts and not to the fee petitions of fiduciaries and their attorneys. *In re Estate of Laas,* 171 Ill.App.3d 916, 525 N.E.2d 1089, 121 Ill.Dec. 782 (1st Dist. 1988). In *Laas,* however, the court did not refer explicitly to the exclusion of the trust beneficiaries from the definition of "interested person" under §1-2.11. Rather, the court referred only to the amended §24-2.

In *Winston, supra,* the plaintiff's mother was the representative of the estate of the plaintiff's father. The plaintiff's mother was also trustee of the trust that was to receive certain assets that were under dispute. The plaintiff had notice of the final account in which his mother did not indicate that the assets were to be distributed to the trust; the plaintiff did not object. However, the court found that the issue of whether the mother received the assets in her capacity as trustee or in her individual capacity had not been adjudicated in the final account of the estate. Therefore, the court held that the plaintiff's subsequent attack on the accounting in the mother's estate was not barred as it was not really a collateral attack.

In *Kemper, supra,* the decedent left the bulk of her estate in trust for the benefit of her husband during his life, with the remainder to her children. Only one son survived to have any interest in the trust. The husband was the representative of his deceased wife's estate and the only surviving trustee of the trust. In his final account, he listed the residue of the estate as passing to himself with no further description. The son had proper notice of the final account and did not

object. Subsequently, the husband placed the assets in joint tenancy with his new wife. After the husband died, the son brought an action to recover the assets that had been transferred to joint tenancy with the new wife. Relying on *Winston, supra,* the court found that the prior judgment did not bar the son's current action.

3. [4.9] Right to Jury Trial

There is no right to a jury trial in a dispute or objection over the representative's accounting for estate activities. *See, e.g., In re Estate of Mulvaney,* 128 Ill.App.3d 133, 470 N.E.2d 11, 83 Ill.Dec. 256 (3d Dist. 1984); *In re Estate of Grabow,* 74 Ill.App.3d 336, 392 N.E.2d 980, 982, 30 Ill.Dec. 215 (3d Dist. 1979). *But cf. Worthing v. Hall,* 153 Ill.App. 587 (2d Dist. 1910) (in which court employed advisory jury).

4. [4.10] Scope of Discharge

Once the court approves a final accounting and the representative has been discharged, the discharge applies to all matters related to the administration, not just to the matters covered by the final accounting. For example, a beneficiary may not challenge a representative's management of the estate's assets once the representative has been discharged. *Houser v. Michener,* 20 Ill.App.3d 391, 313 N.E.2d 651 (4th Dist. 1974). Similarly, beneficiaries cannot subsequently challenge attorneys' fees or other similar expenses after the court has approved the final accounting. *In re Estate of Funk,* 355 Ill.App.3d 466, 822 N.E.2d 20, 290 Ill.Dec. 738 (4th Dist. 2004), *rev'd in part,* 221 Ill.2d 30 (2006).

E. [4.11] Can the Rules for the Provision of an Accounting Be Modified?

The terms of a decedent's will cannot alter the statutory accounting requirements. *People ex rel. Richards v. Ridgley,* 63 Ill.App. 556 (3d Dist. 1895), *aff'd,* 163 Ill. 112 (1896).

III. [4.12] ACCOUNTS OF A TRUSTEE

Illinois law has long recognized "that a trustee owes the highest duty to his beneficiary to fully and completely disclose all material facts relating to dealings with the trust." *Regnery v. Meyers,* 287 Ill.App.3d 354, 679 N.E.2d 74, 79, 223 Ill.Dec. 130 (1st Dist. 1997). Specifically, Illinois law has long recognized that the beneficiaries are entitled to know what the trust property actually is and how the trustee is managing it. *Continental Illinois National Bank & Trust Company of Chicago v. Phelps,* 392 F.Supp. 313, 317 (N.D.Ill. 1975) (citing 2 A.W. Scott, LAW OF TRUSTS §173, p. 1406 (3d ed. 1967)). Section 11 of the Trusts and Trustees Act governs trust accounting requirements, including accounts of trusts under a will. 760 ILCS 5/11, 5/2(1).

Although the accounting requirement in the Trusts and Trustees Act is mandatory in tone, as with all else in the Act, the grantor of a trust "may specify in the [trust] instrument the rights, powers, duties, limitations and immunities applicable to the trustee, beneficiary and others and those provisions where not otherwise contrary to law shall control, notwithstanding this Act." 760 ILCS 5/3(1). As a result, it is common for trusts to have specific provisions governing, and

sometimes limiting, the trustee's accounting duty. Given this ability to modify the default accounting rules, an essential first step for both a trustee and any attorney representing a trustee is to read the trust instrument to identify possible departures from the trust accounting rules set forth in the Trust and Trustees Act.

A. [4.13] Which Parties Are Entitled to an Accounting?

Prior to termination of the trust, the trustees must provide annual accountings to those beneficiaries who are entitled to receive income and to those beneficiaries who are actually receiving the income from the trust estate. 760 ILCS 5/11(a). If there are no such beneficiaries, then the trustee must provide accountings to those beneficiaries who will benefit from the income of the trust estate. *Id.* These contingent beneficiaries are not generally entitled to an accounting if there are beneficiaries currently entitled to receive income or beneficiaries currently receiving income from the trust. *Godfrey v. Kamin,* 19 Fed.Appx. 435 (7th Cir. 2001).

Upon termination of the trust, the remainder beneficiaries are entitled to an accounting. 760 ILCS 5/11(b).

In situations when a beneficiary entitled to an accounting is under a disability, the trustee should provide the accounting to such beneficiary's representative or, if none, to the beneficiary's spouse, parent, adult child, or guardian. 760 ILCS 5/11(e).

Apart from these rules, it is always the case that in appropriate circumstances, a court can compel an accounting regardless of the provisions in a trust instrument that may otherwise limit the trustee's duty to account to beneficiaries. *See, e.g., Maguire v. City of Macomb,* 293 Ill. 441, 127 N.E. 682 (1920); *In re Estate of Thomson,* 139 Ill.App.3d 930, 487 N.E.2d 1193, 94 Ill.Dec. 316 (4th Dist. 1986). Thus, the trust instrument cannot entirely insulate a trustee from court review of his or her administration of the trust.

B. [4.14] When Should the Fiduciary Provide an Accounting?

The trustee is required to provide an accounting to the beneficiaries receiving or entitled to receive income from the trust on an annual basis. 760 ILCS 5/11(a). Upon the termination of the trust, the trustee must provide a final accounting to the beneficiaries then entitled to distribution of the trust property. 760 ILCS 5/11(b). The accounting should cover the period from the date of the last current accounting to the date of distribution. *Id.*

Aside from the annual accountings and final accounting, beneficiaries may request information from the trustee and may be entitled to go to court and demand an accounting. "The right to demand an accounting is not an absolute right, but is one which may be asserted on equitable principles, and such a claim must include allegations that the circumstances make an accounting necessary and proper, that the party asked for and was denied access to the trust records, or that those records were inadequate, and that the party made a demand for an accounting and that demand was refused." *Chicago City Bank & Trust Co. v. Lesman,* 186 Ill.App.3d 697, 542 N.E.2d 824, 827, 134 Ill.Dec. 478 (1st Dist. 1989) (citing *Tankersley v.*

Albright, 514 F.2d 956, 970 – 971 (7th Cir. 1975)). In addition, a contingent beneficiary who is not typically entitled to an accounting may compel an accounting, but "only where waste, mismanagement or dissipation of assets can be shown." *Goodpasteur v. Fried,* 183 Ill.App.3d 491, 539 N.E.2d 207, 131 Ill.Dec. 854 (1st Dist. 1989).

C. [4.15] What Information Should the Accounting Contain?

Both annual accountings and the final accounting must show the receipts, disbursements, and inventory of the trust estate. 760 ILCS 5/11(a), 5/11(b). In addition, a final accounting must include "disbursements," and upon the final accounting, the trustee must also make available to the beneficiaries entitled to the accounting all prior accountings not yet furnished to them. 760 ILCS 5/11(b).

As with the accountings for a decedent's estate, Illinois law does not require a specific form of accounting, but rather provides only broad outlines. As long as the records "fairly show the true state of the accounts . . . and can . . . be fairly held to be original entries, that is all that is required." *Wylie v. Bushnell,* 277 Ill. 484, 115 N.E. 618, 622 (1917). Again, the trustee should keep in mind the purpose of the accountings is to keep beneficiaries informed of the trust's activities and consequently should present information with the goal of clear communication.

In addition to the information provided to the beneficiaries, the trustee must also keep appropriate records. If the trustee does not do so, all presumptions will be against the trustee in matters pertaining to the accountings. *Woolard v. Woolard,* No. 05 C 7280, 2007 WL 2789097 (N.D.Ill. Sept. 19, 2007).

The manner in which certain items are reported in an accounting depends on a trustee's exercise of discretion. Section 3 of the Trusts and Trustees Act (760 ILCS 5/3) and §3(a) of the Principal and Income Act (760 ILCS 15/3(a)) provide trustees authority to exercise discretion regarding expense allocation to income and principal when the settlor of the trust has granted such discretion to the trustee. In *Brown Brothers Harriman Trust Co. v. Bennett,* 357 Ill.App.3d 399, 827 N.E.2d 1101, 293 Ill.Dec.220 (1st Dist. 2005), the court approved the trust account sought by the petitioner trustees who had charged trustee fees solely against trust income. The respondent income beneficiaries contended that the Principal and Income Act required a division of these charges between income and principal. 760 ILCS 15/14. However, the court held that §3 of the Principal and Income Act controlled and gave the trustee the discretion to charge the fees solely to income. The court noted that, in construing a trust, the court must give primary consideration to the settlor's intent and to give effect to that intent as long as it was not contrary to public policy.

In *Estate of Henry v. St. Peter's Evangelical Church,* 337 Ill.App.3d 246, 785 N.E.2d 1049, 271 Ill.Dec. 855 (3d Dist. 2003), the administrator accounted for all receipts and disbursements from principal and income. In so doing, the administrator determined that certain expenses that should have been charged against the principal of the estate were improperly charged against and paid from income. Therefore, the income beneficiaries suffered from a substantial shortfall. To correct for this shortfall, the administrator sold the only remaining asset of the estate. Even though the only remaining asset had been specifically bequeathed, the court held the administrator's sale of such asset was indeed proper. 755 ILCS 5/20-4(b).

D. [4.16] How Do Beneficiaries Object to Accountings?

In general, a beneficiary receiving an accounting has three years to institute an action with respect to the accounting. In particular, annual accountings are binding on the beneficiaries who receive the accounting "and on such beneficiaries' heirs and assigns unless an action against the trustee is instituted by the beneficiary or such beneficiary's heirs and assigns within 3 years from the date the current account is furnished." 760 ILCS 5/11(a). Similarly, final accountings are binding on the beneficiaries receiving the final accountings and "all persons claiming by or through them," unless a beneficiary or a person claiming through them institutes an action against the trustee within three years from the date the account is provided. 760 ILCS 5/11(b).

The above provisions, however, apply only to causes of action that are founded on the accuracy or validity of the information in the accountings themselves. *Walker v. Northern Trust Co.,* No. 06 C 4901, 2008 WL 1775498 (Apr. 17), *aff'g on motion to reconsider* 2008 WL 191182 (N.D.Ill. Jan. 22, 2008). This is substantially different from the full release the representative of a decedent's estate enjoys once that representative's accounts have been approved by the court. Because of the somewhat limited protection provided to trustees, a trustee may wish to have those parties entitled to an accounting sign a broader account approval document that releases the trustee (and the trustee's attorneys and other representatives) from any and all actions performed in the trustee's capacity as trustee.

Different rules apply to trusts that terminated before January 1, 1988. For trusts terminating before January 1, 1978, the beneficiaries have only two years from the date of the final account to bring an action. 760 ILCS 5/11(d). If a trust terminated on or after January 1, 1978, and on or before December 31, 1987, the beneficiaries have ten years from the date of the final account to bring an action. 760 ILCS 5/11(c).

E. [4.17] Can the Rules for the Provision of an Accounting Be Modified?

As discussed in §4.12 above, the grantor of a trust can modify the accounting rules set forth in the Trusts and Trustees Act. 760 ILCS 5/3(1). The grantor may, for example, reduce the frequency of the required accountings or even eliminate the obligation to account. However, a court under appropriate circumstances can compel a trustee to account.

Grantors, trustees, and their attorneys should, however, be aware that not all modifications of the accounting rules meet with court approval. Some trust instruments, for example, provide that the accounts of a trustee can be approved by a majority of the income beneficiaries of the trust. Section 14 of the Trusts and Trustees Act itself provides, in the context of a successor trustee, that, with approval of the majority of the beneficiaries receiving or eligible to receive income, a successor trustee may accept the account rendered by a predecessor trustee as a full and complete discharge to the predecessor without any liability on the part of the successor trustee. A 2008 Illinois case, however, suggests that a majority approval provision may not be effective.

In *Vena v. Vena,* 387 Ill.App.3d 389, 899 N.E.2d 522, 524, 326 Ill.Dec. 305 (2d Dist. 2008), the grantor executed a trust instrument that provided that a "majority in interest of the [income

beneficiaries] may at any time approve the trustee's accounts," and that such approval would have "the same effect as if a court having jurisdiction over the trusts approved the accounts."

Following the grantor's death and after making partial distributions to the income beneficiaries, the trustee received receipt and release agreements from 18 of the 19 income beneficiaries. Then, after making final distributions to the income beneficiaries, the trustee received receipt and release agreements from 13 of the 19 income beneficiaries. The trustee then filed a complaint for declaratory judgment, asking the court to rule that the majority approval of the income beneficiaries had the same effect as if the court had itself approved the accountings and in support thereof submitted affidavits from 16 of the 19 income beneficiaries approving the accounts. An income beneficiary (the one who did not submit a receipt or release agreement after the partial distributions) brought a counterclaim, disputing the enforceability of the majority-approval provision.

The trial court granted summary judgment in favor of the trustee. The trial court relied on, RESTATEMENT (THIRD) OF TRUSTS §83, cmt. d (2007), which notes that "trusts sometimes provide that the trustee need only account or submit reports to a designated person . . . and that the approval of the trustee's account or report by that person shall discharge the trustee from liability." 899 N.E.2d at 525. On appeal, the Second District Appellate Court reversed, holding the provision in question unenforceable.

In setting forth its specific holding, the court initially reasoned that the RESTATEMENT's hypothetical provision differed materially from the trust's majority-approval provision in two ways. First, the RESTATEMENT provision specified that a designated person could approve the accounts, while the trust provision allowed for majority approval. Second, the RESTATEMENT provision stated that approval by a designated person could discharge the trustee from liability, while the trust's majority-approval provision stated that majority approval would have the same effect as court approval. The Second District declined to indicate whether a different provision that more closely resembled the language in the RESTATEMENT would have been effective.

In looking at the provision before it, the court was most concerned by the fact that a disgruntled beneficiary would not have access to a court if the beneficiary were unhappy with the majority's approval of the trustee's accounts. The court observed that under American trust law, while a settlor has the right to set conditions on the settlor's gifts, a right under a trust that is unenforceable is illusory. The court stated that "if no one can hold the trustee to account, no trust exists at all." 899 N.E.2d at 531.

The court then found that the majority-approval provision failed to provide effective oversight of the trustee for two reasons. First, the responsibility was too diffuse, making it likely that beneficiaries would make an uninformed choice about the sufficiency of the trustee's accounts. Second, the trustee had too much control over the process and could too easily manipulate the process to obtain approval even if there had been wrongdoing.

Equating the majority approval clause with a form of "retrospective exculpation," the court concluded that the provision was "an insufficient improvement over a blanket exculpation,"

which was against public policy, and therefore illegal. *Id.* For that reason, the court also held that §3(1) of the Trusts and Trustees Act, which authorizes a settlor to establish the rules of the trust, provided those rules are not contrary to law, did not apply. The trust provision was contrary to law, according to the court; therefore, §3(1) could not save it. 899 N.E.2d at 532.

The upshot of *Vena, supra,* appears to be that an account of a trustee that receives less than unanimous approval of the beneficiaries will remain subject to a timely judicial attack. This is so even if the language of the trust instrument, like the language of the instrument in *Vena,* requires something less.

In discussing the RESTATEMENT provision, the *Vena* court emphasized the fact that the provision allows a court to undo approval of the trustee's accounts by a designated person so that a trustee could still face liability in such situations. If approval of accounts by fewer than all the beneficiaries would be acceptable only if the non-approving beneficiaries could get relief in court, a trustee has no reason to settle for anything less than unanimous beneficiary approval or court approval itself. Knowledgeable trust lawyers have contended that a trustee can be fully protected only with court approval of the trustee's accounts, although considerations of time and expense may justify approval of accounts by means of a virtual representation agreement or even through less formal approvals signed by all of the necessary beneficiaries.

It should also be noted that the *Vena* court makes no mention of §14 of the Trusts and Trustees Act, but, in light of the court's decision, the author would recommend that a successor trustee, before taking office, not rely on an approval of a predecessor's accounts by anything less than all of the income beneficiaries if the successor trustee is not otherwise prepared to review the accounts and take whatever action, if any, is appropriate against the predecessor trustee.

IV. [4.18] ACCOUNTS OF AN AGENT ACTING UNDER A POWER OF ATTORNEY

The Durable Power of Attorney Law, 755 ILCS 45/2-1, *et seq.,* provides rules applicable to agents who have the authority to make property, financial, personal, and healthcare decisions for a principal. Section 2-7 of the Durable Power of Attorney Law provides specific rules for accountings of the agent. 755 ILCS 45/2-7.

A. [4.19] Which Parties Are Entitled to an Accounting?

The following parties may request an accounting from the agent: the principal; a guardian of the principal; a fiduciary acting on the principal's behalf; the personal representative of a deceased principal's estate; and the successors in interest of the estate of a deceased principal. 755 ILCS 45/2-7(c)(1). In addition, the court and other state-related representatives may also request an accounting from an agent in some circumstances. 755 ILCS 45/2-7(c)(2) through 45/2-7(c)(6).

B. [4.20] When Should the Fiduciary Provide an Accounting?

An agent is always required to "keep a record of all receipts, disbursements, and significant actions taken under the authority of the agency." 755 ILCS 45/2-7(c). The agent is not required to make periodic accountings of this information, in contrast to the estate or trust context in which such accountings generally are required. Rather, the agent is required to present such accountings only after a request for such an accounting has been made by a party entitled to an accounting. *Id.*

C. [4.21] What Information Should the Accounting Contain?

An agent's accounting should reflect "all receipts, disbursements, and significant actions taken under the authority of the agency." 755 ILCS 45/2-7(c).

D. [4.22] How Do Interested Persons Object to Accountings?

If an agent violates any provisions of the Durable Power of Attorney Act, §2-7(f) makes such agent liable to the principal and any successors in interest for the amount required to restore the value of the principal's property and required to reimburse the principal and any successors in interest for attorneys' fees and costs paid on the agent's behalf. 755 ILCS 45/2-7(f). In addition, all other legal or equitable remedies (and the related limitations on such remedies) are available to the principal and the successors in interest. *Id.*

Furthermore, any "interested person" (as defined above in §4.2) may petition the court for relief, including removal, construction, or findings of liability, in cases in which the principal lacks the capacity to control or direct the agent. 755 ILCS 45/2-10.

E. [4.23] Can the Rules for the Provision of an Accounting Be Modified?

Although the Durable Power of Attorney Law does not explicitly permit departures from the default accounting rules, §2-7(e) indicates that a document creating a valid power of attorney may provide for separate accounting obligations. Specifically, §2-7(e) notes that the agent need not make an accounting unless one is required under §2-7(c) or "as otherwise provided in the power of attorney." 755 ILCS 45/2-7(e).

V. [4.24] ACCOUNTS OF A GUARDIANSHIP ESTATE

The rules specific to the duty to account for a ward's estate are contained in 755 ILCS 5/24-11. Other issues unique to guardianship proceedings are covered in Chapter 13 of this handbook.

A. [4.25] Which Parties Are Entitled to an Accounting?

In a guardianship, the guardian accounts to the court. 755 ILCS 5/24-11(a).

B. [4.26] When Should the Fiduciary Provide an Accounting?

The representative must present a verified initial accounting within 30 days from the one-year anniversary of the court's having issued letters to the representative, unless the court prescribes a later time. 755 ILCS 5/24-11(a). The representative must also present a verified account within 30 days after the three-year anniversary of the date of the last accounting, unless the court prescribes a later time. The representative must also present an accounting to the court within 30 days from the representative's termination of office. *Id.*

C. [4.27] What Information Should the Accounting Contain?

There is no particular form required for the representative's accountings. Rather, the accountings should contain information on the receipts and disbursements of the representative since the last accounting and all personal estate that is on hand. Accountings shall include any other evidence of disbursements that the court requests. 755 ILCS 5/24-11(a).

D. [4.28] How Do Beneficiaries Object to the Accountings?

If notice of a hearing on an interim accounting is served at least ten days before the hearing, and the court appoints a guardian ad litem to represent the ward at the hearing, then the account as approved will be binding on the ward in the absence of fraud, accident, or mistake. 755 ILCS 5/24-11(b).

Notice of the hearing on any final account must be given to the ward, if the ward is living, and to any other persons as the court directs. It is not uncommon in guardianship cases for the court to require the representative to provide notice to other persons. *Id.*

E. [4.29] Can the Rules for the Provision of an Accounting Be Modified?

No aspect of a guardianship, unlike an estate or trust, is governed by a written instrument such as a will or trust instrument. The guardianship account rules are set forth in §24-11 of the Probate Act, 755 ILCS 5/24-11, and are subject only to such modifications, if any, as the court might impose.

VI. [4.30] SAMPLE FORM OF ACCOUNTING

IN THE CIRCUIT COURT OF _____ COUNTY, ILLINOIS
[COUNTY DEPARTMENT — PROBATE DIVISION**]**

Estate of _____,	**)**	**No. _____**
a person with a disability	**)**	
	)	**Docket No. _____**
	)	
	)	**Page _____**

THIRD ACCOUNTING

TO THE HONORABLE JUDGE OF SAID COURT:

The undersigned, _____, Successor Plenary Guardian of the Estate of _____, a person with a disability, respectfully submits to the court this Third Accounting covering the period from January 1, [year**], up to and including December 31, [**year**], the date of this accounting:**

RECEIPTS

1. Bank Account: #_____

Interest earned:

Date	Amount	Subtotals
1/5/	37.15	37.15
2/5/	24.95	62.10
3/5/	45.13	107.23
4/5/	22.45	129.68
5/5/	33.11	162.79
6/5/	35.44	198.23
7/5/	33.42	231.65
8/5/	28.98	260.63
9/5/	26.77	287.4
10/5/	28.52	315.92
11/5/	29.36	345.28
12/5/	29.19	374.47

2. Funds from *X* Trust:

Date	Amount	Subtotals
3/31/	25,000.00	25,000.00
6/30/	32,575.00	57,575.00

3. Social Security Payments:

Date	Amount	Subtotals
1/1/	993.00	993.00
2/1/	993.00	1,986.00
3/1/	993.00	2,979.00
4/1/	993.00	3,972.00
5/1/	993.00	4,965.00
6/1/	993.00	5,958.00
7/1/	993.00	6,951.00
8/1/	993.00	7,944.00
9/1/	993.00	8,937.00
10/1/	993.00	9,930.00
11/1/	993.00	10,923.00
12/1/	993.00	11,916.00

4. Refund of [year**] Illinois Taxes:**

Date	Amount
10/31/	225.00

Total Receipts: 70,090.47

DISBURSEMENTS

1. Bank Account Maintenance:

Date	Amount	Subtotals
2/13/	(12.30)	(12.30)
9/5/	(45.00)	(57.30)

2. _____ School:

Date	Amount	Subtotals
6/30/	(30,000.00)	(30,000.00)
12/31/	(32,000.00)	(62,000.00)

3. _____ Store:

Date	Amount	Subtotals
4/3/	(2,913.45)	(2,913.45)
11/19/	(485.77)	(3,399.22)

4. State Income Taxes:

Date	Amount
4/14/	(450.00)

5. Federal Income Taxes:

Date	Amount
4/14/	(1,130.00)

Total Disbursements: (67,036.52)

RECAPITULATION

Cash on Hand as of 1/1/	**13,555.63**
Total Receipts	**70,090.47**
Total Disbursements	**(67,036.52)**
Cash on Hand as of 12/31/	**16,609.58**

_____, Successor Plenary Guardian of the Estate of _____, a person with a disability, being first duly sworn on oath, deposes and states that [he**] [**she**] has read the foregoing Account, knows the contents thereof, and the same is true in substance and in fact.**

_____
Guardian

Subscribed and sworn to before me this
[date signed**]**

_____
Notary Public

[attorney information**]**

5 Contested Claims Against Decedents' Estates, Trusts, and Other Nonprobate Assets

RICHARD A. CAMPBELL
Mayer Brown LLP
MARY C. DOWNIE
BMO Financial Group
Chicago

The authors gratefully acknowledge the assistance of Megan M. Okun, an attorney at Mayer Brown LLP, for her assistance in preparing this update.

I. [5.1] INTRODUCTION

The most frequent type of estate litigation involves contested claims against the decedent's estate. Each month in every county around the state numerous claims are filed against decedents' estates. Whether these claims are for unpaid credit card bills, final utility or medical bills, outstanding loans, ongoing litigation involving the decedent, custodial care claims, or otherwise, many of these claims will be contested by the estate representative. At that point, the contested claim becomes a litigation matter that generally follows the normal litigation process. However, contested claims do have certain unique procedures and rules with which attorneys for both the claimant and the estate must be familiar to properly litigate the contested claim.

This chapter sets forth the rules and procedures for handling contested claims. The application of these rules to contested claims is examined from the perspective of the claimant's attorney and the estate's attorney. The process of contested claims is explained from the filing of the claim through resolution of the claim. The unique rules concerning contested claims are highlighted, including what types of claims must be filed against an estate, the various applicable statutes of limitation involving claims, classification and payment of claims, and whether claims can be filed and collected against nonprobate assets. Finally, certain special types of claims that are frequently filed against decedents' estates are discussed in detail.

The applicable rules governing all aspects of contested claims against a decedent's estate are generally set forth in Article XVIII of the Probate Act of 1975, 755 ILCS 5/1-1, *et seq*. Most questions and issues involving contested claims are covered by these provisions and are amplified by common law. Note that this chapter does not cover contested claims that may be filed against the estate of a person with a disability. Such claims are governed by §13-201, *et seq.,* of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.,* and these claims against the estate of a person with a disability are beyond the scope of this chapter.

Note that pursuant to the Illinois Religious Freedom Protection and Civil Union Act (Civil Union Act), 750 ILCS 75/1, *et seq.,* the "rights" of parties to a civil union are broadly defined to include all of the rights, privileges, and responsibilities under Illinois law that heterosexual spouses to a marriage enjoy. Under Illinois law, a partner to a civil union is the equivalent of a spouse. Additionally, in Illinois, pursuant to the Religious Freedom and Marriage Fairness Act, 750, ILCS 80/1, *et seq.,* effective June 1, 2014, same-sex couples have the same rights to marriage as different-sex couples, which has been further solidified by the U.S. Supreme Court. *See Obergefell v. Hodges,* ___ U.S. ___, 192 L.Ed.2d 609, 135 S.Ct. 2584 (2015). Throughout this chapter, all discussions on the rights of spouses should be expanded to include the rights of partners to civil unions and parties to a same-sex marriage.

II. [5.2] WHAT CLAIMS MUST BE FILED IN THE PROBATE ESTATE

There are many ways that claims against a probate estate can be classified. Generally, though, they fall into two categories — absolute and contingent. The primary difference between these categories is that absolute claims must be filed against an estate during the claims period or they

will be barred, whereas contingent claims cannot be filed against an estate until they become absolute. This distinction is the starting point for both the claimant's attorney to decide if a claim must be filed and for the estate's attorney in defending a claim.

A. Absolute Claims

1. [5.3] General Rules

An absolute claim must be filed against a probate estate during the claims period. *In re Estate of Sexton,* 162 Ill.App. 222 (1st Dist. 1911), *aff'd sub nom. Keeler v. Merchants' Loan & Trust Co.,* 253 Ill. 528 (1912). However, an absolute claim does not have to accrue during the statutory claims period. *In re Estate of Morrow,* 150 Ill.App.3d 500, 501 N.E.2d 998, 103 Ill.Dec. 681 (2d Dist. 1986), *appeal denied,* 114 Ill.2d 546 (1987); *In re Estate of Gallagher,* 383 Ill.App.3d 901, 890 N.E.2d 1249, 322 Ill.Dec. 330 (1st Dist. 2008). An absolute claim is a claim based on the absolute liability of the decedent prior to death, as opposed to a contingent liability. An absolute claim must be timely filed against the estate or it will be barred.

If the representative of the estate is aware of a claim that the decedent had contracted to make a will, the purported beneficiary under the contract to make a will is a known creditor of the estate. The limitations period for commencing an action against the representative to enforce a contract to make a will is generally two years. See 735 ILCS 5/13-221. However, if the representative gives notice to the beneficiary in compliance with §18-3 of the Probate Act, 755 ILCS 5/18-3, then the limitations period for an action to enforce a contract to make a will is the six-month claims period. *Id.*

2. [5.4] Claims Not Due at Time of Death

An absolute claim may be based on an obligation that had accrued and existed at the time of the decedent's death, or it may be based on an obligation of the decedent that was not contingent at the decedent's death but was not yet due at the decedent's death. Claims that are not due at the decedent's death still must be timely filed against the probate estate, or they will be barred. A common example of such a claim is the decedent's guaranty of a loan when the loan is not in default at the time of the decedent's death.

Probate Act §18-4 governs claims against an estate not yet due at the time of the decedent's death. 755 ILCS 5/18-4. Such a claim is an absolute claim and therefore may be filed and allowed and paid out of the estate as other claims, but all interest included in the claim as part of the principal obligation, computed from the allowance of the claim to the time it would have become due, shall be deducted from the claim. *Id.*

The court in *Puhrman v. Ver Vynck,* 99 Ill.App.3d 1130, 426 N.E.2d 921, 55 Ill.Dec. 596 (1st Dist. 1981), discussed the distinctions between absolute claims, personal obligations of the representative, and contingent claims. Only an action on a claim against a decedent that arose during the decedent's lifetime may proceed against a representative in his or her official capacity. A claim that wholly arises during the period of administration is the personal liability of the

representative. However, in that case, the representative can be reimbursed from the estate if the claim qualifies as a proper expense of administration of the estate. A representative does not have the authority to create a debt against the decedent's estate, and debts created against the estate after the decedent's death cannot be filed as claims against the estate. 426 N.E.2d at 923 – 924.

The *Puhrman* court observed that an obligation of the decedent that is fixed or vested at the time of the decedent's death may be filed as a claim against the estate pursuant to Probate Act §18-4 and that such a claim is barred if it is not presented within the statute of limitations as provided in Probate Act §18-12. Claims that accrue or mature after the decedent's death, but that may never become due, are merely contingent claims. A contingent creditor of the decedent is not a creditor of the estate and may not file a claim against the estate. Any right of recovery for a contingent claim that vests before the running of the statute of limitations is against the representative personally. *Puhrman, supra.*

A personal guaranty of a note by the decedent is an absolute claim against the probate estate that must be filed during the claims period. The guaranty is an absolute claim even though liability under the guaranty would not accrue until after the expiration of the claims period and even though the decedent's liability is being reduced by payments made by third parties under the note during the claims period. *In re Estate of Mackey,* 139 Ill.App.3d 126, 487 N.E.2d 81, 93 Ill.Dec. 637 (1st Dist. 1985). An unconditional guaranty is an absolute claim and not a contingent claim. *Id.*

B. [5.5] Contingent Claims

A contingent claim is one in which liability depends on a future event (after the decedent's death), which may or may not happen, and the happening of which is not within the control of either the representative of the estate or any other party. *In re Estate of Rice,* 96 Ill.App.3d 1137, 421 N.E.2d 1034, 52 Ill.Dec. 171 (2d Dist. 1981). For a discussion on the distinction between an unmatured claim and a contingent claim, *see In re Estate of Lloyd,* 44 Ill.App.2d 215, 194 N.E.2d 525 (1st Dist. 1963).

The holder of a contingent claim is not a creditor of the estate. If the claim remains contingent during the claims period, the claimant may not participate in the distribution of assets from the estate. Such a creditor may pursue the representative personally or the distributees of the estate, but actions against the representative or distributees may be brought only if the claim is mature and absolute. *Union Trust Co. v. Shoemaker,* 258 Ill. 564, 101 N.E. 1050 (1913), *aff'g* 172 Ill.App. 365 (1st Dist. 1912); *Puhrman v. Ver Vynck,* 99 Ill.App.3d 1130, 426 N.E.2d 921, 55 Ill.Dec. 596 (1st Dist. 1981).

For example, when the decedent and the claimants were to receive funds when lots in a subdivision were sold to third parties, the claim was a contingent rather than an absolute contract right because the lots may or may not have sold. *In re Estate of Morrow,* 150 Ill.App.3d 500, 501 N.E.2d 998, 103 Ill.Dec. 681 (2d Dist. 1986), *appeal denied,* 114 Ill.2d 546 (1987).

C. [5.6] Litigation Existing at Decedent's Death

The expiration of the claims period does not affect the validity of a judgment entered against a defendant just after he or she died, and the judgment cannot be vacated based on §18-12 of the Probate Act, 755 ILCS 5/18-12. *Hannah v. Gilbert,* 207 Ill.App.3d 87, 565 N.E.2d 295, 152 Ill.Dec. 53 (4th Dist. 1990). Section 18-12 bars claims only when the action against the decedent falls under 735 ILCS 5/13-209 (governing actions brought against the representative of a person who has died before the action was commenced). However, when a special administrator is appointed only to defend the pending litigation, the appointment is not the equivalent of appointing a representative pursuant to the Probate Act and does not trigger the issuance of letters of office or empower anyone to distribute the assets of the decedent's estate to satisfy a judgment against the decedent. *Hannah, supra.*

III. [5.7] DUE PROCESS AND STATUTE OF LIMITATIONS FOR CLAIMS

A key area for both prosecuting and defending claims is whether proper notice was given by the representative to the claimant. The type of required notice for a particular claim also determines the applicable statute of limitations for filing such claim.

A. [5.8] Actual Notice Requirements

Illinois has what is known as a "non-claim claims statute." Therefore, the claims of creditors against a decedent's estate are barred unless they are timely filed. 755 ILCS 5/18-12(a). In 1988, the U.S. Supreme Court held in *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988), that the Due Process Clause of the Fourteenth Amendment requires that a representative give actual notice to creditors of the decedent who are known or reasonably ascertainable.

The Probate Act was amended in 1989 to comply with the due-process requirements of *Tulsa.* The Probate Act now requires the representative to publish a claims notice for creditors in a newspaper in the county where the estate is being administered and to mail or deliver a claims notice to each creditor whose name and address are known to or are reasonably ascertainable by the representative. 755 ILCS 5/18-3(a). The claims notice must inform the creditor that claims must be filed on or before the date stated in the notice. The date must be not less than (1) six months from the date of the first publication of the notice, or (2) three months from the date of mailing or delivery of the notice, whichever is later. *Id.* It is important to note that, as a practical matter, the representative may not give actual notice to some of the decedent's creditors.

1. [5.9] Duty of Representative To Determine Known or Reasonably Ascertainable Creditors

The representative has an affirmative duty to determine known or reasonably ascertainable creditors of the decedent based on §18-3(a) of the Probate Act. 755 ILCS 5/18-3(a). This duty is in addition to the duty to publish for creditors. Thus, as soon as the probate estate is opened, the

representative should publish for unknown creditors and search the records of the decedent to determine known or reasonably ascertainable creditors. These creditors must timely receive a written claims notice for the six-month claims bar date to apply to their claims.

How much action does a representative have to take to satisfy the due-process requirements under *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988), to determine reasonably ascertainable creditors? What does it mean to make a search for reasonably ascertainable creditors? The Probate Act is silent on the meaning of the phrase "reasonably ascertainable" creditors.

Further, no published Illinois case discusses the meaning of a "reasonably ascertainable" creditor and the duties of the representative to search for and determine potential creditors to give them actual notice. However, in *In re Estate of Anderson,* 246 Ill.App.3d 116, 615 N.E.2d 1197, 186 Ill.Dec. 140 (4th Dist. 1993), the Fourth District considered whether the claimants, as secured creditors, were reasonably ascertainable. The creditors had filed their claims more than six months after the first publication for creditors. The issues considered by the court were those of burden of proof and whether the representative was reasonably diligent in her efforts to locate the decedent's creditors. The court concluded that the creditors who filed their claims more than six months after the first publication for creditors had the burden to establish that they did not receive actual notice by mail or delivery under §18-3 of the Probate Act. The court stated:

> **Upon such a showing, the burden then shifts to the estate representative to show either that the statutory notice was given, which will automatically bar the claim, or, in the absence of notice, that the existence of the claim was not reasonably ascertainable upon reasonably diligent efforts. If the estate representative is able to prove this latter proposition by a preponderance of the evidence, then the claim will be barred.**
>
> **In determining whether the estate representative has met her burden on this latter proposition, the focus should not be on the actual knowledge of the claim by the executrix nor upon what she subjectively understood legal documents to mean had she looked for them and discovered them. Rather, the focus is on the efforts expended by the executrix in attempting to discover claims against the estate.** 615 N.E.2d at 1206.

The *Anderson* court determined that the minimum standards of diligent inquiry would require a good-faith search of the decedent's personal and business financial records to disclose the debts of the decedent. Such a search is comparable to the search required to marshal the assets of the estate. Because the decedent ran a trucking business, the *Anderson* court concluded that it was likely that the decedent had business debts, and the fact that the debts at issue were secured debts reinforced the court's conclusion that the claimants were reasonably ascertainable creditors. The *Anderson* court concluded: "To hold otherwise provides a disincentive to executors, who often are estate beneficiaries, to use reasonable diligence to ascertain and notify creditors of the estate. . . . The law imposes duties on the executor of the estate which must be fulfilled on pain of liability." *Id.*

The *Anderson* court believed that a creditor's knowledge of the death of a decedent is irrelevant and does not start the six-month claims bar period running against a creditor:

> **It is notice of the opening of the estate, the date of issuance of the letters, and the six-month period for filing claims which are critical under section 18-3(a) of the Act. . . . Knowledge of the date of death *cannot be equated* with knowledge of the critical elements under section 18-3(a) of the Act. [**Emphasis in original.**] [**Citation omitted.**]** 615 N.E.2d at 1207.

However, several Illinois courts have concluded that actual knowledge of the death of the decedent coupled with knowledge that a probate proceeding had been instituted constitutes actual notice for purposes of applying the six-month claims bar period. These cases apply the concept of constructive receipt of the claims notice. *See In re Estate of Sutherland,* 229 Ill.App.3d 281, 593 N.E.2d 955, 171 Ill.Dec. 135 (1st Dist. 1992) (creditor had actual knowledge of probate proceeding with sufficient time to act to protect his rights as creditor); *In re Estate of Doyle,* 229 Ill.App.3d 995, 594 N.E.2d 774, 171 Ill.Dec. 630 (3d Dist. 1992) (court held that brother of decedent, who failed to file claim after contracting with funeral home, had actual knowledge of probate proceedings instituted by another brother, and claim was barred despite fact that he did not receive written notice of claim period); *In re Estate of Winters,* 239 Ill.App.3d 730, 607 N.E.2d 370, 180 Ill.Dec. 476 (5th Dist. 1993) (untimely claim of widow was barred when she had actual knowledge of testator's death, institution of probate proceedings, and developments in probate proceedings).

2. [5.10] Representative's Failure To Provide Actual Notice

What happens when the representative distributes the assets of the estate before a claim has been filed or allowed? This situation can occur when a claim is made after the six-month claims bar date by a creditor who is determined to be a known creditor who did not receive actual notice, and therefore his or her claim is not barred. Section 18-12(d) of the Probate Act protects the representative against personal liability to a creditor of the decedent when the representative has acted in good faith to determine and give notice to the creditors of a decedent. 755 ILCS 5/18-12(d). In that case, claims not barred under §18-12(d) may be asserted against (a) the estate (to the extent that assets have not been distributed), and (b) a distributee of the estate (other than a creditor). If a claim is asserted against a distributee of the estate, it may not exceed the amount that the distributee's share of the estate would have been decreased if the claim had been paid by the representative. *Id.*

However, the representative is not shielded from personal liability for claims known to the representative that are not paid before distributing the estate and are not otherwise barred. *Id.* In the situation described above, does the claim filed by the known or reasonably ascertained creditor that is not paid before distribution of the estate result in personal liability for the representative? Is there a difference between the "claim . . . known to the representative" referred to in §18-12(d) and the "known . . . or . . . reasonably ascertainable" creditor of §18-3(a), 755 ILCS 5/18-3(a)? The authors are not aware of any cases that rule on this point. Based on this, it is unclear whether a representative can ever be completely protected from personal liability in an

estate if distributions are made before the two-year absolute claims bar date. For this reason, it may be prudent for the representative to obtain a refunding agreement from the beneficiaries prior to making any distributions to them.

3. [5.11] Duty To Determine Known or Reasonably Ascertainable Creditor's Address

The representative is obligated to send actual notice only to a creditor whose name and address are known or reasonably ascertainable by the representative. See 755 ILCS 5/18-3(a). Therefore, even if a creditor was known, notice would not need to be sent if the creditor's address was not known or could not be determined after a reasonable inquiry by the representative. It appears that if the creditor has not sent the decedent a bill for many months and has not otherwise corresponded with the decedent, then the representative may not reasonably ascertain the creditor's address. Under Probate Act §18-12(a)(3), it would appear that the representative has no duty to take further action.

The duty of the representative to "reasonably ascertain" the address of a creditor will likely be determined by litigation at some point. *Id*. There is no Illinois case that addresses the issue of what constitutes the duty of the representative to reasonably ascertain the address of a creditor under the current version of the Probate Act.

4. [5.12] Burden of Proof Requirement

As discussed in §5.9 above, the court in *In re Estate of Anderson,* 246 Ill.App.3d 116, 615 N.E.2d 1197, 186 Ill.Dec. 140 (4th Dist. 1993), considered the issue of burden of proof for claims filed after the expiration of the six-month claims period. The *Anderson* court concluded that the claimant has the initial burden of proof to establish that it did not receive a written claims notice by mail or delivery. Thereafter, the burden of proof shifts to the representative to establish that the statutory claims notice was given, that the claimant was not reasonably ascertainable, or that the claimant had constructive notice of the probate proceeding (any of which would bar the claim).

B. [5.13] Written Notice to Known and Reasonably Ascertainable Creditors

After the representative determines that there are known creditors of the decedent, the representative must serve each known creditor with written notice, either by mail or hand delivery, under §18-3(a) of the Probate Act. 755 ILCS 5/18-3(a). However, a claimant whose claim is or will be paid in full by the representative without dispute need not be served with actual notice.

Attorneys often think that distributions to beneficiaries cannot be made from a probate estate until after the expiration of the six-month claims period. While that may be true in a small estate when potential claims of creditors may exceed the assets in the estate, it certainly is not universally true. When the assets of the estate greatly exceed potential claims, distributions may be made to the beneficiaries of the estate before the expiration of the six-month claims period.

A practical approach in that situation is to pay all of the known creditors of the decedent with liquidated claims shortly following the opening of the probate estate. These creditors would include credit card companies, utility companies, medical providers, and other secured and unsecured creditors. Thereafter, the representative can estimate the total liability for unliquidated and unmatured claims. These claims would include a mortgage not yet due and payable, loan guarantees made by the decedent, and estimated unpaid expenses of administration (including the attorney's, accountant's, and executor's fees and any death taxes and income taxes payable by the estate). The representative should deduct all of the unpaid claims from the estimated residue of the estate. The representative should be able to distribute at least 50 percent of the estimated net residue calculated above to the beneficiaries of the estate. As mentioned in §5.10 above, the representative can obtain a refunding agreement from the distributees when these distributions are made before the six-month claims bar date. These "accelerated" distributions will often help prevent the bad feelings of beneficiaries that can lead to litigation or objections later in the administration of the estate. Note, however, that the representative must err on the side of caution when distributing to beneficiaries before the six-month claims bar date — the representative should retain a significant cushion in the estate to cover unforeseen expenses.

C. [5.14] Statute of Limitations for Claims

There are five different claims bar dates applicable to decedents' estates in Illinois under §18-12 of the Probate Act. 755 ILCS 5/18-12. See discussion in §§5.15 – 5.19 below. The representative and his or her attorney and the attorney for the claimant must be aware of these different time limitations.

1. [5.15] Unknown Creditors

Unknown creditors (who are not reasonably ascertainable) must file a claim within the six-month claims period (six months from the date of the first publication of the claims notice) as provided in §18-12(a)(3) of the Probate Act. 755 ILCS 5/18-12(a)(3). However, claims against an estate for expenses of administration and a surviving spouse's or child's award are excluded from the six-month claims period set forth in §18-12(a).

2. [5.16] Known Creditors with Actual Notice

A known (or reasonably ascertainable) creditor who receives an actual claims notice must file a claim by the date specified in the notice. Under §18-3(a) of the Probate Act, that date is the later of (a) six months from the date of the first publication of the claims notice, or (b) three months from the date of delivery or mailing of the written claims notice. 755 ILCS 5/18-3(a).

3. [5.17] Known Creditors Without Actual Notice

Known creditors who do not receive an actual notice of the claims bar date are not bound by the six-month claims period. Instead, they may present their claims at any time within the two-year general statute of limitations provided in §18-12(b) of the Probate Act. 755 ILCS 5/18-12(b).

4. [5.18] Overriding Two-Year Claims Bar Date

Section 18-12(b) of the Probate Act sets a two-year statute of limitations for all claims. 755 ILCS 5/18-12(b). All claims are barred two years after the date of the decedent's death even if letters of office are never issued in a probate estate. *See In re Marriage of Epsteen,* 339 Ill.App.3d 586, 791 N.E.2d 175, 274 Ill.Dec. 379 (1st Dist. 2003) (claim filed in Illinois divorce court to modify decedent's support obligation for disabled child under §§510 and 513 of Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq.,* two and one-half years after decedent's death, when there was no Illinois probate, was absolutely barred by two-year claims bar date). In addition, in *Polly v. Estate of Polly,* 385 Ill.App.3d 300, 896 N.E.2d 350, 324 Ill.Dec. 564 (1st Dist. 2008), the court held that a letter sent by the surviving spouse's attorney threatening to make a claim against the deceased husband's earnings during the marriage based on the couple's prenuptial agreement did not qualify as a claim; when the actual claim was filed against the decedent's estate more than two years after the decedent's death, it was barred. *See also In re Estate of Osborne,* 2011 IL App (4th) 100991-U; *In re Estate of Parker,* 2011 IL App (1st) 102871, 957 N.E.2d 454, 354 Ill.Dec. 138.

However, note that the two-year statute of limitations is not applicable if the estate has liability insurance. 755 ILCS 5/18-12(c). This provision does not extend the time period for filing a cause of action if it is barred by another applicable statute of limitations, though. *In re Estate of Speaker,* 236 Ill.App.3d 954, 603 N.E.2d 1194, 177 Ill.Dec. 820 (3d Dist. 1992).

5. [5.19] Claims Filed with Representative

If a claimant files a claim with the representative but not with the court and the representative decides to disallow the claim, the representative must file a notice of disallowance with the court and mail or deliver a notice of disallowance to the claimant, as provided in §18-11(b) of the Probate Act. 755 ILCS 5/18-11(b). This notice must state that the claimant must file the claim with the court by the date specified in the notice of disallowance. This date cannot be sooner than two months from the date of mailing or delivery of the notice of disallowance. See 755 ILCS 5/18-12(a)(2).

IV. CLAIMS PROCEDURE

A. [5.20] Filing Claims

Most Illinois courts have a preprinted claim form to be used to file a claim. For some counties, this form may be available online. See, *e.g.,* Cook County Form CCP 0345, www.cookcountyclerkofcourt.org/?section=FormsPage (case sensitive); DuPage County Form 3709, www.dupageco.org/courtclerk/courtforms.aspx; and Lake County Form 171P-21a, www.lakecountycircuitclerk.org/court-forms. If the county does not have a form, the attorney should be able to use a form from another county and adapt it for the county in question. Claims proceedings are not governed by the technical rules of pleading under the rules of civil procedure. *In re Estate of Krpan,* 2013 IL App (2d) 121424, 996 N.E.2d 205, 374 Ill.Dec. 758; *Sheetz v. Morgan,* 98 Ill.App.3d 794, 424 N.E.2d 867, 54 Ill.Dec. 117 (2d Dist. 1981). A claimant is not

required to state a cause of action as is normally required in formal pleadings. *Hobin v. O'Donnell,* 115 Ill.App.3d 940, 451 N.E.2d 30, 71 Ill.Dec. 542 (3d Dist. 1983). The claim need only apprise the representative of the nature, type, and amount of the claim. *In re Estate of Piper,* 59 Ill.App.3d 325, 375 N.E.2d 477, 16 Ill.Dec. 604 (1st Dist. 1978); 755 ILCS 5/18-2. The pleading requirement for a claim is similar to notice pleadings rather than formal pleadings.

Because notice pleading is all that is required, a description of the claim or debt due on the claim form should be sufficient. If the claim is based on a written document, a copy of the pertinent document, such as the bill, statement, or other evidence of indebtedness, should be attached to the claim form.

Filing a claim against a decedent's estate does not require the degree of legal skill as to constitute the "practice of law." *Piper, supra,* 375 N.E.2d at 479. Therefore, a corporate creditor may appear pro se to file a claim against an estate. *Id.* Note, however, that if a creditor uses an attorney who is not licensed to practice law in Illinois to file a claim against an Illinois probate estate, the judge may dismiss the claim for that reason alone.

Section 18-1(a) of the Probate Act allows a claimant to file a claim either with the probate court or with the representative. 755 ILCS 5/18-1(a). If the claim is filed with the representative, the representative may, but is not required to, file the claim with the probate court. Sending a letter with delinquent notices enclosed to the decedent's address and in the decedent's name after the decedent's death will not suffice for filing a claim with a representative. *See In re Estate of Beider,* 268 Ill.App.3d 1094, 645 N.E.2d 553, 206 Ill.Dec. 548 (1st Dist. 1994).

In *In re Estate of Lane,* 345 Ill.App.3d 1123, 804 N.E.2d 113, 281 Ill.Dec. 487 (4th Dist. 2003), the creditor directed certain correspondence regarding a decedent's liability under an indemnification agreement to the decedent's wife personally within the six-month claims bar date. The decedent's wife was a co-obligor under the indemnification agreement and executor of the decedent's estate. The creditor filed a formal claim in the probate estate shortly after the six-month claims bar date. The court ruled that the letters directed to the co-obligor personally and not as executor did not constitute filing a claim with this representative under the requirements of Probate Act §18-2.

Within ten days after the claim is filed with the probate court, the claimant must mail or deliver a copy of the claim to the representative and to the attorney of record for the estate, unless the representative or the representative's attorney has, in writing, either consented to the claim or waived delivery or mailing of the claim. 755 ILCS 5/18-1(b).

The claimant must also file proof of any required mailing or delivery of a copy of the claim to the representative and the attorney for the estate. However, failure to comply with the mailing or delivery requirements of the Probate Act does not affect the validity of the claim. *Id.*

A minor or a person with a disability who is a claimant is subject to the filing requirements of §18-3 of the Probate Act. *In re Estate of Baker,* 48 Ill.App.2d 442, 199 N.E.2d 307 (2d Dist. 1964). There is no tolling of the claims period for a minor or a person with a disability under the Probate Act.

If a minor or a person with a disability is a known or reasonably ascertainable creditor of the decedent's estate, the representative should serve notice on both the minor or a person with a disability and his or her guardian or parent to ensure compliance with the due-process requirements of *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988), and §18-3 of the Probate Act.

B. [5.21] Allowance of Claims

The representative may, at any time after the probate estate is opened, pay or consent in writing to all or any part of a claim that is not barred under §18-12 of the Probate Act, that has not been disallowed by the court, and that the representative has determined to be valid. 755 ILCS 5/18-11(a). Payment of the claim by the representative constitutes allowance of the claim and binds the estate. *Id.* The representative has a duty to the beneficiaries of the estate to review all claims to determine if the claims are valid. Any interested person may request that the representative establish the propriety of the allowance of any claim at a hearing on the issue; therefore, the representative must keep good records of all claims allowed and paid. *See Nonnast v. Northern Trust Co.,* 374 Ill. 248, 29 N.E.2d 251 (1940); *In re Estate of Roth,* 24 Ill.App.3d 412, 321 N.E.2d 81 (3d Dist. 1974); Robert S. Hunter, 18 ILLINOIS PRACTICE SERIES: ESTATE PLANNING AND ADMINISTRATION, *Decedents' Estates, Minors' Estates* §§137:1, 137:11 (4th ed. 2007).

The representative also has a duty to the beneficiaries of the estate to review all claims to determine if the claims have been timely filed. If a claim is filed within the six-month claims period, the claim (whether from a known, reasonably ascertainable, or unknown creditor) is timely filed. 755 ILCS 5/18-3. However, if a claim is filed after the six-month claims period, the representative must determine whether the creditor was known or reasonably ascertainable and, if so, whether the creditor received notice. If the creditor did not receive notice, the representative must determine whether notice should have been served on the creditor (*i.e.,* if the representative could have reasonably ascertained both the name and address of the creditor). If there is some question as to whether the creditor was reasonably ascertainable and whether notice should have been given, then the prudent representative should file the claim with the probate court (if it has not already been filed with the court) and request a hearing on the issue of whether the creditor was reasonably ascertainable. A hearing on that issue will protect the representative from claims of the beneficiaries that a claim was paid that should not have been.

1. [5.22] Claim Filed with the Probate Court

The representative may allow any claim timely filed with the probate court. The allowance is typically done in writing by the representative or by notation of the probate judge on the filed claim. The representative must promptly file a notice of allowance with the probate court, but failure to file the notice will not affect the allowance of the claim. 755 ILCS 5/18-11(a).

2. [5.23] Claim Filed with the Representative

The representative may allow any claim timely filed with the representative in writing by notifying the creditor of the allowance of the claim or by paying the claim and requesting a

release of claim from the creditor. The representative should file with the court a notice of allowance of the claim; however, a failure to do so will not affect the validity of the allowance of a claim. 755 ILCS 5/18-11(a).

C. Disallowance of Claims

1. [5.24] Claim Filed with the Probate Court

The representative may disallow any claim filed with the probate court either by filing a written notice of disallowance or by orally disallowing the claim at the initial hearing on the claim. If a claim is to be disallowed by the representative, the representative should do so within 30 days of the initial filing of the claim. 755 ILCS 5/18-5(a).

2. [5.25] Claim Filed with the Representative

The representative may disallow any claim filed with the representative by filing a notice of disallowance with the probate court and serving a copy of the notice of disallowance on the creditor. As stated in §5.19 above, the notice of disallowance must inform the creditor that the claim will be barred unless the creditor files a claim with the probate court on or before the date stated in the notice. The date stated in the notice must not be less than two months from the date of the mailing or delivery of the notice. 755 ILCS 5/18-11(b). If a claim is to be disallowed by the representative, the representative should do so within 30 days of the filing of the claim. 755 ILCS 5/18-5(a).

V. CONTESTED CLAIMS PROCEDURE

A. [5.26] Initial Hearing on Claim

The general procedure for a claim that is filed with the probate court is to place it on the claim call (in Cook County) or schedule an initial hearing on the claim (in other counties) generally less than 30 days after the claim is filed. At this initial hearing on the claim, the representative may allow the claim, continue the claim, dismiss the claim, or set the claim for hearing. 755 ILCS 5/18-7(a). The claim may be continued if the parties believe the claim may be settled. If the representative disputes the claim, the claim may be set for trial subject to additional pleadings and discovery.

If the estate files a counterclaim against a claimant and the court determines that the claimant is indebted to the estate, the court may enter judgment against the claimant and in favor of the estate after allowing all just credits, deductions, and setoffs. 755 ILCS 5/18-7(b).

B. [5.27] Responsive Pleadings/Motions

Probate Act §18-5(a) allows a representative or any other interested person whose rights may be affected by the allowance of a claim or counterclaim (*e.g.,* an heir or legatee) to file pleadings within 30 days after the mailing or delivery of the claim. 755 ILCS 5/18-5(a). These pleadings

may be filed for the benefit of the estate and against any claimant named in the claim and may be filed before the initial hearing on the claim. *Id.* Thereafter, the probate court may order the parties to file any appropriate pleadings (responses, replies, etc.) and set the matter for hearing. 755 ILCS 5/18-5(b).

Because the rules of civil procedure apply to probate proceedings, the representative or the claimant may file a motion for summary judgment or a motion for judgment on the pleadings on the claim.

Attorneys should be aware that one appellate court concluded (without citation to any authority and without acknowledging Probate Act §1-6) that a motion for judgment on the pleadings has no application to a probate claim because the claim need only comply with Probate Act §18-2. *In re Estate of Wagler,* 217 Ill.App.3d 526, 577 N.E.2d 878, 160 Ill.Dec. 553 (3d Dist. 1991). Because Probate Act §1-6 does not exclude the application of §2-615(e) of the Code of Civil Procedure, 735 ILCS 5/2-615(e), to probate proceedings, the analysis in *Wagler* appears to be incorrect as a matter of law.

C. [5.28] Discovery

Discovery can be done by the claimant and the estate as permitted by the probate court. Because the rules of civil procedure apply, all discovery rules are applicable to contested claims.

D. [5.29] Jury Trial

Any interested person may demand a jury trial on the claim. 755 ILCS 5/18-6. A claimant or counterclaimant must file a jury demand at the time he or she files a claim or counterclaim. 755 ILCS 5/18-6(a). A person opposing a claim or counterclaim must file a jury demand no later than the filing of his or her answer or other pleading. 755 ILCS 5/18-6(b). Failure to timely file a jury demand constitutes a waiver of a trial by jury. 755 ILCS 5/18-6.

If the claimant or counterclaimant demands a jury and later waives the jury demand, the person opposing the claim or counterclaim may demand a jury promptly after being advised of the waiver. 755 ILCS 5/18-6(c). The probate court may, for good cause shown, permit a jury demand to be filed after the expiration of the time specified. *Id.*

E. [5.30] Dead-Man's Act Issues

The Dead-Man's Act, 735 ILCS 5/8-201, prohibits an adverse party or person directly interested in an action brought or defended by an estate from testifying on his or her own behalf to any conversation with the decedent or to any event that took place in the presence of the decedent, except in the following instances:

> **(a) If any person testifies on behalf of the representative to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability, any adverse party or interested person, if otherwise competent, may testify concerning the same conversation or event.**

(b) If the deposition of the deceased or person under legal disability is admitted in evidence on behalf of the representative, any adverse party or interested person, if otherwise competent, may testify concerning the same matters admitted in evidence.

(c) Any testimony competent under [735 ILCS 5/8-401 regarding account books and records**] is not barred by this Section.**

(d) No person shall be barred from testifying as to any fact relating to the heirship of a decedent.

The act of taking the deposition of an adverse party does not operate to waive the application of the Dead-Man's Act. *Garb v. Harris,* 87 Ill.App.2d 437, 232 N.E.2d 83 (1st Dist. 1967); *Pink v. Dempsey,* 350 Ill.App. 405, 113 N.E.2d 334 (1st Dist. 1953).

The representative may examine an adverse party in open court for a restricted purpose without waiving the application of the Dead-Man's Act to other matters. The adverse party may testify on his or her own behalf only as to the same matters on which the representative previously examined him or her. *Perkins v. Brown,* 400 Ill. 490, 81 N.E.2d 207 (1948).

A more complete analysis of the Dead-Man's Act is beyond the scope of this chapter. However, the representative's attorney and the claimant's attorney must be well-versed in the application of the Dead-Man's Act to contested claims.

F. [5.31] Burden of Proof

As in any other civil suit, the claimant has the burden of proof in an evidentiary hearing for a claim against a probate estate. *In re Estate of Likes,* 6 Ill.App.3d 976, 286 N.E.2d 65 (4th Dist. 1972); *Floyd v. Smith's Estate,* 320 Ill.App. 171, 50 N.E.2d 254 (4th Dist. 1943); *In re Teehan's Estate,* 287 Ill.App. 58, 4 N.E.2d 513 (1st Dist. 1936). The burden of proof may then shift to the estate to establish any defense to the claim once the claimant has made a prima facie case. *Chicago Composition, Inc. v. LaSalle National Bank,* 345 Ill.App. 507, 104 N.E.2d 106 (1st Dist. 1952) (abst.) (corporation sued decedent's estate alleging misappropriation of corporate funds; burden shifted to estate to show funds were used for corporate purpose or any other defense once corporation established that decedent received corporate funds). *But see In re Estate of Andernovics,* 197 Ill.2d 500, 759 N.E.2d 501, 259 Ill.Dec. 721 (2001), in which the court ruled that the trial court had discretion under Probate Act §18-7(a), 755 ILCS 5/18-7(a), to demand that the claimant prove the claim even when the estate only filed a general denial of the claim and did not file a specific response to the allegations in the claim.

In re Estate of Hill, 88 Ill.App.3d 1038, 411 N.E.2d 77, 44 Ill.Dec. 171 (5th Dist. 1980), provides a detailed analysis of various presumptions that may arise in a complex factual scenario.

VI. CLASSIFICATION OF CLAIMS AND PRIORITY OF PAYMENT OF CLAIMS

A. [5.32] Classification of Claims and Effect on Payment of Claims

All contested claims for which judgment is entered in favor of the claimant by the probate court (and uncontested claims that are allowed by the representative) must be classified under Probate Act §18-10. 755 ILCS 5/18-10. The classification is usually determined at the time judgment is entered in favor of the claimant. Classification of claims is not an issue if the estate has sufficient funds to pay all claims in full. However, if the estate is insolvent or otherwise cannot pay every claim in full, payment will be made on claims based on their classification. In that case, the classification of a claim determines whether the claim will be paid and how much of the claim will be paid.

For example, if the estate is partially insolvent and has sufficient funds to pay only first-class claims (funeral, burial, and administration expenses and statutory custodial claims) in full with some funds remaining after payment, then the next class of claims will share the remaining funds on a pro rata basis. If the next class consists of second-class claims (surviving spouse's or child's awards), the second-class claims will be paid in full if possible, and if not, these claims will be paid on a pro rata basis. Any lower-tier claims — *e.g.,* seventh-class claims (all other claims, which normally include unsecured creditors) — will not receive any payment from the estate unless all of the higher-class claims are paid in full. Therefore, in an insolvent estate, both the attorney for a claimant and the attorney for the estate must understand how the classification of claims will affect the potential payment of a claim in analyzing how and whether to prosecute or defend the claim. See discussion in §§5.33 – 5.41 below.

B. [5.33] First-Class Claims — Expenses of Administration

Funeral and burial expenses, expenses of administering the estate (including the attorneys' and representatives' fees), and statutory custodial claims are first-class claims and have the highest priority for payment. 755 ILCS 5/18-10. *In re Estate of Funk,* 221 Ill.2d 30, 849 N.E.2d 366, 302 Ill.Dec. 574 (2006), contains a lengthy and detailed analysis of the payment of attorneys' fees and other administrative expenses and the classification of claims under the Probate Act when the estate manages and disposes of secured property.

C. [5.34] Second-Class Claims — Surviving Spouse's and Children's Statutory Awards

The surviving spouse's award is a preferred claim and is not a debt against the estate. 755 ILCS 5/15-1. The award is the surviving spouse's own property and is exempt from attachment. The purpose of the award is to support the surviving spouse for a period of nine months after the death of the decedent. A surviving spouse's award cannot be less than $20,000 and the child's award cannot be less than $10,000 per child. *Id.*

Keep in mind that pursuant to the Illinois Religious Freedom Protection and Civil Union Act, the term "party to a civil union" is included in any definition and anywhere the following terms are used throughout Illinois law: " 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of

kin,' and other terms that denote the spousal relationship." 750 ILCS 75/10. Therefore, a partner in a civil union is entitled to a spousal award from his or her deceased partner's probate estate.

Surviving spouse's and child's awards have priority over any creditors' claims other than first-class claims. 755 ILCS 5/18-10. It is not an inheritable interest and must be paid before any of the assets are distributed from the estate to the beneficiaries. *In re Estate of Signore,* 149 Ill.App.3d 904, 501 N.E.2d 282, 103 Ill.Dec. 261 (1st Dist. 1986). The surviving spouse's award and the child's award share the same priority for payment because they are both second-class claims. *In re Estate of Meyers,* 113 Ill.App.3d 886, 446 N.E.2d 892, 68 Ill.Dec. 721 (2d Dist. 1983).

As second-class claims, the surviving spouse's and child's awards took priority over the claim of the Internal Revenue Service for unpaid taxes owed by the decedent and assessed before his death when the United States did not attempt to enforce a purported lien. *In re Estate of Brooks,* 134 Ill.App.3d 993, 481 N.E.2d 759, 89 Ill.Dec. 916 (5th Dist. 1985).

It is important to note that the allowance of child's awards does not bar claims for unpaid future child support. In *In re Estate of Hudson,* 385 Ill.App.3d 1112, 896 N.E.2d 1123, 324 Ill.Dec. 904 (5th Dist. 2008), the court held that a child's award under Probate Act §15-2(b), 755 ILCS 5/15-2(b), and child support obligations under Illinois Marriage and Dissolution of Marriage Act §510(d), 750 ILCS 5/510(d), are not duplicative, and under the latter section, the death of a parent does not terminate the parent's obligations to support a child.

Note also *In re Estate of Mosquera,* 2013 IL App (1st) 120130, 991 N.E.2d 18, 371 Ill.Dec. 931, which held that for purposes of a child's award an adult dependent child did not have to be disabled while a minor to qualify for the child's award as long as the adult dependent child was disabled at the time of decedent's death.

D. [5.35] Third-Class Claims — Amounts Due the United States

Federal estate tax owed is a third-class claim against the estate. *In re Estate of Grant,* 83 Ill.2d 379, 415 N.E.2d 416, 419, 47 Ill.Dec. 411 (1980); 755 ILCS 5/18-10.

Although Probate Act §18-14 provides that real and personal property of the decedent and the income therefrom during the period of administration are chargeable with the claims against the estate, including estate and inheritance taxes, the rights of creditors are derivative of the rights of the representative and are not "lien rights" as that term is normally defined. 755 ILCS 5/18-14; *White v. Stults (In re White),* 174 B.R. 775 (Bankr. S.D.Ill. 1994). Thus, in *White,* the IRS, which did not file a notice of levy or lien as part of any collection process, did not have a lien against property inherited by legatees of the decedent after the representative's right to sell the property during administration had expired and the property was distributed to the legatees.

E. [5.36] Fourth-Class Claims — Amounts Owed to Employees and Medical Expenses

Money due to employees of the decedent not exceeding $800 for services rendered to the decedent within four months of the decedent's death, along with the expenses of the decedent's final illness, are fourth-class claims. 755 ILCS 5/18-10.

F. [5.37] Fifth-Class Claims — Property Held in Trust by Decedent

In general, money or property received or held by the decedent in trust that cannot be identified or traced is a fifth-class claim. 755 ILCS 5/18-10. This includes trust property commingled with personal assets (*Russell v. United States,* 260 F.Supp. 493 (N.D.Ill. 1966); *Guttman v. Schiller,* 39 Ill.App.2d 58, 187 N.E.2d 315 (1st Dist. 1963)), statutory trusts over insurance premiums converted by the decedent to personal use (*Robert P. Butts & Co. v. Estate of Butts,* 119 Ill.App.2d 242, 255 N.E.2d 622 (4th Dist. 1970) (resulted in decedent being defaulting trustee indebted to insurance brokerage company of which he was officer)), resulting trusts (*In re Estate of Tarr,* 37 Ill.App.3d 915, 347 N.E.2d 69 (4th Dist. 1976)), and trusts arising out of the decedent's official capacity as an executor, administrator, or guardian (*Butts, supra*). The trust need not be an express trust and does not require a written trust instrument. *Id.*

However, claims resulting from an attorney's theft of assets of various clients were classified as seventh-class claims, rather than fifth-class claims, in *In re Estate of Cappetta,* 315 Ill.App.3d 414, 733 N.E.2d 426, 247 Ill.Dec. 962 (2d Dist. 2000). The *Cappetta* court reasoned that although the decedent attorney obtained the property fraudulently and in breach of his fiduciary duty to his clients, there was no allegation that the decedent was acting in an official capacity as an executor, administrator, or guardian at the time he took the assets. Therefore, the court concluded that the claims were in the nature of a constructive trust and constituted seventh-class claims. *Id.* The authors question the propriety of the *Cappetta* decision. The definition of a "fifth-class claim" contained in §18-10 does not require the trust property to be received in any such official capacity, and *Cappetta* seems in opposition to *Butts* and *Tarr,* cited above.

G. [5.38] Sixth-Class Claims — Debts to the State

Debts to the State of Illinois and any municipality located within Illinois are sixth-class claims. 755 ILCS 5/18-10.

H. [5.39] Seventh-Class Claims — All Other Claims

All claims not included in a higher classification are seventh-class claims. 755 ILCS 5/18-10. These claims include some of the most common claims, such as credit card debt, utility bills, and unsecured loans.

I. [5.40] Secured Property

Secured creditors are not subject to claims classification under §18-10 of the Probate Act, 755 ILCS 5/18-10. Secured collateral that is in the possession of the representative is not a part of the probate estate and does not become a part of the probate estate until the secured lien has been discharged. Once the lien has been discharged, the formerly secured collateral becomes part of the probate estate and is available to other creditors of the estate.

A representative does not have the authority to sell secured collateral and use the proceeds to pay other claims against the estate. The security interest of the secured creditor attaches to the

proceeds of the sale. Thus, the secured creditor's lien first must be satisfied from the proceeds of the sale before any remaining funds are available to satisfy other claims against the estate. *In re Estate of Philp,* 114 Ill.App.3d 107, 448 N.E.2d 535, 69 Ill.Dec. 817 (1st Dist. 1983); *In re Estate of Yealick,* 69 Ill.App.3d 353, 387 N.E.2d 399, 25 Ill.Dec. 743 (4th Dist. 1979).

However, when the secured creditor elects to forgo the remedy of foreclosing the lien to extinguish the debt and instead elects to have the estate manage and dispose of the property, the creditor subjects itself to the classification of claims under the Probate Act. *In re Estate of Funk,* 221 Ill.2d 30, 849 N.E.2d 366, 302 Ill.Dec. 574 (2006). In that situation, the proceeds from the sale of the secured property are subject to the priority classification that requires payment of administrative expenses before all other claims, and the secured creditor has no superior rights in the matter of classifying claims. 849 N.E.2d at 401, citing 6 ILL.JUR. *Probate, Estates & Trusts* §29:20 (2001). The rationale is that the secured creditor benefited from the estate's efforts to collect and disburse the funds and that creditors' ability to satisfy claims would be seriously compromised without the orderly administration of estates. A creditor who does not wish to be subject to the Probate Act's classification of claims can elect to foreclose the security lien on its own.

Note, however, that the Illinois Supreme Court has held that a secured creditor must name the personal representative for a deceased mortgagor in a mortgage foreclosure proceeding involving the secured property in order for the circuit court to acquire subject-matter jurisdiction over the proceeding. *ABN AMRO Mortgage Group, Inc. v. McGahan,* 237 Ill.2d 526, 931 N.E.2d 1190, 342 Ill.Dec. 7 (2010).

J. [5.41] Insolvent Estates

As noted in §5.32 above, when an estate is insolvent, claims must be paid according to their classification. When a probate estate receives reimbursement from a health insurance provider for healthcare services provided by the claimants to the decedent, the claimants are not entitled to direct reimbursement from the estate for their claims. Instead, the claims are seventh-class claims, reimbursable only if all other classes of claims have been paid in full. *In re Estate of McVietty,* 312 Ill.App.3d 478, 727 N.E.2d 653, 245 Ill.Dec. 206 (3d Dist. 2000).

VII. [5.42] SPECIAL TYPES OF CLAIMS

There are several types of claims that differ significantly from the run-of-the-mill credit card bill or final medical expenses claims. These claims, including claims for reimbursement by the State of Illinois and claims by caregivers of the decedent, are frequently contested, and there are many reported cases that rule on various aspects of these types of claims.

A. [5.43] Claims of the State of Illinois

The State of Illinois may file a claim against an estate for care and services rendered by state agencies to the decedent, for example, if the decedent was developmentally disabled. See §5-105 of the Mental Health and Developmental Disabilities Code (Mental Health Code), 405 ILCS 5/1-100, *et seq.* One issue that has consistently been raised is whether the state can obtain money

for reimbursement of expenses provided to an individual with a disability, either during the individual's life or after his or her death, from a trust held for the benefit of the individual. A series of court cases established that certain discretionary or special-needs trusts created for a person with a disability may be invulnerable to the claims of the state for reimbursement for services provided. *See Department of Mental Health & Developmental Disabilities v. Phillips,* 114 Ill.2d 85, 500 N.E.2d 29, 102 Ill.Dec. 407 (1986); *Button v. Elmhurst National Bank,* 169 Ill.App.3d 28, 522 N.E.2d 1368, 119 Ill.Dec. 509 (2d Dist. 1988); *Department of Mental Health & Developmental Disabilities v. First National Bank of Chicago,* 104 Ill.App.3d 461, 432 N.E.2d 1086, 60 Ill.Dec. 187 (1st Dist. 1982). These cases required careful drafting of special-needs or supplemental-needs trusts to avoid reimbursement claims by the state upon such person's death.

However, both the Trusts and Trustees Act, 760 ILCS 5/1, *et seq.,* and the Mental Health Code have been amended to provide that any discretionary trust held for the benefit of an individual with a disability will not be subject to such reimbursements during life or at the individual's death except for a trust created by the individual with a disability or for money distributed from the trust to the individual. See 760 ILCS 5/15.1. Section 5-105 of the Mental Health Code provides:

> **If a recipient is a beneficiary of a trust described in Section 15.1 of the Trusts and Trustees Act, the trust shall not be considered a part of the recipient's estate and shall not be subject to payment for services to the recipient under this Section except to the extent permitted under Section 15.1 of the Trusts and Trustees Act.** 405 ILCS 5/5-105.

Section 15.1 was added to the Trusts and Trustees Act when the Mental Health Code was amended and provides:

> **A discretionary trust for the benefit of an individual who has a disability that substantially impairs the individual's ability to provide for his or her own care or custody and constitutes a substantial disability shall not be liable to pay or reimburse the State or any public agency for financial aid or services to the individual except to the extent the trust was created by the individual or trust property has been distributed directly to or is otherwise under the control of the individual, provided that such exception shall not apply to a trust created with the property of the individual with a disability or property within his or her control if the trust complies with Medicaid reimbursement requirements of federal law. Notwithstanding any other provisions to the contrary, a trust created with the property of the individual with a disability or property within his or her control shall be liable, after reimbursement of Medicaid expenditures, to the State for reimbursement of any other service charges outstanding at the death of the individual with a disability. Property, goods and services purchased or owned by a trust for and used or consumed by a beneficiary with a disability shall not be considered trust property distributed to or under the control of the beneficiary. A discretionary trust is one in which the trustee has discretionary power to determine distributions to be made under the trust.** 760 ILCS 5/15.1.

Under §5-13 of the Illinois Public Aid Code, 305 ILCS 5/1-1, *et seq.,* the amount expended by the State of Illinois on Medicaid benefits for an individual is a claim against the individual's estate or a claim against the estate of the individual's spouse, regardless of the order of death, but the state cannot recover on the claim until the death of the last to die of the individual and the individual's spouse. 305 ILCS 5/5-13. The estate of the individual from which recovery on the claim can be made is limited to the probate estate of that individual, except that if the individual received or was entitled to receive benefits under a long-term insurance policy, the estate includes all property (real or personal) in which the individual had a legal interest at death, including joint tenancy property, living trusts, or other arrangements.

However, federal law regarding recovery of Medicaid benefits by states limits necessary recovery to the estate of the individual, not the estate of the surviving spouse. 42 U.S.C. §1396p(b).

In *Hines v. Department of Public Aid,* 358 Ill.App.3d 225, 831 N.E.2d 641, 294 Ill.Dec. 691 (3d Dist. 2005), the State of Illinois sought to recover Medicaid benefits paid on behalf of a husband from the estate of his wife who survived him. At the time of the husband's death, his only assets were joint tenancy assets with his wife as cotenant. When the wife died after the husband, her probate estate included the former joint tenancy assets.

The appellate court ruled that §5-13 of the Public Aid Code exceeded the authority of the federal statute by providing for recovery from the estate of the surviving spouse, who did not receive the Medicaid benefits. The federal statute allows states to recover only against the estate of the individual who actually received the Medicaid benefits. Even though the federal statute broadly defines the "estate" of the deceased individual from which recovery of Medicaid benefits can be made, this is not broad enough to include recovery from the estate of the surviving spouse. Legislative efforts to conform the Illinois statute with the federal statute by allowing a claim against the estate of the individual who received the benefit, not against the estate of such person's spouse, appear to have stalled.

The ruling in *Hines* follows a similar ruling by a Wisconsin court of appeals on the same issue (*In re Estate of Budney,* 197 Wis.2d 948, 541 N.W.2d 245 (App. 1995)) but is opposite of rulings in four other states (*see, e.g., In re Estate of Thompson,* 586 N.W.2d 847 (N.D. 1998)).

Presumably, under the Illinois appellate court rationale, the state could recover Medicaid benefits from the deceased husband's joint tenancy property at his death even if his wife survived him if it expanded §5-13 to so provide, because such recovery would be specifically authorized under the federal statute.

B. [5.44] Custodial Care Claims

With many people living longer and in need of personal care for more extended periods of time, it is no surprise that many estates include contested claims for custodial care under §18-1.1 of the Probate Act, 755 ILCS 5/18-1.1, or for a general claim for services provided to care for the decedent before death. These claims (other than claims of contracted service providers) are often

vigorously contested and create much animosity among the surviving family members. There are many court cases involving such claims that provide guidance on prosecuting and defending these types of claims. See §§5.45 – 5.50 below.

1. [5.45] Statutory Custodial Claims

Section 18-1.1 of the Probate Act allows a member of the immediate family of the decedent (spouse, parent, brother, sister, or child), who lives with an individual with a disability and dedicates himself or herself to caring for the individual for three years prior to death, to make a claim against the decedent's estate for a minimum statutory amount. The claim is designed to compensate the individual for lost employment opportunities, lost lifestyle opportunities, and emotional distress experienced as a result of caring for the person with a disability. The claim is in addition to any other claim the claimant may have, including a claim for reasonable costs of nursing and other care. 755 ILCS 5/18-1.1. Keep in mind that pursuant to the Illinois Religious Freedom Protection and Civil Union Act, the term "party to a civil union" is included in any definition and anywhere the following terms are used throughout Illinois law: " 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' and other terms that denote the spousal relationship." 750 ILCS 75/10. Therefore, a partner in a civil union is a member of the immediate family of the decedent and is entitled to file a statutory custodial care claim against his or her deceased partner's probate estate.

Section 18-1.1 requires five elements that must all be strictly satisfied to qualify for the statutory custodial claim: (a) the appropriate relationship to the decedent and the claimant cannot have been convicted of financial exploitation, abuse, or neglect of the decedent; (b) cohabitation with the decedent; (c) personal care of the decedent; (d) three years of care prior to the decedent's death; and (e) surviving the decedent.

The three-year requirement of the statutory custodial claim is strictly enforced. *In re Estate of Riordan,* 351 Ill.App.3d 594, 814 N.E.2d 597, 286 Ill.Dec. 609 (3d Dist. 2004). In *Riordan,* the decedent's son, who was a Roman Catholic priest, had cared for his disabled mother on a full-time basis for two and one-half years prior to her death. He argued that he met the three-year requirement for a statutory custodial claim in one of two ways: (a) he should be credited for the times he spent living with his mother during his vacations and for the visits he had with his mother two to three times per week; or (b) he had "constructively complied" with the three-year requirement because he had intended to live with and care for his mother for that period, and it was only because she died before the three-year period that he had been prevented from fulfilling that requirement. 814 N.E.2d at 599 – 600. The *Riordan* court rejected both arguments and held that the claimant had not met the three-year requirement to sustain a statutory custodial claim.

The dollar amount to which the caretaker is entitled is subject to court determination and the available assets of the estate. 755 ILCS 5/18-1.1. The award is based on the amount of disability of the decedent with minimum awards as set forth in the statute. The minimum amounts are (a) $180,000 for 100-percent disability, (b) $135,000 for 75-percent disability, (c) $90,000 for 50-percent disability, and (d) $45,000 for 25-percent disability. *Id.* A statutory custodial claim is a first-class claim against the estate. 755 ILCS 5/18-10.

The factors that a court is to consider in setting the amount of the claim include the lost employment opportunities of the claimant, the lost lifestyle opportunities of the claimant, and the emotional distress experienced by the claimant in caring for the decedent. However, the court may reduce the claim amount if the living arrangements were intended to and did in fact provide a physical or financial benefit to the claimant. The factors a court may consider in reducing the claim amount include the free or low cost of housing provided to the claimant, alleviation of the claimant's need for full-time employment, any financial benefits provided to the claimant, the personal care received by the claimant from the decedent or others, and the proximity of the care provided by the claimant to the decedent to the time of the decedent's death. 755 ILCS 5/18-1.1.

In *In re Estate of Hale,* 383 Ill.App.3d 559, 890 N.E.2d 1244, 322 Ill.Dec. 325 (1st Dist. 2008), the appellate court ruled that although the statute requires a minimum of three years of care, once that condition is satisfied, the dollar amount of the claim is based on the entire term that such care is provided. In *Hale,* the care was provided for nine and one-half years, and the claimant should have been awarded an amount for that entire period. This recovery amount is not limited to three years or the five-year general statute of limitations.

A statutory custodial claim may be filed only against a decedent's estate (not a guardianship estate) and only after the individual with a disability dies. *In re Estate of Gebis,* 186 Ill.2d 188, 710 N.E.2d 385, 237 Ill.Dec. 755 (1999).

Although whether a claimant suffered loss of employment opportunities, lifestyle opportunities, or emotional distress is probative, §18-1.1 does not mean that a claimant may not recover in the absence of those factors, nor need a claimant show "full-time service" to the person with a disability. *In re Estate of Rollins,* 269 Ill.App.3d 261, 645 N.E.2d 1026, 1033, 206 Ill.Dec. 774 (1st Dist.), *appeal denied,* 162 Ill.2d 568 (1995). In fact, the claimant need not even personally provide services to the individual with a disability. *In re Estate of Lower,* 365 Ill.App.3d 469, 848 N.E.2d 645, 302 Ill.Dec. 346 (2d Dist. 2006). In *Lower,* the court found that the decedent, who died in August 2003, was 100-percent disabled from Parkinson's disease since at least 1999, thereby meeting the first requirement of a statutory custodial claim that the decedent be disabled for at least three years. The court also found that the evidence supported a finding that the decedent's widow, although herself prevented from physically caring for the decedent by the effects of a stroke, had directed his care for the statutory period. The widow supervised the caregivers employed in the home and made sure that the decedent received quality care, that his food was served, that he had clean clothes, that his needs were attended to, that appointments were made, that instructions from doctors were carried out, and that medications were properly administered. The widow was with the decedent 24 hours a day, gave up social activities, and devoted herself to the decedent's care, even though she could not physically perform all of the care required by the decedent. The evidence also showed that the widow was the only person who could understand the decedent because of the advancing Parkinson's disease and communicated all of his needs to caregivers who carried out the physical tasks involved in the decedent's care. The court affirmed a statutory custodial claim in favor of the widow.

The custodial care claim provision has been held to be constitutional by the Supreme Court. In *In re Estate of Jolliff,* 199 Ill.2d 510, 771 N.E.2d 346, 264 Ill.Dec. 642 (2002), the court upheld the constitutionality of this statute against equal protection, due-process, special legislation, and separation of powers arguments.

As an alternative to the statutory custodial claim, §11a-18.1 of the Probate Act provides for a "conditional gift" that is established in a guardianship estate. 755 ILCS 5/11a-18.1.

2. Other Claims for Care of Decedent Before Death

a. [5.46] Implied Agreements

Because the requirements of the statutory custodial claim are often hard to satisfy (the care may be for less than three years, the caretaker may not have the required familial relationship, or cohabitation with the decedent may not have occurred), many caretakers have only the option of filing a claim against the decedent's estate as a nursing claim or a regular claim for services provided to the decedent. These claims, however, rarely are based on written contracts and thus cause much litigation in estates. These cases often turn on whether an implied agreement existed to pay for such personal services.

The lack of an explicit agreement between a decedent and a claimant to pay the claimant for the services rendered does not bar recovery by the claimant on a claim for personal services. Illinois courts have examined this issue in several cases. In *In re Estate of Dal Paos,* 118 Ill.App.2d 235, 254 N.E.2d 300 (5th Dist. 1969), the court found that a claimant who nursed the decedent provided services beyond those contemplated by the parties' agreement to share expenses and that the claimant established an implied promise by the decedent to pay for the reasonable value of the services. The lack of an explicit agreement did not preclude an implied agreement to pay for those services known to and accepted by the decedent.

Similarly, the court found that when a claimant had provided services to the decedent and his wife at the wife's request and to the decedent at his request following the wife's death, the claimant was entitled to recover the value of the services from the decedent's estate. *In re Estate of Mallas,* 100 Ill.App.2d 88, 241 N.E.2d 482 (1st Dist. 1968). There was no reason to suppose that the services were gratuitously rendered.

A subsequent case relied on *Mallas* to reach a similar conclusion. In *Estate of Sewart,* 236 Ill.App.3d 1, 602 N.E.2d 1277, 177 Ill.Dec. 105 (1st Dist. 1991), Irene and Eugene Popham cared for the decedent after he was unable to care for himself. The decedent's will left everything to Eugene Popham and did not make any residuary disposition. Eugene Popham predeceased the decedent. The decedent's heirs claimed that they were entitled to the residuary estate, but Irene Popham claimed that Eugene's estate was entitled to the entire residue. Irene Popham filed a claim to enforce the contract she claimed existed between the decedent and the Pophams. The appellate court reversed the probate court's entry of summary judgment for the heirs, quoting *Mallas, supra,* 241 N.E.2d at 484 – 485:

> **When no kin or family relationship exists between the parties, and one accepts and retains the beneficial results of another's services, which were rendered at his own insistence and request and which he had no reason to suppose were gratuitous, the law will imply liability for such services in such an amount as they are reasonably worth.** 602 N.E.2d at 1284.

As the *Sewart* court noted, when services are rendered by one person for another and are knowingly and voluntarily accepted, the law presumes that the services were given and received in expectation of payment. *In re Estate of Teall,* 329 Ill.App.3d 83, 768 N.E.2d 124, 263 Ill.Dec. 364 (1st Dist. 2002). An implied contract can be inferred from the circumstances, conduct, and acts of the parties showing an intention to be bound. *Frey v. Belleville News-Democrat, Inc.,* 64 Ill.App.3d 495, 381 N.E.2d 705, 21 Ill.Dec. 378 (5th Dist. 1978).

b. [5.47] Claims by Nonrelatives

A lack of a family relationship is a key factor in determining whether an implied agreement for compensation existed. When there is no family relationship between a claimant and the decedent, and the decedent accepted and retained the beneficial results of the claimant's services that were rendered at the decedent's request, and for which there was no reason to believe the services were rendered gratuitously, the law implies a liability for the reasonable value of the services. *Runowicz v. Rock Island Bank & Trust Co.,* 90 Ill.App.2d 222, 232 N.E.2d 459 (3d Dist. 1967). As noted in §5.46 above, in the absence of a family relationship, a claimant may recover under an implied contract theory without the need to prove an explicit agreement. *In re Estate of McWain,* 77 Ill.App.2d 359, 222 N.E.2d 576 (4th Dist. 1966); *In re Estate of Pomeroy,* 21 Ill.App.3d 648, 316 N.E.2d 231 (1st Dist. 1974).

The general rule in Illinois is that the consideration for the promise must be conferred prior to the promise that forms the basis of the alleged contract. If not, the consideration does not support a valid contract. The exception to the general rule is discussed in *Estate of Casey v. Harris Trust & Savings Bank,* 222 Ill.App.3d 12, 583 N.E.2d 83, 86, 164 Ill.Dec. 529 (1st Dist. 1991), in which the court found that the claimant failed to establish how his situation fit into any of the exceptions described below:

> **(1) the consideration was rendered at the request of the promisor; (2) the alleged consideration was of a "beneficial" or "meritorious" nature which placed the promisor under a moral duty or obligation such that consideration for the promise will be implied; (3) the promise is to pay a debt due in "conscience," such as a promise to support an illegitimate child; or (4) the promise is founded upon an antecedent legal obligation, such as a debt which has become barred by the statute of limitations. (citation) Not every benefit conferred upon an individual is deemed to create a moral duty to repay which forms consideration for a promise of the person benefited to pay for the benefit. . . . [**C**]ircumstances must be of such a nature as to presuppose a request for the benefit.** Quoting *Worner Agency, Inc. v. Doyle,* 133 Ill.App.3d 850, 479 N.E.2d 468, 473, 88 Ill.Dec. 855 (4th Dist. 1985).

c. [5.48] Claims by Relatives

Services by relatives are generally presumed to be rendered without any expectation of payment. *In re Estate of Clausen,* 51 Ill.App.3d 18, 366 N.E.2d 162, 9 Ill.Dec. 48 (3d Dist. 1977); *In re Estate of White,* 15 Ill.App.3d 200, 303 N.E.2d 569 (3d Dist. 1973); *In re Moore's Estate,* 310 Ill.App. 365, 33 N.E.2d 130 (1st Dist. 1941). The presumption decreases in proportion to the remoteness of the family relationship and also varies with the duties performed.

In addition, the fact that the claimant did not demand payment before the decedent's death and that the amount to be paid was never mentioned does not preclude the claimant from recovering from the estate for the reasonable value of his or her services. *In re Estate of Dal Paos,* 118 Ill.App.2d 235, 254 N.E.2d 300 (5th Dist. 1969). It is not necessary that the claimant live in the same household with the decedent to overcome the presumption that the claimant is entitled to compensation. *Campion v. Tennes,* 93 Ill.App.3d 597, 417 N.E.2d 748, 49 Ill.Dec. 58 (1st Dist. 1981). Contributions of financial support for the decedent's welfare have also been presumed to have been made gratuitously, and claims for repayment must overcome this presumption. *In re Estate of Hill,* 88 Ill.App.3d 1038, 411 N.E.2d 77, 44 Ill.Dec. 171 (5th Dist. 1980).

A number of cases describe the presumptions and evidentiary standards regarding claims for relatives. *See Campion, supra.* In *In re Estate of Devoy,* 231 Ill.App.3d 883, 596 N.E.2d 1339, 173 Ill.Dec. 460 (5th Dist. 1992), the court reiterated the general rule of law in Illinois that a person who furnishes services to a family member is presumed to do so gratuitously. The *Devoy* court cited both *Hill* and *In re Estate of Foster,* 46 Ill.App.2d 319, 197 N.E.2d 257, 261 (5th Dist. 1964), and stated:

> **In order to overcome this presumption [**that a person who furnishes services to a family member is presumed to do so gratuitously**], the person requesting compensation from the estate must establish either an express contract or an implied "contract established by such facts and circumstances as show that both parties, at the time the services were rendered, contemplated or intended pecuniary recompense other than that which arises naturally out of the family relation."** 596 N.E.2d at 1343, quoting *Hill, supra,* 411 N.E.2d at 80.

In *In re Estate of Templeton,* 339 Ill.App.3d 310, 789 N.E.2d 1265, 273 Ill.Dec. 833 (4th Dist. 2003), for more than two years two nieces provided care for their aunt who lived with one of the nieces. The nieces filed claims against the aunt's estate under the implied agreement theory. The appellate court reversed the trial court's dismissal of the claims because the testimony of third parties that the decedent told them she wanted the nieces compensated for their services overcame the presumption that the services by these family members were gratuitous. The appellate court remanded the case to the trial court to then determine if the claimants had proved by clear and convincing evidence the existence of an implied agreement. *See also Estate of Jesmer v. Rohlev,* 241 Ill.App.3d 798, 609 N.E.2d 816, 182 Ill.Dec. 282 (1st Dist. 1993).

In *In re Estate of Walsh,* 2012 IL App (2d) 110938, 972 N.E.2d 248, 361 Ill.Dec. 763, the court addressed the presumption of gratuitous services in a near-familial relationship in detail. The claimant lived with the decedent for approximately 25 years, working for the decedent in his upholstery business as well as in the home, and providing caregiver services to the decedent during his final illness. During that period, the decedent provided the claimant a home and food, and there was ample testimony that the relationship between the men was close, including celebrating birthdays and holidays together, gifts from the decedent to the claimant, and the claimant's attendance at family events including funerals. The court concluded that the claimant and decedent shared a near-familial relationship that raised the presumption of gratuity. Once the presumption of gratuity is raised, the claimant must overcome the presumption in order to prevail on a claim for compensation for the services provided.

The presumption of gratuity may be overcome by evidence of an expressed contract or an implied contract. The factors relevant in rebutting the presumption of gratuity include (1) an express contract for the services; (2) an oral promise to leave property by will or an invalid or ineffective instrument, evidencing an intent to pay; (3) the circumstances under which the claimant first began providing services; (4) the decedent's failure or inability to reciprocate, either in money or in kind, for the services; (5) whether the decedent's estate was enhanced by the services provided; (6) whether the claimant provided extraordinary services that went beyond what is typically done in any normal domestic relationship; and (7) the financial condition of the parties. 202 IL App (2d) 110938 at ¶¶48 – 54. The court found that with respect to the work in the upholstery business, the claimant had rebutted the presumption of gratuity because the services were professional in nature and far beyond what is normal in a domestic relationship. Having rebutted the presumption, the claimant then had to prove his claim. A claim in quantum meruit has four elements: (1) the claimant provided services to the decedent; (2) the services were not performed gratuitously; (3) the decedent accepted the services; and (4) the claimant was not paid for the services. The court concluded that while the claimant proved three of the four elements, the claimant had not carried his burden of proof on the claim itself since he never introduced evidence that he expected to be paid beyond the room and board he received from the decedent.

d. [5.49] Claims of a Fiduciary for Personal Services

The courts have ruled that compensation may be recovered for services rendered the decedent by someone in a fiduciary relationship, such as a power of attorney. *In re Estate of Brumshagen,* 27 Ill.App.2d 14, 169 N.E.2d 112 (2d Dist. 1960); *In re Estate of Teall,* 329 Ill.App.3d 83, 768 N.E.2d 124, 263 Ill.Dec. 364 (1st Dist. 2002).

e. [5.50] Court Will Not Rewrite Contract If Express Contract Exists

When a contract existed between a claimant and the decedent prior to the decedent's death, the court in *In re Estate of Pomeroy,* 21 Ill.App.3d 648, 316 N.E.2d 231 (1st Dist. 1974), concluded that it would not award additional compensation for the housekeeper on her claim against the employer's estate for the value of the housekeeper's services prior to death.

VIII. [5.51] CLAIMS AGAINST NONPROBATE PROPERTY

In recent years, nonprobate assets, such as funded living trusts, retirement assets (individual retirement accounts (IRAs), 401(k) accounts, profit-sharing plans, Keogh plans, etc.), life insurance, and joint tenancy assets comprise most, if not all, of a decedent's assets at death. If the decedent does not have sufficient probate assets to fully satisfy a claim, the claimant may want to proceed against nonprobate assets to satisfy the claim. This means that attorneys for both claimants and the representative of the decedent (or the distributee of the nonprobate assets) must know if those other assets are liable for claims against the decedent.

A. [5.52] Living Trusts

Living trusts are used to avoid probate. Because living trusts are revocable by the settlor, it is unquestioned that in Illinois the creditors of a living person can reach the assets in such a person's

living trust. However, after the settlor's death, the living trust becomes irrevocable. Can the creditors of the decedent recover on a claim against the living trust after the decedent's death? The answer is probably not, unless the provisions of the living trust allow or require the living trust assets to be used to satisfy the decedent's debts after death. *See Matthews v. Serafin,* 319 Ill.App.3d 72, 744 N.E.2d 934, 253 Ill.Dec. 201 (3d Dist. 2001) (holding valid claim against decedent's estate could not be satisfied from assets of decedent's living trust absent fraudulent conveyance to trust).

One issue regarding creditors of living trusts that is clear in Illinois involves satisfying a surviving spouse's statutory share from the living trust. The status in Illinois of living trust assets being subject to a surviving spouse's statutory share is an anomaly compared to the rest of the country. In the seminal Illinois case *Johnson v. La Grange State Bank,* 73 Ill.2d 342, 383 N.E.2d 185, 22 Ill.Dec. 709 (1978), the court concluded that an inter vivos transfer of property is valid to defeat the marital rights of the surviving spouse, unless the transaction is tantamount to a fraud as manifested by the absence of donative intent to make a conveyance of a present interest in the property. Although the court in *Johnson* reached its decision without applying the Lifetime Transfer of Property Act, 755 ILCS 25/0.01, *et seq.,* because the effective date of that legislation was after the transfers at issue in *Johnson,* the court nonetheless observed that the legislation had retained "intent to defraud" as necessary to be established in proving the invalidity of a transfer on the ground that it was illusory. 383 N.E.2d at 192.

See also In re Estate of Defilippis, 289 Ill.App.3d 695, 683 N.E.2d 453, 225 Ill.Dec. 285 (1st Dist. 1997); *Hofmann v. Hofmann,* 94 Ill.2d 205, 446 N.E.2d 499, 510, 68 Ill.Dec. 593 (1983); *In re Estate of Prusis,* 105 Ill.App.3d 494, 434 N.E.2d 443, 61 Ill.Dec. 290 (1st Dist. 1982); *In re Estate of Nemecek,* 85 Ill.App.3d 881, 407 N.E.2d 655, 41 Ill.Dec. 157 (1st Dist. 1980); *Lesnik v. Estate of Lesnik,* 82 Ill.App.3d 1102, 403 N.E.2d 683, 38 Ill.Dec. 452 (1st Dist. 1980).

Thus, in Illinois a spouse can fund a living trust before death and defeat the surviving spouse's statutory share even though almost every other state takes the opposite position (based on the will substitute theory of a living trust). In *In re Marriage of Centioli,* 335 Ill.App.3d 650, 781 N.E.2d 611, 269 Ill.Dec. 814 (1st Dist. 2002), the court specifically recognized this result even when the parties were in the middle of a dissolution when the spouse transferred funds to the living trust.

One case that has allowed a claim to be satisfied against living trust assets is *Society of Lloyd's v. Estate of McMurray,* 274 F.3d 1133 (7th Cir. 2001). In this case, the famous English regulator of insurance, Lloyd's of London, was suing McMurray in England while McMurray was alive but did not obtain a judgment against McMurray until after McMurray's death. McMurray created and funded a living trust before the English lawsuit was filed. An Illinois probate estate was opened upon McMurray's death, and a claims notice was sent to Lloyd's. Lloyd's registered its English judgment in the District Court for the Northern District of Illinois and filed a citation to discover assets against McMurray's estate and living trust. The district court granted the estate's motion to quash the citation because Lloyd's failed to file a claim against the estate within the two-year claims bar date. The district court denied the motion to quash against the living trust and allowed Lloyd's to proceed against the living trust, stating that

the two-year claims bar date did not apply to the living trust. Instead, the seven-year statute of limitations concerning enforcement of foreign money judgments applied. Also noteworthy in *Lloyd's* is the district court's discussion concerning the interpretation of the living trust's language that directed the trustee to pay the decedent's legally enforceable debts.

Rush University Medical Center v. Sessions, 2012 IL 112906, 980 N.E.2d 45, 366 Ill.Dec. 245, involved a creditor's claim that a decedent's transfer of assets to a self-settled creditor protection irrevocable trust was per se fraudulent under the common-law rule set forth in *Crane v. Illinois Merchants Trust Co.,* 238 Ill.App. 257 (1st Dist. 1925). The Supreme Court held that the Uniform Fraudulent Transfer Act, 740 ILCS 160/1, *et seq.,* is not incompatible with nor does it supersede the common-law rule in *Crane*. The decedent had made a charitable pledge prior to his death and subsequently funded his irrevocable trust. The trust was a spendthrift trust created in the Cook Islands, the decedent was the lifetime beneficiary and retained the right as a trust protector to appoint or remove any trustee and to veto any discretionary distributions, and the trust prohibited the use of trust assets to pay the creditors of the decedent or his estate. Common law provides that if a settlor creates a self-settled trust and inserts a spendthrift provision, that clause is void as to the settlor's creditors (both existing and future), even if the transfer is not fraudulent and the settlor had no intent to defraud creditors. Under the facts presented in *Sessions*, the Supreme Court held that that the medical center was a creditor of the decedent and could recover against the assets of the living trust.

For an interesting case discussing the interpretation of a tax clause within a living trust, *see In re Estate of Matthews,* 409 Ill.App.3d 780, 948 N.E.2d 187, 193, 350 Ill.Dec. 118 (1st Dist. 2011), concluding that the tax clause, which called for the payment from the living trust of "all governmental charges, taxes or liens imposed upon my estate or upon the interest of any and all beneficiaries . . . relating to the transfer of property by descent or devise" did not obligate the trust to pay real estate taxes associated with a parcel of property distributed from the trust to a beneficiary, because the real estate taxes are liens against the property and thus are not obligations of a probate estate or living trust upon a descendant's death.

B. [5.53] Joint Tenancy Assets

The general rule is that except for fraudulent conveyances, creditors have no rights against property held in joint tenancy by the decedent and another person, because the decedent's interest passes directly to the surviving tenant free of any claims of creditors. Thus, for example, the decedent's home, which is frequently held in joint tenancy with the surviving spouse, usually is not subject to creditors' claims at a spouse's death. See Donald Kepner, *Five More Years of the Joint Bank Account Muddle,* 26 U.Chi.L.Rev. 376 (1959); Mary Lou Haddad, *The Joint Tenancy Bank Account for Convenience: A Boon to Litigation,* 72 Ill.B.J. 538 (1984); Robert E. Hunt, *What About That Joint Bank Account?,* 52 Ill.B.J. 30 (1963); Henry R. Barber and Bernard G. Segatto, *Joint Tenancy Property and Estate Planning,* 1959 U.Ill.L.F. 1022, 1033.

The intrinsic feature of joint tenancy is the right of survivorship, which entitles the last surviving joint tenant to take the entire estate so that title vests automatically upon the death of the deceased joint tenant. A surviving joint tenant succeeds to the share of the deceased joint

tenant by virtue of the conveyance that created the joint tenancy, not as the successor of the decedent. *Harms v. Sprague,* 105 Ill.2d 215, 473 N.E.2d 930, 85 Ill.Dec. 331 (1984); *In re Estate of Alpert,* 102 Ill.App.3d 600, 430 N.E.2d 181, 58 Ill.Dec. 239 (1st Dist. 1981), *aff'd,* 95 Ill.2d 377 (1983).

Note, however, that the rules applicable to a joint tenancy in real property do not necessarily apply to a joint bank account. A joint bank account is subject to the provisions of the agreement between the bank and its depositors, and an agreement allowing one joint depositor unilaterally to pledge the interests of all joint depositors would result in the pledge surviving the death of the joint tenant-pledgor. *Pescetto v. Colonial Trust & Savings Bank,* 111 Ill.2d 314, 489 N.E.2d 1365, 95 Ill.Dec. 501 (1986).

Also note the special status of joint tenancy real estate that is encumbered. At common law, the doctrine of exoneration provides that a devisee of real estate that was encumbered by a testator in the testator's lifetime is entitled to a discharge of the lien from the testator's personal estate, unless the testator directed otherwise in a will. *Griffin v. Gould,* 72 Ill.App.3d 747, 391 N.E.2d 124, 28 Ill.Dec. 925 (1st Dist. 1979). Section 20-19 of the Probate Act, 755 ILCS 5/20-19, abrogates the doctrine of exoneration, and a surviving joint tenant takes the real estate subject to the lien and is not entitled to have the indebtedness paid in whole or in part from the decedent's probate estate. The statute assumes the existence of a lien indebtedness against the real estate interest, referred to as an "encumbrance." The requisite is that the real estate be "subject to an encumbrance." *Id. See also Alpert, supra; Pescetto, supra; Harms, supra.*

C. [5.54] Life Insurance Proceeds

Under §238 of the Illinois Insurance Code, 215 ILCS 5/1, *et seq.,* the creditors of a decedent have no rights against life insurance proceeds payable to a named beneficiary. 215 ILCS 5/238. However, if the proceeds are payable to the estate, the proceeds may be used to satisfy claims just as any other asset in the estate. If the premiums are paid in fraud of creditors, the death benefits are not subject to administration but can be reached by the creditors. 215 ILCS 5/238. *See In re Estate of Grigg,* 189 Ill.App.3d 5, 545 N.E.2d 160, 136 Ill.Dec. 636 (1st Dist. 1989).

Note, however, a 2007 ruling in a dissolution context in which the claimant argued that insurance proceeds payable to an estate should be considered as held by the estate in constructive trust. *In re Estate of Beckhart,* 371 Ill.App.3d 1165, 864 N.E.2d 1002, 309 Ill.Dec. 761 (3d Dist. 2007). In *Beckhart,* the decedent's ex-wife, as mother and next friend of their minor son, filed a claim in the decedent's probate estate for the insurance proceeds payable to the estate. Under the terms of the Beckharts' dissolution decree, the decedent was required to designate his minor son as the beneficiary of all employer-provided life insurance. The decedent's employer provided a no-cost life insurance policy to the decedent, which by default named the decedent's estate as the beneficiary. The decedent never changed the beneficiary designation to name his minor son as beneficiary. Within one month of the decedent's death, the ex-wife filed a claim against the probate estate, asserting the minor son's entitlement to "the proceeds of any life insurance policies provided to decedent by his employer" pursuant to the terms of the dissolution decree. 864 N.E.2d at 1004. The claim was filed prior to the time that the proceeds were paid to the estate. Approximately one year later, the ex-wife, through new counsel, subsequently amended

her pleadings to include a motion to establish a constructive trust. The estate defended, asserting an affirmative defense of laches and arguing that the insurance proceeds had been disbursed to pay estate administrative expenses. The appellate court held that the minor son obtained a vested, contingent right to the policy proceeds when the dissolution decree became final. Accordingly, the court held that the estate was without authority to use the proceeds to pay estate expenses. Because the estate received property belonging to the minor son and was on notice of the claim to the policy proceeds, the remedy of constructive trust was appropriate. Even though the administrator thought the proceeds were available for estate expenses, the administrator had a duty to transfer the insurance proceeds to the minor child. The court readily dismissed the estate's argument that laches applied, finding that a five-year statute of limitations for constructive trust applied, and that the ex-wife promptly filed the claim and then amended her pleadings to include a motion for a constructive trust within a year of the decedent's death. It is clear from *Beckhart* that a representative who is on notice of a claim to insurance policies payable to an estate should hold the entirety of the proceeds in a separate account until the claim of ownership is resolved and should not use the insurance proceeds to fund the expenses of litigation.

For a situation somewhat the reverse of *Beckhart, see In re Estate of Trevino,* 381 Ill.App.3d 553, 886 N.E.2d 530, 319 Ill.Dec. 767 (2d Dist. 2008) (marital settlement agreement requiring decedent's death benefits be payable to decedent's minor children included life insurance policy payable to decedent's ex-spouse, and therefore constructive trust for minor children's benefit was imposed on policy proceeds).

D. [5.55] Retirement Accounts

Retirement plan benefits generally are not subject to the decedent's creditors. The Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. No. 93-406, 88 Stat. 829, codified at 29 U.S.C. §1001, *et seq.,* mandates that the employee's interest must be nontransferable, and these interests are exempt from creditors. See generally William T. Vukowich, *Debtors' Exemption Rights,* 62 Geo.L.J. 779, 822 – 824 (1974). Similarly, individual retirement accounts and other non-ERISA retirement benefits generally provide for exemption from creditors both during the participant's life and after the participant's death under state law in Illinois. *See Peoples Finance Co. v. Saffold,* 83 Ill.App.3d 120, 403 N.E.2d 765, 38 Ill.Dec. 534 (3d Dist. 1980); *Dinwiddie v. Baumberger,* 18 Ill.App.3d 933, 310 N.E.2d 841 (1st Dist. 1974).

Although beyond the scope of this chapter, note that in the Seventh Circuit (and contrary to other federal circuits), an inherited IRA, meaning an IRA that was established by one person who designated a second person as the beneficiary upon the first person's death and upon the first person's death the IRA continues for the benefit of the second person, is subject to the creditors of the second person because the inherited IRA is not a "retirement fund" under §§522(b)(3)(c) and 522(d)(12) of the Bankruptcy Code, 11 U.S.C.A. §101, *et seq. In re Clark*, 714 F.3d 559 (7th Cir. 2013).

E. [5.56] Illinois Land Trusts

The Illinois Supreme Court in *In re Estate of Alpert,* 95 Ill.2d 377, 447 N.E.2d 796, 69 Ill.Dec. 361 (1983), held that property held in a land trust in joint tenancy does not become part

of a probate estate upon the death of the first joint tenant and is not available to pay off an assignment of beneficial interest in the land trust to secure a loan. The court in *Alpert* ruled that the assignment of the beneficial interest in the land trust to the assignee bank for purposes of securing a loan gave the bank a personal property interest only and not a direct interest in the property of the trust, and the assignment of the beneficial interest did not create an equitable real estate mortgage in the assignee.

The Supreme Court held that the bank's claim could not be satisfied solely and separately against the joint tenancy property held in the land trust. The court also cited Probate Act §20-19, now codified at 755 ILCS 5/20-19, concerning no exoneration of encumbered interests in real estate and acknowledged that §20-19 is specifically applicable except as otherwise expressly provided by the decedent's will. If the will has any direction as to the payment of debts, §20-19 is not applicable.

F. [5.57] *Totten* Trust Accounts

Creditors' claims against *Totten* trust accounts generally arise in the context of a surviving spouse claiming that these funds are subject to the spouse's statutory share.

Totten trusts are savings accounts usually in the name of the owner as trustee for the benefit of another. *In re Totten,* 179 N.Y. 112, 71 N.E. 748 (1904). They are held to be enforceable by the beneficiary upon the death of the depositor as to any funds remaining at the depositor's death, and thus the account does not pass through the decedent's estate. *In re Estate of Petralia,* 32 Ill.2d 134, 204 N.E.2d 1 (1965). In *Montgomery v. Michaels,* 54 Ill.2d 532, 301 N.E.2d 465 (1973), the court held that a *Totten* trust could not be used to defeat a surviving spouse's statutory share in the estate of his deceased spouse on the theory that a *Totten* trust is illusory as against a surviving spouse. This decision also contains dicta to the extent that *Totten* trust funds may be made available for the payment of creditors if the estate's funds were insufficient for that purpose.

Moreover, after *Montgomery,* Illinois enacted the Lifetime Transfer of Property Act, 755 ILCS 25/0.01, *et seq.,* which provides in relevant part:

> **An otherwise valid transfer of property, in trust or otherwise, by a decedent during his or her lifetime, shall not, in the absence of an intent to defraud, be invalid, in whole or in part, on the ground that it is illusory because the decedent retained any power or right with respect to the property.** 755 ILCS 25/1.

The Lifetime Transfer of Property Act also states that the Act applies to savings account trusts established on or after September 16, 1977, and as to all other transfers, it is declaratory of existing law. 755 ILCS 25/2. The illusory trust, a doctrine of *Montgomery, supra,* appears to have been statutorily overturned by this legislation.

G. [5.58] Payable-on-Death Accounts

Payable-on-death (POD) accounts are authorized by the Illinois Trust and Payable on Death Accounts Act, 205 ILCS 625/1, *et seq.,* effective January 1, 1986. The statute does not say

anything concerning the rights of creditors to POD accounts. See generally William M. McGovern, Jr., *The Payable on Death Account and Other Will Substitutes,* 67 Nw.U.L.Rev. 7 (1972).

In *Johnson v. Garellick,* 118 Ill.App.2d 80, 254 N.E.2d 597, 598 (1st Dist. 1969), a man named his brother as beneficiary of a POD account but assured his wife, "That doesn't mean anything. . . . The money will be yours." The court awarded the account to the brother on the theory that the written agreement with the savings institution was conclusive. POD accounts differ from joint tenancy accounts since the POD payee cannot make withdrawals during the depositor's lifetime. For a good review of POD accounts law in Illinois, *see Cotton v. First State Bank of Mendota,* 182 Ill.App.3d 400, 537 N.E.2d 1103, 130 Ill.Dec. 774 (3d Dist. 1989).

In re Estate of Weiland, 338 Ill.App.3d 585, 788 N.E.2d 811, 273 Ill.Dec. 220 (2d Dist. 2003), provides a discussion on the burden of proof in establishing POD or *Totten* trust accounts, the effect on a guardianship and probate estate of a ruling on whether accounts are POD, and claims filed against the estate by the POD account beneficiaries.

Query whether the transfer-on-death (TOD) accounts now authorized for brokerage accounts in Illinois have the same rules regarding availability of assets in the account for the decedent's creditor.

On January 1, 2012, the Illinois Residential Real Property Transfer on Death Instrument Act, 755 ILCS 27/1, *et seq.,* became effective. The Act creates a transfer-on-death deed (TODD), which is revocable as a nontestamentary interest. The revocation may be effectuated in a non-recorded instrument or by will. To create a TODD, the owner must have testamentary capacity, and the TODD must include all of the essential elements and formalities of a deed and be recorded in the recorder's office prior to the owner's death. In addition, a TODD must be executed with the formalities of a will, with two or more credible witnesses and an attestation clause. 755 ILCS 27/45. The owners of real property who are married or are partners in a civil union may own the property as tenants by the entirety during their lifetimes. Beneficiaries of TODDs have the right to disclaim the transfer upon the owner's death.

The Act provides that a beneficiary of a TODD is subject to the claims of creditors to the same extent as a beneficiary of any nontestamentary transfer. Essentially, that means that the transfer is not subject to claims unless it was a fraudulent transfer. To accept the transfer, the beneficiary must file a statutory notice of death affidavit and acceptance within two years, or the property reverts back to the owner's estate. Note that the two-year period is the same as the two-year absolute claims bar date. If a probate estate is opened, there is a six-month period in which a challenge to the TODD may be brought. Note that the six-month challenge period corresponds to the six-month will contest period. 755 ILCS 27/90.

H. [5.59] Spendthrift Trusts

If a person is the beneficiary of a spendthrift trust, can a creditor of the beneficiary reach the trust assets to satisfy the debt in contradiction of the spendthrift clause? The answer is generally not in Illinois except to satisfy any child support obligations of the beneficiary.

Section 2-1403 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.,* provides that no judgment shall be satisfied out of any property held in trust for the judgment debtor if the trust has, in good faith, been created by, or if the funds held in trust have come from, a person other than the judgment debtor. 735 ILCS 5/2-1403. Section 2-1403 also provides that the income or principal of a trust shall be subject to withholding for purposes of securing collection of unpaid child support obligations owed by the beneficiary as provided in §22 of the Non-Support Punishment Act, 750 ILCS 16/1, *et seq*. Section 2-1403 reads in part:

> **(1) income may be withheld if the beneficiary is entitled to a specified dollar amount or percentage of the income of the trust, or is the sole income beneficiary; and**
>
> **(2) principal may be withheld if the beneficiary has a right to withdraw principal, but not in excess of the amount subject to withdrawal under the instrument, or if the beneficiary is the only beneficiary to whom discretionary payments of principal may be made by the trustee.** 735 ILCS 5/2-1403.

A case dealing with a spendthrift clause is *Safanda v. Castellano,* No. 14 CV 07094, 2015 WL 1911130 (N.D.Ill. Apr. 27, 2015). In *Safanda* the bankruptcy trustee sought to include assets from a trust in which the debtor-defendant, Castellano, had a discretionary interest. The discretionary trust contained a spendthrift clause and was created pursuant to the terms of the debtor's mother's living trust upon the mother's death. The court found that Castellano's beneficial interest was subject to a valid nonbankruptcy restriction on transfer and consequently was not included in her bankruptcy estate. *See also In re Rowand,* No. 11-81717, 2012 WL 3070215 (Bankr. C.D.Ill. July 30, 2012) (discretionary trust that granted debtor unrestricted right to withdraw trust property became effective only after bankruptcy petition was filed was not part of bankruptcy estate).

I. [5.60] Gifts

Gifts made by the decedent before death become the property of the donees and are not subject to creditors' claims unless they are fraudulent conveyances.

J. [5.61] Disclaimers

Under Probate Act §2-7, 755 ILCS 5/2-7, a disclaimer relates back to the date of the decedent's death and has the legal effect of barring passage of title to the disclaimant or the vesting of an estate in the disclaimant. *Tompkins State Bank v. Niles,* 127 Ill.2d 209, 537 N.E.2d 274, 130 Ill.Dec. 207 (1989). *See also In re Estate of Hansen,* 109 Ill.App.2d 283, 248 N.E.2d 709 (1st Dist. 1969). This rule applies in the context of a beneficiary of an estate who has a creditor the beneficiary wants to avoid by refusing to take the bequest.

Illinois has numerous cases that support the holding that a disclaimer is effective to the date of the decedent's death even when the effect of the disclaimer acts to defeat the rights of creditors or taxing authorities. *In re Estate of Aylsworth,* 74 Ill.App.2d 375, 219 N.E.2d 779 (3d Dist. 1966). See also William A. Peithmann, *An Introduction to the Rules of Disclaimers,* 37 ISBA Est.Plan.Prob. & Tr.Sec. Council Newsl., No. 2 (Apr. 1991), also published in the ISBA Law Ed Series, ESTATE PLANNING, PROBATE & TRUST UPDATE, pp. 121 – 212 (Feb. 1991).

The court in *Tompkins State Bank, supra,* concluded that creditors cannot compel a beneficiary to accept a devise against the beneficiary's wishes and may not set aside a disclaimer as a conveyance within the scope of the fraudulent conveyance statute. *See also In re Estate of Heater,* 266 Ill.App.3d 452, 640 N.E.2d 654, 203 Ill.Dec. 734 (4th Dist. 1994).

K. [5.62] Unadministered Estates/Small Estate Affidavit

For many decedents with smaller estates, a formal probate estate will not be opened, but instead, one of the statutory probate substitutes will be used. What happens to creditors' claims in these cases?

Probate Act §25-1 provides that in any estate with a gross value of the personal property less than $100,000, those assets can be transferred to the heirs, legatees, or other persons entitled to the funds pursuant to a small estate affidavit. 755 ILCS 5/25-1. Any unpaid creditor can follow the property and recover from those transferees. However, recovery by the creditor is not possible against the decedent's debtor who transferred property pursuant to a small estate affidavit even if the affidavit is incorrect or misrepresents the size of the decedent's estate because the statute specifically releases the debtor from such liability. 755 ILCS 5/25-1(d). All statements made in the small estate affidavit are made by the affiant under the penalties of perjury as defined in §32-2 of the Criminal Code of 2012, 720 ILCS 5/32-2. The statute further provides that each person to whom payment, delivery, transfer, access, or issuance is made or given is answerable to any person having a prior right and is accountable to any representative of the estate. 755 ILCS 5/25-1(d).

Any creditor or heir of the decedent who relies on the small estate affidavit and who incurs loss because of that reliance is entitled to bring action against the affiant. The person signing the small estate affidavit is required to indemnify and hold harmless all creditors of the decedent up to the amount lost because of the act or omission of the affiant. 755 ILCS 5/25-1(e). Any person recovering under Probate Act §25-1(e) shall be entitled to reasonable attorneys' fees and expenses of recovery. *Id.* Therefore, it would appear that a creditor would have a remedy against the person signing a small estate affidavit if assets are received by the affiant and not used to pay the debts of the decedent prior to distribution.

Section 25-1(b) of the Probate Act provides the requirements of a small estate affidavit.

6 Construing and Modifying Wills and Irrevocable Trusts

RICHARD A. CAMPBELL
GINA E. ODERDA
Mayer Brown LLP
Chicago

This chapter includes material provided by Susan W. Drewke and Caitlin E. Abram for previous editions of this handbook.

I. [6.1] INTRODUCTION

Irrevocable trusts and wills (after the death of the testator) are meant to be final documents that cannot be changed. That said, quite frequently attorneys are faced with clients who have some interest in the irrevocable document and who seek to change or construe the irrevocable trust or will. Often, the irrevocable instrument is no longer accomplishing the intent of the settlor or testator. Sometimes, provisions in the instrument are simply unclear or, in other words, ambiguous. Under Illinois law, options exist that allow changes to or construction of irrevocable trusts, in limited circumstances. Wills are much more difficult to modify; in fact, under Illinois law, wills generally may not be reformed at all (except in extreme circumstances). *See, e.g., Graves v. Rose,* 246 Ill. 76, 92 N.E. 601 (1910); *Appleton v. Rea,* 389 Ill. 222, 58 N.E.2d 854 (1945). Testamentary trusts that are considered "will substitutes" may be reformed in Illinois, but only to correct minor scrivener's errors. *Handelsman v. Handelsman,* 366 Ill.App.3d 1122, 852 N.E.2d 862, 304 Ill.Dec. 406 (2d Dist. 2006). Illinois law allows both wills and trusts to be construed by a court, however, when an ambiguity exists. The law for the construction of wills and irrevocable trusts is generally the same. This chapter discusses options under Illinois law to construe or modify irrevocable trusts and wills.

II. [6.2] CONSTRUCTION

If provisions in a trust (or will) are ambiguous, a court of equity has jurisdiction to construe the meaning of those provisions under Illinois law. The primary purpose of a trust construction is to give effect to the settlor's intent when the governing document is ambiguous. In a construction action, a court proceeds in equity to resolve ambiguities in a will or trust instrument based on the court's determination of the intent of the settlor or testator. *See Duvall v. LaSalle National Bank, LaSalle, Illinois,* 177 Ill.App.3d 770, 532 N.E.2d 974, 975 – 976, 127 Ill.Dec. 145 (3d Dist. 1988). The court then enters an order that gives effect to that intent, as long as it is not in conflict with a rule of law or public policy. *See, e.g., In re Estate of Roller,* 377 Ill.App.3d 572, 880 N.E.2d 549, 558, 316 Ill.Dec. 813 (4th Dist. 2007).

Parties to construction proceedings often request that the court look to extrinsic evidence to illuminate the intent of the settlor or testator. The court's power and duty to admit extrinsic evidence in construction actions, however, is limited. A party who disagrees with the effect of a will or trust and believes that it does not reflect the intent of the settlor or testator cannot simply file a construction action and ask to introduce extrinsic evidence to prove that the settlor or testator intended something else. In the absence of an ambiguity, discussed in §§6.5 – 6.9 below, a court has no jurisdiction to construe an irrevocable instrument at all. When there is an ambiguity in a will or irrevocable trust, a court may resolve unanswered questions resulting from such ambiguity but cannot change or draft new instruments under the pretext of construction. *Johnston v. Cosby,* 374 Ill. 407, 29 N.E.2d 608, 611 (1940); *Steinke v. Novak,* 109 Ill.App.3d 1034, 441 N.E.2d 883, 886, 65 Ill.Dec. 568 (3d Dist. 1982). A court must take the instrument as it finds it, and only when it contains an ambiguity can the court look to outside evidence to construe it. *In re Estate of Laas,* 134 Ill.App.3d 504, 480 N.E.2d 1183, 1187, 89 Ill.Dec. 440 (1st Dist. 1985).

A. [6.3] Law of Construction: Same for Wills and Trusts

The same rules of construction apply to both wills and trusts. *Harris Trust & Savings Bank v. Donovan,* 145 Ill.2d 166, 582 N.E.2d 120, 123, 163 Ill.Dec. 854 (1991); *In re Estate of McInerny,* 289 Ill.App.3d 589, 682 N.E.2d 284, 289, 224 Ill.Dec. 723 (1st Dist. 1997); *Stein v. Scott,* 252 Ill.App.3d 611, 625 N.E.2d 713, 716, 192 Ill.Dec. 558 (1st Dist. 1993).

B. [6.4] When a Construction Proceeding Is Appropriate

A construction proceeding is appropriate any time there is an ambiguity in a will or trust that renders the rights and interests created by the instrument uncertain. *Jusko v. Grigas,* 26 Ill.2d 92, 186 N.E.2d 34, 37 (1962). Any party whose rights or interests are affected by the ambiguity can petition the court to construe the instrument to resolve the uncertainty. These parties include trustees, executors, settlors, and beneficiaries. In certain situations, even contingent remainder beneficiaries can bring a petition. *See, e.g., Login v. Newman,* 40 Ill.App.2d 454, 189 N.E.2d 782 (1st Dist. 1963) (holding that beneficiary's interest was vested since it was contingent on event that was certain to happen, so she thereby had sufficient interest to maintain construction suit).

A disagreement or dispute alone will not support a construction proceeding. There must be an ambiguity in the instrument before the court will engage in judicial construction. *In re Estate of Breckenridge,* 56 Ill.App.3d 128, 371 N.E.2d 1286, 1287, 14 Ill.Dec. 233 (4th Dist. 1978). *See also Brown Brothers Harriman Trust Co. v. Bennett,* 357 Ill.App.3d 399, 827 N.E.2d 1101, 1108, 293 Ill.Dec. 220 (1st Dist. 2005). A court will not construe a document simply because the parties disagree on its meaning or believe that it will lead to an unjust or unintended result. *See Stein v. Scott,* 252 Ill.App.3d 611, 625 N.E.2d 713, 716 – 717, 192 Ill.Dec. 558 (1st Dist. 1993); *Lloyd v. Sears Bank & Trust Co.,* 67 Ill.App.3d 141, 384 N.E.2d 742, 745, 23 Ill.Dec. 835 (1st Dist. 1978). If the settlor's or testator's words are clear as to their intention, the parties and the court must follow the plain meaning of the document. *Steinke v. Novak,* 109 Ill.App.3d 1034, 441 N.E.2d 883, 886, 65 Ill.Dec. 568 (3d Dist. 1982).

C. [6.5] Ambiguity Is Necessary To Plead a Cause of Action for Construction

An ambiguity is the essential element of a construction cause of action. An ambiguity is necessary for the court to assume jurisdiction, and the court will dismiss a construction action if the plaintiff does not allege an ambiguity. *See Lloyd v. Sears Bank & Trust Co.,* 67 Ill.App.3d 141, 384 N.E.2d 742, 745, 23 Ill.Dec. 835 (1st Dist. 1978) ("In suits involving the construction of a will or trust, the complaint is fatally defective if the language of the document is unambiguous."). Even if a party alleges an ambiguity in its complaint, a court will not assume jurisdiction over a dispute if it finds that no ambiguity exists. *Peck v. Drennan,* 411 Ill. 31, 103 N.E.2d 63, 66 (1951) (holding that court was without jurisdiction to construe will that was clear and certain, and stating that "court never acquires jurisdiction to construe a will merely by allegation that a question requiring construction exists, when the record shows there is no such question"); *Bartlett v. Mutual Ben. Life Ins. Co.,* 358 Ill. 452, 193 N.E. 501 (1934). *See also Jusko v. Grigas,* 26 Ill.2d 92, 186 N.E.2d 34, 37 (1962) ("The court does not acquire jurisdiction to construe a will merely because the complaint contains an allegation that a question requiring construction exists where the record shows no such question exists.").

1. [6.6] What Constitutes an Ambiguity

An ambiguity exists when the words of a will or trust are in conflict or are reasonably susceptible to more than one interpretation. *Coussee v. Estate of Efston,* 262 Ill.App.3d 419, 633 N.E.2d 815, 818, 199 Ill.Dec. 19 (1st Dist. 1994); *Stein v. Scott,* 252 Ill.App.3d 611, 625 N.E.2d 713, 716, 192 Ill.Dec. 558 (1st Dist. 1993). The court must determine, as a question of law, whether an ambiguity exists. *In re Estate of Steward,* 134 Ill.App.3d 412, 480 N.E.2d 201, 204, 89 Ill.Dec. 315 (2d Dist. 1985). An ambiguity exists if a will or trust is silent on a question or does not contain an express answer. *Steburg v. Swanson,* 198 Ill.App.3d 636, 556 N.E.2d 315, 317, 144 Ill.Dec. 848 (3d Dist. 1990); *Northern Trust Co. v. Winona Lake School of Theology,* 61 Ill.App.3d 966, 377 N.E.2d 1182, 1186, 18 Ill.Dec. 546 (1st Dist. 1978) ("where a will is silent on a particular question, in the sense that it contains no express answer to the question . . . a construction of the will is necessary"). However, if the settlor's or testator's words used in their ordinary sense are plain, and their meaning is clear, the court will simply apply those words without construing them. *Brown Brothers Harriman Trust Co. v. Bennett,* 357 Ill.App.3d 399, 827 N.E.2d 1101, 1108, 293 Ill.Dec. 220 (1st Dist. 2005); *Northern Trust, supra,* 377 N.E.2d at 1186 ("Where the words used in a trust agreement are plain and their meaning clear, the plain intention will prevail over the presumed intention."). Courts will consider the will or trust instrument as a whole when looking for ambiguity and will not examine each provision in isolation. *Bank of America, N.A. v. Carpenter,* 401 Ill.App.3d 788, 929 N.E.2d 570, 579, 340 Ill.Dec. 919 (1st Dist. 2010) (holding that settlor's trust was clear and unambiguous when read in its entirety, and, therefore, no construction was necessary). When the instrument is unambiguous, courts are not free to speculate as to what may have been the settlor's or testator's intention had he or she been aware of certain facts or subsequent events. *Steinke v. Novak,* 109 Ill.App.3d 1034, 441 N.E.2d 883, 886, 65 Ill.Dec. 568 (3d Dist. 1982). Moreover, the use of poor grammar or incorrect punctuation is not sufficient to sustain a construction suit; courts will try to determine the intent of the drafter without resorting to extrinsic evidence in spite of formal errors. *Mercantile Trust & Savings Bank v. Rogers,* 5 Ill.App.2d 162, 124 N.E.2d 683, 687 (3d Dist. 1955).

2. [6.7] Latent and Patent Ambiguities

The existence of any legal ambiguity allows the court to construe a will or trust. Traditionally, courts divided ambiguities into two categories — patent (or obvious) ambiguities and latent (or dormant) ambiguities. This distinction was originally significant because the courts would allow extrinsic evidence to resolve latent ambiguities only. *See Alford v. Bennett,* 279 Ill. 375, 117 N.E. 89, 91 (1917). Illinois courts later departed from this rule and now admit extrinsic evidence when necessary to resolve both patent and latent ambiguities. *Griffin v. Gould,* 104 Ill.App.3d 397, 432 N.E.2d 1031, 1033, 60 Ill.Dec. 132 (1st Dist. 1982). In *Weir v. Leafgreen,* 26 Ill.2d 406, 186 N.E.2d 293, 296 (1962), the Illinois Supreme Court concluded that it is not necessary to decide whether an ambiguity is patent or latent. The *Weir* court held that if a will is ambiguous when considered as a whole and in light of the surrounding circumstances (regardless of whether a particular ambiguity is patent or latent), extrinsic evidence may be considered to construe it.

PRACTICE POINTER

✓ Not all construction actions allow extrinsic evidence to resolve an ambiguity in the governing instrument. First, the rules of construction must be applied. If the intent of an ambiguous provision can be ascertained by looking within the four corners of the document, extrinsic evidence may be disallowed. The rules of construction are discussed in detail in §§6.10 – 6.24 below.

a. [6.8] Patent Ambiguities

A patent ambiguity is an ambiguity that is evident in the plain language of the instrument. One can recognize a patent ambiguity simply by reading the document without any outside information or understanding. For example, in *In re Estate of Reinhard,* 41 Ill.App.3d 102, 353 N.E.2d 307 (1st Dist. 1976), a patent ambiguity existed when a will called for equal distribution of the residue of an estate among 6 persons named in a specific section but then named 12 persons in that section. Such numerical inconsistencies or impossibilities constitute patent ambiguities.

b. [6.9] Latent Ambiguities

A latent ambiguity is an ambiguity that arises when the otherwise plain language of a document is unclear when applied to external facts or subjects. The language in latent ambiguities appears to have a straightforward, single meaning, but some extrinsic fact or circumstance makes it ambiguous and requires the court to construe its meaning. *Krog v. Hafka,* 413 Ill. 290, 109 N.E.2d 213, 216 (1952). Thus, latent ambiguities arise not from the words of the instruments themselves, but when those words are applied to the objects or subjects that they describe. *Huff v. State Bank & Trust Co.,* 414 Ill. 111, 110 N.E.2d 449, 451 (1953).

Latent ambiguities arise in many situations. For example, they often appear when the settlor or testator does not adequately describe the recipient of a gift. For example, the settlor in *Continental Illinois National Bank & Trust Company of Chicago v. Clancy,* 18 Ill.2d 124, 163 N.E.2d 523, 524 (1959), called for income to be distributed to his "lawful issue" and "grandchildren" but did not specify whether those terms included adopted children. Latent ambiguities also arise when the settlor or testator does not effectively describe the property to be bequeathed, or when the settlor or testator bequeaths property he or she does not own. Finally, latent ambiguities appear when the settlor or testator did not contemplate certain subsequent events that make strict adherence to the will or trust impossible. For example, in *Steburg v. Swanson,* 198 Ill.App.3d 636, 556 N.E.2d 315, 316 – 317, 144 Ill.Dec. 848 (3d Dist. 1990), a settlor created a trust to support his ex-wife and her daughter but failed to address how to distribute the funds if both the ex-wife and her daughter died. The court was called on to construe the trust to determine whether the remaining funds should be distributed to the heirs of the ex-wife's daughter, or whether they should revert to the heirs of the creator of the trust.

PRACTICE POINTER

✓ Lawyers, judges, and clients often get mixed up trying to understand the meaning of an ambiguity. Sometimes they find a document ambiguous when the truth is that the terms are clear, but they are simply objectionable, though not ambiguous. It is important to learn the test for latent ambiguities, described immediately above.

Another issue arises when a document is entirely ambiguous and clearly can be interpreted more than one way. In this example, a party believes that there is only one proper interpretation and does not want to admit that the document is in fact ambiguous. This is a common error. If a petitioner appears in court with an ambiguous document and recites that the document is unambiguous, and the proper beneficiary is Ann, not Mary, a court might very well dismiss the petition for lack of jurisdiction to construe the trust. The way to handle this situation is for the petitioner to admit that there is an ambiguity, *i.e.,* the document is unclear who the proper beneficiary should be, Ann or Mary, but then state that although the document is ambiguous, there is only one way to interpret it properly, and that is to find that Ann is the beneficiary.

When a document is ambiguous, a trustee has a duty to seek a judicial construction. The trustee's powers and duties are found only in the intent of the settlor, as expressed in the document, or under Illinois law. A trustee does not have the power to interpret or construe a trust instrument and should avoid ever trying to do so. There are times when beneficiaries who are disgruntled will suggest that the trustee's interpretation of the document is wrong. It is important not to let that go. The trustee should deny that he or she is interpreting an instrument and explain that he or she, if this is the case, is merely exercising discretion — something that the trustee does have the power to do. Only a court can interpret an ambiguous document and determine the intent of a settlor when it is unclear.

PRACTICE POINTER

✓ Beware the disgruntled beneficiary who complains that the trustee's "interpretation" of the trust is wrong. Beneficiaries frequently have great difficulty understanding that a trustee does not "interpret" the terms of a trust instrument. A trustee "follows" the terms of a trust instrument. This may mean that the trustee is "choosing" to act a certain way consistent with discretion granted to it under the instrument. It is important not to let this issue go if it is raised. A beneficiary should never be left with the impression that the trustee is interpreting the meaning of an irrevocable document. The trustee does not have the power to interpret the meaning of the governing instrument, and for him or her to do so would be a breach of duty. The trustee, or the trustee's attorney, should correct the beneficiary, in writing if appropriate, and deny that the trustee is interpreting an instrument. Instead, the trustee should explain that he or she, if this is the case, is merely exercising discretion — something that the trustee does have the power to do. Only a court can interpret an ambiguous document and determine the intent of a settlor when it is unclear.

D. Construction of a Will or Trust

1. [6.10] General Rules

The cardinal rule in any construction proceeding is to ascertain and follow the express intention of the creator of the instrument. *Estate of Smith,* 107 Ill.App.3d 1038, 438 N.E.2d 553, 556, 63 Ill.Dec. 622 (1st Dist. 1982). *See also Bradshaw v. Lewis,* 54 Ill.2d 304, 296 N.E.2d 747, 749 (1973). It is the intent of the settlor or testator at the time he or she created the instrument that is controlling. *In re Estate of Powers,* 117 Ill.App.3d 1087, 454 N.E.2d 384, 73 Ill.Dec. 524 (4th Dist. 1983); *Brown v. Leadley,* 81 Ill.App.3d 504, 401 N.E.2d 599, 601, 36 Ill.Dec. 758 (3d Dist. 1980) (in construction of wills, "the law at the time of the execution of the will governs in determining the intention of the testator, while the operative effect of the will and the rights of the parties thereunder are governed by the law in force when the rights of the parties accrue, which normally is the time of the testator's death").

All extrinsic evidence and rules of construction will first yield to the intent of the settlor or testator that is evidenced within the four corners of the document. *See, e.g., In re Estate of Kirchwehm,* 211 Ill.App.3d 1015, 570 N.E.2d 851, 156 Ill.Dec. 375 (1st Dist. 1991). Caselaw also cannot overcome the language of an instrument; "the precedents in other will cases are never of controlling importance" when determining the drafter's intent expressed in a particular instrument. *Bergendahl v. Stiers,* 8 Ill.2d 257, 133 N.E.2d 280, 283 (1956).

When a court construes a document, it considers the language and scheme of the instrument as a whole, including codicils or amendments. *See Bradley v. Bradley,* 3 Ill.2d 58, 119 N.E.2d 788, 791 (1954); *Fischer v. La Fave,* 188 Ill.App.3d 16, 544 N.E.2d 55, 57, 135 Ill.Dec. 698 (2d Dist. 1989). No isolated clause, phrase, or sentence will be singled out as determinative of intent. Neither will the court disregard any part of the instrument as insignificant or superfluous. *See In re Estate of Mank,* 298 Ill.App.3d 821, 699 N.E.2d 1103, 1107, 232 Ill.Dec. 918 (1st Dist. 1998). The court will compare the different provisions and parts of the instrument and read them in light of each other in an attempt to deduce a harmonious whole. *In re Estate of Hurst,* 329 Ill.App.3d 326, 769 N.E.2d 55, 64, 263 Ill.Dec. 853 (4th Dist. 2002).

Because giving effect to the intent of the creator of the instrument is the underlying purpose of will and trust construction, courts can insert, delete, or transpose words in an instrument to arrive at the settlor's or testator's true intention. *See Wheeler v. Williams,* 400 Ill. 438, 81 N.E.2d 175, 177 (1948); *Chicago Title & Trust Co. v. Schwartz,* 120 Ill.App.3d 324, 458 N.E.2d 151, 154, 76 Ill.Dec. 12 (1st Dist. 1983). Nevertheless, Illinois courts are not at liberty to read words of condition into unconditional provisions, and they may alter the language of an instrument only when it is necessary to effectuate the plain and unmistakable intent of the drafter. *See Rosenthal v. First National Bank of Chicago,* 40 Ill.2d 266, 239 N.E.2d 826, 831 (1968); *Caracci v. Lillard,* 7 Ill.2d 382, 130 N.E.2d 514, 517 (1955) (finding that intent to make complete disposition of testatrix's property was "sufficiently evident" throughout will).

2. [6.11] Construction Based on Surrounding Circumstances

If the court cannot determine the drafter's intent from the language of the instrument alone, it will consider the circumstances under which the will or trust was created. *See, e.g., In re Estate of*

Roller, 377 Ill.App.3d 572, 880 N.E.2d 549, 558, 316 Ill.Dec. 813 (4th Dist. 2007); *Griffin v. Gould,* 104 Ill.App.3d 397, 432 N.E.2d 1031, 1033, 60 Ill.Dec. 132 (1st Dist. 1982). The court will place itself in the role of the settlor or testator at the time the document was created and will use evidence of the surrounding circumstances to illuminate the intention and the meaning of the drafter's words. Surrounding circumstances include the state of the settlor's or testator's property and his or her relation to the named beneficiaries. *Caracci v. Lillard,* 7 Ill.2d 382, 130 N.E.2d 514, 517 (1955). See §6.25 below for a discussion of the role of parol evidence in construction.

3. [6.12] Rules of Construction Applied

If a court cannot ascertain the drafter's intent from the four corners of the document or the surrounding circumstances, it generally will resort to rules of construction. *Hoge v. Hoge,* 17 Ill.2d 209, 161 N.E.2d 117, 119 (1959) (one way that intent of settlor is determined "is by ascertaining the actual meaning from the words employed in the will, to which all rules of construction give way, and the other by finding the presumed intention, gathered by the application of rules of construction, which rules apply in cases where the meaning of the will is obscure, doubtful or uncertain").

Rules of construction are court-created presumptions of what the ordinary settlor or testator would have intended certain ambiguous words to mean. *Harris Trust & Savings Bank v. Beach,* 118 Ill.2d 1, 513 N.E.2d 833, 834, 112 Ill.Dec. 224 (1987). Notably, these rules are not absolute and will always yield to the intent of the drafter when it is to the contrary. *See Northern Trust Co. v. Wheeler,* 345 Ill. 182, 177 N.E. 884, 887 (1931) (stating that when drafter's intention is ascertainable, "there is no room for presumption"). Moreover, unlike when the drafter's intent is clear from the four corners of the document, a court cannot add to or alter an instrument to conform it to a rule of construction. *In re Estate of Cancik,* 106 Ill.2d 11, 476 N.E.2d 738, 741, 87 Ill.Dec. 36 (1985); *Hampton v. Dill,* 354 Ill. 415, 188 N.E. 419, 421 (1933). Nevertheless, there are many common rules of construction that Illinois courts frequently use.

a. [6.13] Presumption Against Intestacy

Illinois law presumes that a settlor or testator intended to dispose of all of his or her property and leave no part of his or her estate to intestate succession. *In re Estate of Cancik,* 106 Ill.2d 11, 476 N.E.2d 738, 741, 87 Ill.Dec. 36 (1985). This presumption is strengthened when the instrument contains a residuary clause. *Cahill v. Michael,* 381 Ill. 395, 45 N.E.2d 657, 662 (1942). Like all rules of construction, however, the presumption does not override clear and unambiguous language in the instrument to the contrary. *Coussee v. Estate of Efston,* 262 Ill.App.3d 419, 633 N.E.2d 815, 820, 199 Ill.Dec. 19 (1st Dist. 1994). Nevertheless, if the instrument and the surrounding circumstances are ambiguous, the court will liberally interpret the will or trust to avoid intestacy. *In re Estate of Shaw,* 182 Ill.App.3d 847, 538 N.E.2d 643, 645, 131 Ill.Dec. 268 (1st Dist. 1989).

b. [6.14] Construction in Favor of Validity

Illinois courts favor a construction that maintains the validity and legality of wills and trusts. The court will presume that the drafter intended to make a valid disposition of property and will

construe the will or trust in a manner that maintains its validity over a construction that would render any portion invalid or illegal. *Miller v. O'Neil,* 47 Ill.App.3d 340, 361 N.E.2d 1165, 1167, 5 Ill.Dec. 637 (2d Dist. 1977); *Cahill v. Michael,* 381 Ill. 395, 45 N.E.2d 657 (1942).

c. [6.15] Knowledge of Law

Illinois law presumes that the creator of a will or trust had knowledge of the law governing the instrument at the time it was executed and that he or she created the instrument in conformity with the law. *Chicago Title & Trust Co. v. Vance,* 175 Ill.App.3d 600, 529 N.E.2d 1134, 1136, 125 Ill.Dec. 58 (1st Dist. 1988); *In re Estate of Ross,* 237 Ill.App.3d 574, 604 N.E.2d 982, 178 Ill.Dec. 459 (3d Dist. 1992).

d. [6.16] Later Language Governs

Sometimes, there exists an irreconcilable conflict between two unambiguous paragraphs or clauses in an instrument, and in these instances, the court will presume that the later clause will prevail as the last expression of the drafter's intent. *Weilmuenster v. Swanner,* 404 Ill. 21, 87 N.E.2d 756, 757 – 758 (1949); *Appleton v. Rea,* 389 Ill. 222, 58 N.E.2d 854, 858 (1945). Notably, this rule applies only when otherwise clear and unambiguous provisions are repugnant to each other and cannot both coincide with the general intent evidenced in the instrument. *Weilmuenster, supra,* 87 N.E.2d at 757 – 758.

e. [6.17] Specific Language Controls

In the case of specific provisions of an instrument conflicting with general language of the instrument, the specific provisions ordinarily will prevail over and control the general language. *McCreery v. Burmood,* 332 Ill. 645, 164 N.E. 135, 137 (1928); *Untz v. Untz,* 74 Ill.App.3d 133, 392 N.E.2d 745, 747, 30 Ill.Dec. 90 (2d Dist. 1979); *In re Estate of Gibson,* 19 Ill.App.3d 550, 312 N.E.2d 1 (2d Dist. 1974).

f. [6.18] Construction in Favor of Heirs

Illinois law favors a construction that conforms to general laws of inheritance and results in heirs of equal degree being treated equally. *Cahill v. Cahill,* 402 Ill. 416, 84 N.E.2d 380, 387 (1949); *Peoples Bank of Bloomington v. Hoffman,* 403 Ill. 463, 86 N.E.2d 185, 187 (1949); *Bank of America, N.A. v. Judevine,* 2015 IL App (1st) 140532, ¶23, 26 N.E.3d 555, 389 Ill.Dec. 465. Unless there is a manifest intent to the contrary, the courts will construe an instrument in accord with laws of descent and distribution that favor heirs over persons not closely related to the creator of the instrument. Further, Illinois courts prefer equal treatment of descendants of equal degree rather than "an excessive share being given to members of one group to the partial or total exclusion of members of another, equally meritorious group." *Judevine, supra,* 2015 IL App (1st) 140532 at ¶21, quoting *Continental Illinois National Bank & Trust Company of Chicago v. Llewellyn,* 67 Ill.App.2d 171, 214 N.E.2d 471, 479 (1st Dist. 1976). A peculiar or illogical scheme of distribution will not be followed when contrary to the clear intention of the testator at the time the will was executed. *Llewellyn, supra,* 214 N.E.2d at 479. A settlor or testator who

seeks to disinherit an heir must do so expressly or through "*necessary implication*" in which the implied intent to disinherit is so strong that a court could not suppose a contrary intent. [Emphasis in original.] *Shea v. Lyons,* 47 Ill.App.2d 187, 198 N.E.2d 151, 154 (3d Dist. 1964).

g. [6.19] Construction in Favor of Charitable Gifts

In construing a will or a trust instrument, courts attempt to uphold charitable gifts, if consistent with the testator's or settlor's intent, as determined by the language in the applicable instrument. *Citizens National Bank of Paris v. Kids Hope United, Inc.,* 235 Ill.2d 565, 922 N.E.2d 1093, 1097, 337 Ill.Dec. 516 (2009) ("Charitable gifts are viewed with peculiar favor by the courts, and every presumption consistent with the language contained in the instruments of gift will be employed in order to sustain them."), quoting *Village of Hinsdale v. Chicago City Missionary Soc.,* 375 Ill. 220, 30 N.E.2d 657, 663 (1940).

h. [6.20] Construction in Favor of Upholding the Entire Instrument

When possible, Illinois courts will construe a will or trust instrument in a manner that upholds all of the instrument's parts and provisions. *Scott v. Crumbaugh,* 383 Ill. 144, 48 N.E.2d 532, 534 (1943); *Knight v. Bardwell,* 32 Ill.2d 172, 205 N.E.2d 249 (1965); *In re Estate of Kirchwehm,* 211 Ill.App.3d 1015, 570 N.E.2d 851, 854, 156 Ill.Dec. 375 (1st Dist. 1991) ("The testator's intention, however, must be gathered from the will as a whole, giving effect and meaning to each and every clause if possible."). When one construction renders a portion of the instrument meaningless, and another gives effect to every provision, the court will adopt the latter construction. *Feder v. Luster,* 54 Ill.2d 6, 294 N.E.2d 293, 295 (1973). *See also Carr v. Hermann,* 16 Ill.2d 624, 158 N.E.2d 770 (1959). However, if a mistake or misdescription is the source of an ambiguity, and the ambiguity can be cured by striking the false word or ambiguous description, the court can disregard those words in construing the instrument. *In re Estate of Beck,* 272 Ill.App.3d 31, 649 N.E.2d 1011, 1014, 208 Ill.Dec. 651 (5th Dist. 1995); *Holliday v. Dixon,* 27 Ill. 33 (1861). While the court may reject terms or descriptions shown to be incorrect, it cannot insert any language in place of the stricken words simply to fulfill this rule of construction. *Breckheimer v. Kraft,* 133 Ill.App.2d 410, 273 N.E.2d 468, 471 (1st Dist. 1971).

i. [6.21] Construction in Favor of Earliest Possible Vesting

Illinois courts favor a construction of a devise as vested rather than contingent. *Peadro v. Peadro,* 400 Ill. 482, 81 N.E.2d 192, 195 (1948). When an instrument is ambiguous, the court will construe it to vest in the first devisee or earliest possible opportunity. *In re Estate of Knight,* 178 Ill.App.3d 777, 533 N.E.2d 949, 951, 127 Ill.Dec. 867 (1st Dist. 1989).

j. [6.22] Presumption of Consistency of Terms

Illinois courts presume that words used in different parts of an instrument have the same meaning throughout the document. *Gridley v. Gridley,* 399 Ill. 215, 77 N.E.2d 146, 151 (1948); *In re Estate of Julian,* 227 Ill.App.3d 369, 592 N.E.2d 39, 45, 169 Ill.Dec. 552 (1st Dist. 1991).

k. [6.23] Common Words vs. Technical Words

Ordinarily, courts give common words their plain and familiar meaning and presume that technical terms are used with their technical meaning. *Gridley v. Gridley,* 399 Ill. 215, 77 N.E.2d 146, 150 (1948); *Steinke v. Novak,* 109 Ill.App.3d 1034, 441 N.E.2d 883, 886, 65 Ill.Dec. 568 (3d Dist. 1982). However, when the drafter's intention to do so is plainly shown, technical terms can be used in a lay sense. *Harris Trust & Savings Bank v. Beach,* 118 Ill.2d 1, 513 N.E.2d 833, 838, 112 Ill.Dec. 224 (1987); *Irish v. Profitt,* 28 Ill.App.3d 607, 330 N.E.2d 861, 866 (4th Dist. 1975); *Finnerty v. Neary,* 9 Ill.2d 495, 138 N.E.2d 540 (1956).

l. [6.24] Punctuation and Grammar Will Not Interfere with Intent

Although punctuation cannot be disregarded when its context is unambiguous (*Jensen v. McMahon,* 324 Ill. 574, 155 N.E. 379, 380 (1927)), it will not control the meaning of an instrument. *Mercantile Trust & Savings Bank v. Rogers,* 5 Ill.App.2d 162, 124 N.E.2d 683, 687 (3d Dist. 1955). In fact, courts will ignore or alter punctuation and paragraphing when doing so renders the instrument's meaning more obvious and certain. *Tolman v. Reeve,* 393 Ill. 272, 65 N.E.2d 815, 821 (1946); *Rogers, supra,* 124 N.E.2d at 687. Even when a will is written "in an inartful and ungrammatical fashion," if "the language is sufficient to identify the nature and object" of a testator's gifts and expresses the testator's intention to dispose of his or her property, it will be sustained. *Whitmore v. Starks,* 17 Ill.2d 202, 161 N.E.2d 254, 257 (1959).

E. [6.25] Role of Parol Evidence in Construction

It is well-settled law in Illinois construction actions that if a will or trust is unambiguous, parol or extrinsic evidence cannot be used to interpret its meaning. *See, e.g., In re Estate of Hurst,* 329 Ill.App.3d 326, 769 N.E.2d 55, 64, 263 Ill.Dec. 853 (4th Dist. 2002); *In re Estate of Steward,* 134 Ill.App.3d 412, 480 N.E.2d 201, 203, 89 Ill.Dec. 315 (2d Dist. 1985); *Fifth Third Bank, N.A. v. Rosen,* 2011 IL App (1st) 093533, ¶24, 957 N.E.2d 956, 354 Ill.Dec. 362. The instrument must be sufficiently unclear to justify a court looking beyond such instrument's plain language to resolve an ambiguity. *Northern Trust Co. v. Winston,* 32 Ill.App.3d 199, 336 N.E.2d 543, 548 (1st Dist. 1975). A party cannot create an ambiguity and open the door for parol evidence simply by alleging that the drafter did not intend to say what is otherwise clearly stated in the document. *In re Estate of Romanowski,* 329 Ill.App.3d 769, 771 N.E.2d 966, 972, 265 Ill.Dec. 7 (1st Dist. 2002). But if any ambiguity — either patent or latent — exists within the instrument, Illinois courts may allow parol evidence to resolve it if necessary after the surrounding circumstances are considered. *Weir v. Leafgreen,* 26 Ill.2d 406, 186 N.E.2d 293, 296 (1962). CAVEAT: *Weir* must be read carefully because the court's holding is capable of being misunderstood. In *Weir,* the court held that "if the will, when considered as a whole and in light of the surrounding circumstances, is ambiguous, extrinsic evidence may be considered in construing it." *Id.* This language could be read to suggest that extrinsic evidence may always be admissible in the event a will or trust is ambiguous. That is not the law in Illinois. Rather, if a will or trust is found to be ambiguous, then courts will apply the rules of construction to determine the meaning of the instrument. One of the first rules of construction is to look to the four corners of the instrument. If the meaning of the document can be construed by reference to the four corners of the instrument, extrinsic evidence is not admissible. Another rule of construction, discussed below, is to consider

the surrounding circumstances at the time of execution of the ambiguous document. That rule is followed after the rule requiring review of the four corners of the document. The *Weir* court's language suggested, by stating that extrinsic evidence would be admissible in light of the surrounding circumstances, it had been following the rules of construction (which would have prohibited extrinsic evidence if the ambiguity could have been resolved within the four corners of the document) and that it had proceeded to the next steps in the application of the rules of construction that might allow extrinsic evidence depending on the circumstances.

The courts also will allow parol evidence to demonstrate whether an ambiguity exists. *See Hays v. Illinois Industrial Home for Blind,* 12 Ill.2d 625, 147 N.E.2d 287, 290 (1958). It is important to recognize, however, that this line of cases limiting the use of parol evidence to cases in which an instrument contains an ambiguity applies only to the admissibility of extrinsic evidence in construction actions. From time to time, lawyers and courts have mistakenly attempted to apply these cases to reformation actions, taking language out of context to argue that if no ambiguity exists, extrinsic evidence may not be admitted.

If an ambiguity does exist, the use of parol evidence is limited to illuminating the language of the instrument and the drafter's intention in using that specific language. In other words, parol evidence is not admissible to show what the drafter meant to say, but only to clarify what he or she did say. *First Illini Bank v. Pritchard,* 230 Ill.App.3d 861, 595 N.E.2d 728, 732, 172 Ill.Dec. 367 (3d Dist. 1992). In other words, the court will try to determine the meaning of, and the settlor's intent behind, the actual words that he or she included in the document. Those words might be changed by the court in a construction action to show the court's conclusion about the settlor's meaning of those words when they are ambiguous, but a court will not speculate about what the settlor might have intended to say. The intention expressed in the instrument is controlling, not the intention that is presumed to have been in the mind of the settlor or testator. *Rosenthal v. First National Bank of Chicago,* 40 Ill.2d 266, 239 N.E.2d 826, 831 (1968). Thus, parol evidence, no matter how conclusive, is not admissible to import an intention that is inconsistent with the writing itself. *Alford v. Bennett,* 279 Ill. 375, 117 N.E. 89, 91 (1917).

Parol evidence is often admitted to reveal the facts and circumstances surrounding the settlor or testator at the time of the creation of the instrument. These extrinsic facts generally must exist prior to or contemporaneously with the execution of the document. *Weir, supra,* 186 N.E.2d at 298. *See also Sennot v. Collet-Oser,* 36 Ill.App.3d 928, 344 N.E.2d 783, 786 (1st Dist. 1976). In *Sennot,* the First District Appellate Court deemed evidence of the settlor's long-term affection for his adopted nieces and nephews irrelevant in interpreting the term "surviving issue" in a will, because the evidence did not relate to the time of execution of the agreement. 344 N.E.2d at 786. This temporal limitation, however, is not absolute. Courts will consider subsequent events when they are indicative of the drafter's intent at the time of execution, especially when the ambiguity would not have arisen but for the occurrence of the subsequent events. *Weir, supra,* 186 N.E.2d at 298.

F. [6.26] Charitable Trusts

Construction of charitable trusts is addressed in §6.87 below and in Chapter 14 of this handbook.

III. REFORMATION

A. [6.27] Overview of Reformation

Unlike a construction action, which seeks not to change a will or trust but merely to interpret the instrument, reformation is an equitable remedy that allows a court to modify the terms of a trust in limited circumstances if necessary to give effect to the intent of the settlor. As in a construction action, however, the paramount concern of the court in a reformation proceeding is the intent of the settlor. Reformation may be sought either to (1) correct a mistake in the trust instrument or (2) modify the trust instrument to accommodate changed circumstances that could not have been anticipated or foreseen by the settlor.

1. [6.28] Origin of Reformation

Reformation is an equitable remedy, in part because it involves a trust (*Curtiss v. Brown,* 29 Ill. 201, 230 (1862) ("Trust estates are peculiarly under the charge of and within the jurisdiction of the court of chancery."); *Longwith v. Riggs,* 123 Ill. 258, 14 N.E. 840, 843 (1887)), and in part because the nature of the remedy is to correct a mistake or to modify a document based on changed circumstances or emergencies, rather than a remedy that seeks money damages (*Neuburger v. Foreman Bros. Banking Co.,* 239 Ill.App. 173, 184 – 185 (1st Dist. 1925) ("One of the principal provinces of equity jurisdiction is the correction of mistakes."); *Curtiss, supra,* 29 Ill. at 230 ("From very necessity a power must exist somewhere in the community to grant relief in such cases of absolute necessity, and under our system of jurisprudence, that power is vested in the court of chancery.")).

Although courts have the power to reform trust instruments, it is not a power that is to be exercised lightly, and "courts should be exceedingly cautious when interfering with, or changing in any way the settlements of trust estates, and especially in seeing that such estates are not squandered and lost." *Curtiss, supra,* 29 Ill. at 230. *See also Thorne v. Continental Illinois National Bank & Trust Company of Chicago,* 18 Ill.App.2d 163, 151 N.E.2d 398, 403 (1st Dist. 1958) ("The authorities consistently state that the power to break in upon the terms of a trust should be exercised with great caution."). Although reformation is granted cautiously, the authority of a court to reform a trust is flexible and depends on the unique facts of each case. "[T]he fact that no precedent can be found in which relief has been granted under a similar state of facts is no reason for refusing it." *Id., quoting Dodge v. Cole,* 97 Ill. 338, 364 (1881), and *Outhet v. Follansbee,* 218 Ill.App. 512, 515 (1st Dist. 1920).

2. [6.29] Difference Between Wills, Will Substitutes, and Trusts

Reformation generally is permitted only for inter vivos trusts and not, except in extreme situations, for wills (*Graves v. Rose,* 246 Ill. 76, 92 N.E. 601 (1910); *Appleton v. Rea,* 389 Ill. 222, 58 N.E.2d 854 (1945)) or testamentary trusts that are considered will substitutes (*Handelsman v. Handelsman,* 366 Ill.App.3d 1122, 852 N.E.2d 862, 304 Ill.Dec. 406 (2d Dist. 2006)).

Reformation of wills is generally not permitted under Illinois law. *Graves, supra; Appleton, supra.* The rationale for this is that (a) it is not appropriate for courts "to add to the will, to substitute words not used by the testator in place of those used by him, — in effect, to make a will for the testator" (*Decker v. Decker,* 121 Ill. 341, 12 N.E. 750, 757 (1887)); and (b) by statute, all wills must "be in writing and properly witnessed, and extrinsic evidence is never admissible to alter, detract from, or add to the terms of a will," because "[i]f that were not so, all wills would be subject to proof of mistake and of a different intention from that expressed, so that, in fact, property would pass without a will in writing which the law declares shall not pass except by a written will" (*Graves, supra,* 92 N.E. at 602). *See also Engelthaler v. Engelthaler,* 196 Ill. 230, 63 N.E. 669, 671 (1902) ("The provision of the law which throws around the execution of wills the safeguards of signature and attestation and acknowledgment in the presence of witnesses would be rendered of no effect if such insertions could be made in wills, and such omissions could be supplied and corrected by parol testimony.").

This prohibition on reformation of wills even holds true when it can be clearly demonstrated that a mistake has occurred. *Graves, supra,* 92 N.E. at 604 ("The mistakes, inaccuracies, or deficiencies of a will cannot be corrected by extrinsic evidence, and parol evidence cannot be adduced either to add to, contradict or explain the contents of a will."); *Decker, supra,* 12 N.E. at 757 ("Every consideration impels us to deny the power of courts to add to or reform a will on the ground of mistake."); *Engelthaler, supra,* 63 N.E. at 670 ("Courts of chancery have no power to add to or reform a will on the ground of mistake."). The only exception to this is that part of a description in a will can be eliminated if it is shown to be false, and the remaining part of the "devise will be held valid if enough remains to identify the subject of the devise in accordance with facts and circumstances existing when the will was made." *Graves, supra,* 92 N.E. at 603. Nevertheless, "the rule that nothing can be added to the description is inflexible and forbids the insertion of anything else in place of that stricken out. In all of the decisions it has been emphatically declared that no word or words can be supplied." *Id.*

Reformation of will substitutes is also granted only in limited situations. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS §7.1 (2003) defines a "will substitute" as "an arrangement respecting property or contract rights that is established during the donor's life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor's death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor." In *Handelsman, supra,* the court adopted the principle set forth in RESTATEMENT (THIRD) OF TRUSTS §25 (2003) that, in general, will substitutes are to be construed according to the rules used to construe wills. The court went on to apply the same principle to the reformation of will substitutes. The rationale behind the rule restricting the availability of reformation for wills and will substitutes is "that the use of extrinsic evidence to deviate from the unambiguous terms of the will would flout the statutory requirement that all wills be in writing. . . and. . . allowing the use of extrinsic evidence to rewrite a unilateral disposition by one now deceased would risk opening the floodgates to litigation over the settlor's 'true' intentions." [Citations omitted.] 852 N.E.2d at 871. The court in *Handelsman* stated that "the effect of allowing the reformation of a will substitute is similar to that of allowing the reformation of a will: to enable a stranger to the original proceeding to 'make a will [substitute] for the [settlor].' " *Id.,* quoting *Decker, supra,* 12 N.E. at 757.

B. [6.30] Reformation Based on Mistake

The law of trust reformation based on mistake is the same as the law of reformation of other property transfers and, in many cases, is based directly on the law of contract reformation. *Reinberg v. Heiby,* 404 Ill. 247, 88 N.E.2d 848, 852 (1949) (court has power "to correct the mistakes of a scrivener incorporated into a contract, deed, or other instrument"). See also RESTATEMENT (THIRD) OF TRUSTS §62, cmt. a (2003). In contract law, the basis for a reformation suit based on mistake "is that the parties had reached an agreement but, in reducing it to writing, some provision agreed upon was omitted or one that was not agreed upon was inserted, either through mutual mistake or through mistake on the part of one party and fraud on the part of the other." *Friedman v. Development Management Group, Inc.,* 82 Ill.App.3d 949, 403 N.E.2d 610, 612, 38 Ill.Dec. 379 (1st Dist. 1980). To succeed in a suit for reformation, the party seeking reformation must demonstrate both that a mistake has been made and that an actual agreement exists other than the agreement that is expressed in the writing. *Id.; Parrish v. City of Carbondale,* 61 Ill.App.3d 500, 378 N.E.2d 243, 18 Ill.Dec. 779 (5th Dist. 1978).

1. [6.31] Purpose of Reformation Based on Mistake

The purpose of reformation is to change a written agreement "so that it properly reflects the agreement originally reached by the parties." *Friedman v. Development Management Group, Inc.,* 82 Ill.App.3d 949, 403 N.E.2d 610, 612, 38 Ill.Dec. 379 (1st Dist. 1980). The guiding principle for an Illinois court reforming a trust is "that the rights of all the beneficiaries of the trust became fixed and inviolable the instant the trust agreement was consummated; and that [reformation] proceedings are not to change the actual agreement arrived at, but to have that agreement exist in the very words it was understood to be expressed in; to establish and perpetuate the actual contents of the agreement itself." *Neuburger v. Foreman Bros. Banking Co.,* 239 Ill.App. 173, 190 – 191 (1st Dist. 1925).

2. [6.32] When Reformation Based on Mistake Is Appropriate

Reformation is appropriate when a written agreement does not express the actual agreement of the parties. It is not appropriate when there is no agreement, such as when there has not been a meeting of the minds regarding a fundamental aspect of the contract (*Friedman v. Development Management Group, Inc.,* 82 Ill.App.3d 949, 403 N.E.2d 610, 614, 38 Ill.Dec. 379 (1st Dist. 1980)) or "[w]here parties to an agreement are ignorant of facts which, if known, would have caused a different contract" (*Harley v. Magnolia Petroleum Co.,* 378 Ill. 19, 37 N.E.2d 760, 764 (1941)). Rescission, and not reformation, is the appropriate remedy for these types of errors because a court cannot reform a document to reflect the parties' agreement when no agreement ever existed. *Friedman, supra,* 403 N.E.2d at 612.

Reformation cannot be used "by a voluntary grantee to reform a deed for mistake against his grantor, or anyone claiming through or under him as heirs, devisees, purchasers, creditors or subsequent grantees." *Reinberg v. Heiby,* 404 Ill. 247, 88 N.E.2d 848, 851 (1949). The rationale for this is based in contract; the recipient of a gift has not given consideration to receive his or her interest, and a court of equity will not allow him or her to become unjustly enriched at the expense of the grantor. Nevertheless, courts of equity will intervene when one trust beneficiary

brings suit against another, because reformation in this type of situation is designed to effect the intention of the grantor as to the interests of such beneficiaries. 88 N.E.2d at 853 (holding that "plaintiff beneficiary in a voluntary trust agreement has the right to have the agreement reformed as against defendant, the other beneficiary, claiming under the same instrument" to prevent one beneficiary from being enriched at expense of other, when such enrichment would have been result of scrivener's error and contrary to grantor's intent).

3. [6.33] Elements of Reformation Based on Mistake

A cause of action for reformation based on mistake must include two elements: (a) a mistake; and (b) an actual agreement other than that expressed in the writing. *Friedman v. Development Management Group, Inc.,* 82 Ill.App.3d 949, 403 N.E.2d 610, 612, 38 Ill.Dec. 379 (1st Dist. 1980). Although it has not been expressly adopted in Illinois, the section of the RESTATEMENT (THIRD) OF TRUSTS (2003) regarding reformation is consistent with Illinois law regarding reformation. RESTATEMENT (THIRD) OF TRUSTS §62, cmt. b, provides:

> **Even if the will or other instrument creating a donative testamentary or inter vivos trust is unambiguous, the terms of the trust may be reformed by the court to conform the text to the intention of the settlor if the following are established by clear and convincing evidence: (1) that a mistake of fact or law, whether in expression or inducement, affected the specific terms of the document; and (2) what the settlor's intention was.**

Because "[t]here is a presumption that a written instrument conforms to the intention of the parties thereto," in a reformation action, the party seeking reformation

> **has the burden of proving by very strong, clear and convincing evidence . . . that there has been a meeting of the minds . . . resulting in an actual agreement between the parties . . . but, at the time the agreement was reduced to writing and executed . . . some agreed-upon provision was omitted or one not agreed upon was inserted . . . either through mutual mistake or through mistake by one party and fraud by the other. [**Citations omitted.**]** *Sheldon v. Colonial Carbon Co.,* 116 Ill.App.3d 797, 452 N.E.2d 542, 544 – 545, 72 Ill.Dec. 289 (1st Dist. 1983).

This analysis "is primarily a question of fact." 452 N.E.2d 542 at 545.

a. Mistake

(1) [6.34] Based in contract law

Principles of contract law are also applied by courts in analyzing the appropriateness of trust reformation actions based on mistake. This makes sense, particularly when the trust is not a will substitute that falls within the law applicable to wills because a trust is a contract between the settlor and the trustee. Just as a contract can be reformed when it contains a mistake that prevents it from reflecting the intent of the parties, a trust can be reformed when it contains a mistake that prevents it from reflecting the intent of the settlor.

(2) Types of mistake

(a) [6.35] Mutual or unilateral mistake

Reformation of trusts in Illinois may be permitted in cases of either mutual or unilateral mistake. *Neuburger v. Foreman Bros. Banking Co.,* 239 Ill.App. 173 (1st Dist. 1925); *Reinberg v. Heiby,* 404 Ill. 247, 88 N.E.2d 848 (1949); *Estate of Kraus v. Commissioner,* 875 F.2d 597 (7th Cir. 1989). This is based on the requirement of contract law that the party seeking reformation "must show a mistake by both parties or a mistake by one party which is known and concealed by the other party." *In re Marriage of Johnson,* 237 Ill.App.3d 381, 604 N.E.2d 378, 388, 178 Ill.Dec. 122 (4th Dist. 1992). *See also Sheldon v. Colonial Carbon Co.,* 116 Ill.App.3d 797, 452 N.E.2d 542, 546, 72 Ill.Dec. 289 (1st Dist. 1983). Nevertheless, this requirement does not apply perfectly to trust law because, unlike a contract, there are not always two separate parties to a trust agreement (often the settlor is also the trustee). In *Neuburger, supra,* the court granted reformation based on a mutual mistake when both the grantor and the trustee did not know that a scrivener's error had caused certain words to be omitted from the execution copy of the trust instrument. 239 Ill.App. at 185. In *Reinberg, supra,* the grantor donor and the donee beneficiaries had all signed a trust agreement that contained a scrivener's error, and the court allowed reformation because one of the beneficiaries had acquired a larger share of property than the settlor had intended "by an admittedly mutual mistake of all the parties to the trust agreement." 88 N.E.2d at 853. In *Handelsman v. Handelsman,* 366 Ill.App.3d 1122, 852 N.E.2d 862, 873, 304 Ill.Dec. 406 (2d Dist. 2006), in which the beneficiary defendants had no role in the creation of a trust and did not sign it, the court determined that because the beneficiaries did not participate in the mistake, they could not use the doctrine of mutual mistake to succeed on their claim. *But see Estate of Kraus v. Commissioner,* 60 T.C.M. (CCH) 312 (1990) (on remand, mistake of attorney was imputed to grantor, and reformation was allowed even though there was technically only unilateral mistake).

(b) [6.36] Mistake of fact or of law

Although some Illinois courts have stated that reformation is permitted only when a mistake is of fact and not of law (*Zannini v. Reliance Insurance Company of Illinois, Inc.,* 147 Ill.2d 437, 590 N.E.2d 457, 462, 168 Ill.Dec. 820 (1992)), the general rule seems to be that reformation based on either type of mistake is permissible. *See, e.g., In re Estate of Hurst,* 329 Ill.App.3d 326, 769 N.E.2d 55, 263 Ill.Dec. 853 (4th Dist. 2002) (holding that mistake of law by attorney drafting promissory note that resulted in establishment of tenancy in common instead of joint tenancy was appropriately corrected by reformation). *See also Barkhausen v. Continental Illinois Nat. Bank Trust Co. of Chicago,* 3 Ill.2d 254, 120 N.E.2d 649 (1954); *Peter v. Peter,* 343 Ill. 493, 175 N.E. 846, 849 (1931).

(c) [6.37] Scrivener's error

A common rationale behind a reformation suit is that the writing memorializing the agreement does not accurately reflect the parties' agreement (or settlor's intent) due to a scrivener's error. That courts have the power to reform trusts to correct scrivener's errors is well established in Illinois. *Reinberg v. Heiby,* 404 Ill. 247, 88 N.E.2d 848, 852 (1949) ("The power

and authority of a court of equity to correct the mistakes of a scrivener incorporated into a contract, deed, or other instrument is so well known as to require no citation of authorities."). Whether an alleged mistake in drafting qualifies as a scrivener's error is less clear under Illinois law.

A scrivener's error may be a mistake made during the drafting process, such as an omission of words or a misdescription of property. In *Estate of Kraus v. Commissioner,* 875 F.2d 597 (7th Cir. 1989), the court reversed the Tax Court's refusal to allow reformation of a trust to remedy a scrivener's error that prevented the trust from achieving its stated intent. The scrivener's error at issue was the drafting attorney's omission of five words that were necessary to create a general power of appointment (necessary for the trust to be eligible for the marital deduction), instead of a specific power of appointment, when the language of the trust stated that the grantor intended that the trust be eligible for the marital deduction. The Tax Court had refused to allow reformation based on its determination that the testimony of the scrivener and other evidence presented did not reach the clear and convincing evidentiary standard required under Illinois law, but the Seventh Circuit determined that newly discovered evidence strongly corroborated the scrivener's testimony and "if believed, would change the result of the trial." 875 F.2d at 603. On remand, the Tax Court concluded that because it had no reason to disbelieve the scrivener's testimony, and because the federal court had "indicated that the mistake should be imputed to [the] decedent," it was "bound to change the result of the trial." *Estate of Kraus v. Commissioner,* 60 T.C.M. (CCH) 312, 314 (1990). In *Reinberg, supra,* the settlor had directed his attorney to draft a trust that would divide his land in half to be distributed to his daughters at his death, but the attorney had written the trust to divide the land unequally by mistakenly using an outdated description of the property from the time it was acquired. The court permitted reformation to remedy this scrivener's error, holding that this remedy would be "in harmony with [the settlor's] interest, since it effectuates his manifest intention to divide the property in question equally between his two daughters." 88 N.E.2d at 852 – 853.

In *Estate of Kraus v. Commissioner,* 875 F.2d 597, *supra,* and *Reinberg,* reformation of a trust was allowed to correct inadvertent drafting errors that had a substantive effect on the disposition of the property. In *Handelsman v. Handelsman,* 366 Ill.App.3d 1122, 852 N.E.2d 862, 304 Ill.Dec. 406 (2d Dist. 2006), however, the Second District Appellate Court reversed the trial court's reformation of a testamentary trust (will substitute) to correct a scrivener's error. The court refused to reform the will substitute even though there was undisputed extrinsic evidence that the settlor's intent was not expressed correctly in the document by finding that the error made was not a scrivener's error since the settlor's "attorneys did not make errors in drafting but in the legal or factual assumptions that they brought to the drafting process." 852 N.E.2d at 873. The *Handelsman* court attempted to clarify the definition of "scrivener's error," stating that an error that is "decisional or judgmental" rather than "'mechanical or technical' is not a scrivener's error." 852 N.E.2d at 872, quoting *Schaffner v. 514 West Grant Place Condominium Ass'n,* 324 Ill.App.3d 1033, 756 N.E.2d 854, 861, 258 Ill.Dec. 580 (1st Dist. 2001). At least part of the reason for these different results is that the *Handelsman* court was addressing the reformation of a will substitute, for which there is a much stricter standard than for a trust. Still, the distinction between inadvertent drafting errors that have an unintended substantive effect and careless mistakes is not completely clear under Illinois law.

(d) [6.38] Mistake as to the meaning of written words

Generally, a mistake as to the meaning of written words will not warrant reformation; "[t]he general rule is that if the words are written as the parties intended they should be written or supposed they were written when the instrument is signed, then no matter how much they may be mistaken as to the meaning of those words no relief can be granted, either at law or in equity." *Pernod v. American National Bank & Trust Company of Chicago,* 8 Ill.2d 16, 132 N.E.2d 540, 543 (1956). *See also Handelsman v. Handelsman,* 366 Ill.App.3d 1122, 852 N.E.2d 862, 873, 304 Ill.Dec. 406 (2d Dist. 2006) (reformation of testamentary trust was not permitted when attorneys' alleged errors were deliberate choices (as opposed to careless errors) made in exercise of their professional responsibilities, albeit based on erroneous perceptions of law or facts).

b. [6.39] Another Agreement Exists

In addition to proving the element of mistake, the proponent of reformation must demonstrate that an actual agreement other than the one that was expressed in the writing existed at the time a document was executed. *Neuburger v. Foreman Bros. Banking Co.,* 239 Ill.App. 173, 190 – 191 (1st Dist. 1925) (granting reformation of trust agreement so that it would "exist in the very words it was understood to be expressed in"). *See also Friedman v. Development Management Group, Inc.,* 82 Ill.App.3d 949, 403 N.E.2d 610, 612, 38 Ill.Dec. 379 (1st Dist. 1980); *Parrish v. City of Carbondale,* 61 Ill.App.3d 500, 378 N.E.2d 243, 247, 18 Ill.Dec. 779 (5th Dist. 1978).

C. [6.40] Reformation Based on Changed Circumstances Unanticipated by the Settlor

Reformation may also be granted by a court in an emergency or when circumstances occur that were not anticipated by the settlor, which, had they been anticipated, would have been provided for. In *Curtiss v. Brown,* 29 Ill. 201, 230 (1862), the seminal Illinois case on trust reformation based on changed circumstances, the court explained the remedy, stating:

> **Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency.**

See also Thorne v. Continental Illinois National Bank & Trust Company of Chicago, 18 Ill.App.2d 163, 151 N.E.2d 398, 403 (1st Dist. 1958).

1. [6.41] Purpose of Reformation Based on Changed Circumstances

The purpose of reformation based on changed circumstances is to better effectuate the intent of the settlor so "that the main object of the party creating the trust is best served by the court's action and the intent of the creator of the trust actually carried out." *Thorne v. Continental Illinois National Bank & Trust Company of Chicago,* 18 Ill.App.2d 163, 151 N.E.2d 398, 403 (1st Dist. 1958). *See also Curtiss v. Brown,* 29 Ill. 201, 228 (1862) ("It is insisted for the plaintiff in error, that . . . the terms of the deed, creating the trust, are like iron bands, rigid and unyielding, and that

no human power can unloose or even adjust them, no matter what emergency or necessity may arise, even though they may destroy the whole interest designed for the beneficiary. . . . We do not think so great a defect exists in our system of jurisprudence.").

2. [6.42] When Reformation Based on Changed Circumstances Is Appropriate

Reformation based on changed circumstances is not appropriate in all situations. Under Illinois law, a court may reform the terms of a trust "only in extreme cases," and "the exercise of the power must be based on facts showing that conditions have arisen or exigencies developed which could not have been foreseen by the donor, and that as a result of such unforeseen conditions, the beneficiaries will suffer loss." *Thorne v. Continental Illinois National Bank & Trust Company of Chicago,* 18 Ill.App.2d 163, 151 N.E.2d 398, 403 (1st Dist. 1958).

3. Elements of Reformation Based on Changed Circumstances

a. [6.43] Changed Circumstances

As in the case of reformation based on mistake, the determination of whether circumstances have changed in such a way as to merit reformation is a factual inquiry into the details of the circumstances. Still, the caselaw suggests that there are two general categories of changed circumstances that are likely to fulfill the requirement for reformation.

The first is when the trust property is unproductive, especially when it is so unproductive that the trustee cannot pay the taxes on the trust property or there is a risk of total loss of the trust estate. *Curtiss v. Brown,* 29 Ill. 201, 229 – 230 (1862); *Dyer v. Paddock,* 395 Ill. 288, 70 N.E.2d 49, 52 (1946) (holding "that a court of equity has the power to direct a conversion of real estate into personal property and vice versa, and to direct other modifications of the trust if it appears necessary that such action be taken to preserve the trust estate," and allowing sale of deteriorated residence in district that had become commercial area); *American State Bank v. Kupfer,* 114 Ill.App.3d 760, 449 N.E.2d 1024, 70 Ill.Dec. 677 (4th Dist. 1983) (allowing sale of movie theater contrary to terms of trust when testimony had established that downtown theaters had been closing rapidly; that costly renovations would have to be made to expand theater; that neither trust nor beneficiaries could afford to make such renovations, and company that had been renting theater did not wish to continue its lease and would invest in necessary renovations only if it owned theater; that no other financially stable tenants could be obtained; that trust could not afford to pay taxes and insurance on property without tenant; that one of two primary beneficiaries would bring action for partition to sell her one-half interest in theater if reformation to permit its sale to established chain were not allowed; and that sale of theater was in line with purpose of settlor).

The second category of changed circumstances is when a beneficiary is experiencing some sort of emergency, such as when he or she is "perishing from want." *Curtiss, supra,* 29 Ill. at 229. An emotional emergency can warrant reformation as much as a financial emergency, as it has the potential to "be far more devastating." *Thorne v. Continental Illinois National Bank & Trust Company of Chicago,* 18 Ill.App.2d 163, 151 N.E.2d 398, 404 (1st Dist. 1958) (allowing reformation to end bitter family feud). This type of changed circumstance must actually constitute

an emergency; the power to reform a trust "is exercised with caution and cannot be used . . . merely for the purpose of enabling the beneficiaries to receive a greater income or to use it in what they may regard as a more profitable manner than that contemplated by the trust instrument." *Dyer, supra,* 70 N.E.2d at 52. For example, one court refused to allow the income beneficiary of a testamentary spendthrift trust to invade the trust corpus for his support in the absence of a provision in the will allowing for this invasion because, although the beneficiary claimed that the income was insufficient for his support, the court did not find a hardship that merited reformation. *Tree v. Rives,* 347 Ill.App. 358, 106 N.E.2d 870 (1st Dist. 1952) (beneficiary wished to live in England and claimed he needed $100,000 per year to live there but would receive only $20,000 per year after taxes if he lived in England as compared to $135,000 per year after taxes as long as he lived in United States). It is important to note, however, that spendthrift clauses themselves will not prevent reformation that allows an invasion of the trust corpus, as there is no indication "that spendthrift clauses are to be considered in any different category than other trust provisions" in this context. *Thorne, supra,* 151 N.E.2d at 405.

b. [6.44] Unanticipated or Unforeseen by the Settlor/Testator

To succeed in an action for reformation, the proponent of reformation must demonstrate not only that circumstances have changed, but also that these changes were unanticipated or unforeseen by the settlor. As with the determination of changed circumstances, the determination of what is unforeseen is primarily a factual inquiry; there is no bright-line rule regarding what can be considered unanticipated and what cannot. The caselaw provides some examples. Extensive and expensive litigation causing extreme emotional distress can be considered an unforeseen circumstance not contemplated by the settlor. *Thorne v. Continental Illinois National Bank & Trust Company of Chicago,* 18 Ill.App.2d 163, 151 N.E.2d 398, 404 (1st Dist. 1958) (allowing reformation to effectuate family settlement agreement ending lengthy and expensive litigation surrounding death of trust beneficiary and alleged undue influence on beneficiary's will). Developments in the law, however, have been considered foreseeable. *Department of Mental Health & Developmental Disabilities v. Phillips,* 114 Ill.2d 85, 500 N.E.2d 29, 32 – 33, 102 Ill.Dec. 407 (1986) (court held that new caselaw holding that spendthrift trusts for benefit of disabled people are subject to reimbursement proceedings by government could "reasonably be said to be foreseeable" and was not "an unforeseen exigency sufficient to warrant reformation of the trust" but construed trust to prohibit government reimbursement because that would be contrary to settlor's intent, and settlor had no legal obligation to support beneficiary when she created trust).

D. Proof and Evidence in a Reformation Action

1. [6.45] Burden of Proof

The burden of proof in an action for reformation is on the party seeking reformation. *Law v. Bank of Galesburg,* 28 Ill.App.3d 98, 327 N.E.2d 609, 610 (3d Dist. 1975) ("There is a presumption that a written instrument indicates the intention of the parties and where a party seeks reformation of an instrument, the burden of proof rests on the person seeking reformation."). *See also In re Marriage of Johnson,* 237 Ill.App.3d 381, 604 N.E.2d 378, 178 Ill.Dec. 122 (4th Dist. 1992).

2. [6.46] Standard of Proof

The standard of proof in an action for reformation is clear and convincing evidence. *In re Marriage of Johnson,* 237 Ill.App.3d 381, 604 N.E.2d 378, 178 Ill.Dec. 122 (4th Dist. 1992); *Pernod v. American National Bank & Trust Company of Chicago,* 8 Ill.2d 16, 132 N.E.2d 540, 542 (1956); *Law v. Bank of Galesburg,* 28 Ill.App.3d 98, 327 N.E.2d 609, 611 (3d Dist. 1975) ("strong and convincing" evidence); *Estate of Kraus v. Commissioner,* 875 F.2d 597, 601 (7th Cir. 1989).

3. Role of Extrinsic Evidence

a. [6.47] Extrinsic Evidence Is Generally Admissible

Extrinsic evidence is admissible in reformation actions. In reformation actions based on mistake, extrinsic evidence can be used to demonstrate that a mistake was made, to show that the trust as written does not reflect the intent of the settlor or testator, and to illustrate the real intent of the settlor or testator so that the court can reform the trust or will accordingly. *Board of Trustees of University of Illinois v. Insurance Corporation of Ireland, Ltd.,* 750 F.Supp. 1375, 1382 (N.D.Ill. 1990) ("Even though the contractual language may appear to be plain and unambiguous and even though at law no extrinsic evidence may be used to show otherwise, the equitable remedy of reformation allows such evidence to establish the true intent of the parties."); *In re Marriage of Johnson,* 237 Ill.App.3d 381, 604 N.E.2d 378, 385, 178 Ill.Dec. 122 (4th Dist. 1992) (under contract law, "even when the instrument to be reformed is clear and unambiguous on its face . . . parol evidence may be used to show the real agreement between the parties when a mistake has been made and the evidence is for the purpose of making the contract conform to the original intent of the parties"). The reason that parol evidence is admitted is not "to aid in interpretation of the written instrument but to prove by clear and convincing evidence the actual agreement in light of the allegation that the written instrument, in spite of the apparent agreement expressed by its language, fails to express the actual agreement." *Brady v. Prairie Material Sales, Inc.,* 190 Ill.App.3d 571, 546 N.E.2d 802, 807, 137 Ill.Dec. 857 (2d Dist. 1989). This is consistent with the general rule that "[a]n agreement reduced to writing must be presumed to speak the intention of the parties who signed it, which intention is to be determined from the language used and such agreement is not to be changed by extrinsic evidence." *Johnson, supra,* 604 N.E.2d at 385.

In reformation suits based on changed circumstances, extrinsic evidence is inherently necessary to demonstrate how circumstances have changed. *See, e.g., American State Bank v. Kupfer,* 114 Ill.App.3d 760, 449 N.E.2d 1024, 70 Ill.Dec. 677 (4th Dist. 1983).

b. [6.48] Timing of Extrinsic Evidence

"Parol evidence may be admissible to show the concerns of the parties prior to and contemporaneous with the signing of the written agreement." *In re Marriage of Johnson,* 237 Ill.App.3d 381, 604 N.E.2d 378, 385 – 386, 178 Ill.Dec. 122 (4th Dist. 1992).

c. [6.49] Examples of Extrinsic Evidence That May Be Admissible

There are many different types of extrinsic evidence that can be admissible in a reformation suit. These include testimony of parties as to their intent, even if the parties cannot remember how they communicated their intent, and indirect written evidence (*e.g.,* a previous bid in a contract situation). *Board of Trustees of University of Illinois v. Insurance Corporation of Ireland, Ltd.,* 750 F.Supp. 1375 (N.D.Ill. 1990). Testimony of an attorney can be permitted to demonstrate the terms of the negotiations between parties to a settlement agreement. *In re Marriage of Johnson,* 237 Ill.App.3d 381, 604 N.E.2d 378, 178 Ill.Dec. 122 (4th Dist. 1992). In *Johnson,* the court determined that attorney-client privilege did not protect these communications, because they were intended to be disclosed to a third party during the negotiations. Finally, if a grantor is unavailable, but evidence of a scrivener's error is strong, the error can be imputed to the grantor. *Estate of Kraus v. Commissioner,* 875 F.2d 597, 601 (7th Cir. 1989); *Estate of Kraus v. Commissioner,* 60 T.C.M. (CCH) 312 (1990) (on remand).

Testimony must rise to the clear and convincing standard in order for a court to be willing to grant reformation. *Law v. Bank of Galesburg,* 28 Ill.App.3d 98, 327 N.E.2d 609, 610 – 611 (3d Dist. 1975) (refusing to overturn trial court's denial of reformation, finding that evidence of mistake was not "strong and convincing" because witness' testimony was subject to doubt and did not adequately explain why mistake was made). This is especially true when the settlor of a trust is the party suing for reformation; "[b]ecause the testimony of a settlor seeking to revoke a trust is likely to be unreliable, and because solemn written instruments are not to be lightly overturned, strong corroboration of the settlor's testimony is required in order to warrant the granting of relief." *Pernod v. American National Bank & Trust Company of Chicago,* 8 Ill.2d 16, 132 N.E.2d 540, 542 (1956).

E. [6.50] Remedy in Reformation Suits

When reformation is granted, the proper remedy is for the court to "carry out what the creator of the trust would have desired if he had anticipated the existing circumstances." *American State Bank v. Kupfer,* 114 Ill.App.3d 760, 449 N.E.2d 1024, 1027, 70 Ill.Dec. 677 (4th Dist. 1983). The courts have the power "to strike out of the written instrument all subject-matter not embraced within the actual agreement of the parties" and may also insert terms "when a proper case has been presented and clearly proven . . . where it was clearly shown that some of the terms or provisions of the agreement or some part of the subject-matter had been omitted through accident, fraud, or mistake." *Froyd v. Schultz,* 260 Ill. 268, 103 N.E. 220, 222 (1913).

F. [6.51] Charitable Trusts

Reformation of charitable trusts is addressed in §§6.92 and 6.93 below and in Chapter 14 of this handbook.

IV. [6.52] EQUITABLE DEVIATION

Equitable deviation is a common-law doctrine that allows courts to modify trusts "when compliance with them becomes impossible or illegal or, because of circumstances not known to

the testator and not anticipated by him, literal compliance would defeat or impair the purpose of the trust." *In re Estate of Offerman,* 153 Ill.App.3d 299, 505 N.E.2d 413, 417, 106 Ill.Dec. 107 (3d Dist. 1987) (holding equitable deviation to be inapplicable because compliance with terms of will was possible since settlor had anticipated that one of charities would disclaim her bequest). *See also Burr v. Brooks,* 83 Ill.2d 488, 416 N.E.2d 231, 48 Ill.Dec. 200 (1981); RESTATEMENT (THIRD) OF TRUSTS §66 (2003); Uniform Trust Code §412 (note that the Uniform Trust Code has not been adopted in Illinois).

RESTATEMENT (THIRD) OF TRUSTS §66 states:

> **(1) The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.**
>
> **(2) If a trustee knows or should know of circumstances that justify judicial action under Subsection (1) with respect to an administrative provision, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust.**

The requirement of unanticipated circumstances for equitable deviation in RESTATEMENT (THIRD) OF TRUSTS §66 is different from the requirement in trust reformation, as RESTATEMENT (THIRD) OF TRUSTS §66 does not require circumstances to have changed but instead states that "[i]t is sufficient that the settlor was unaware of the circumstances in establishing the terms of the trust." RESTATEMENT (THIRD) OF TRUSTS §66, cmt. a.

V. [6.53] DECANTING

In certain states, a trustee who possesses the power to invade the principal of a trust may be able to modify a trust by "decanting" (*i.e.,* appointing all or part of the principal of the trust in favor of the trustee of another trust). See, *e.g.,* Alaska Stat. §13.36.157; Del. Code Ann., tit. 12, §3528; Fla.Stat. §736.04117; N.Y. Estates, Powers and Trusts Law §10-6.6; S.D. Codified Laws §55-2-15; Tenn. Code Ann. §35-15-816(b)(27). This power is usually limited to situations in which the exercise of such power is (a) in favor of the proper objects of the power and (b) does not reduce any income interest of any beneficiary.

Until recently, practitioners in Illinois wishing to take advantage of the benefits offered by decanting typically had to look for ways to change a trust's situs to a state that allowed decanting. However, on January 1, 2013, Illinois' decanting statute (760 ILCS 5/16.4) became law, thus allowing Illinois trusts to be decanted in certain situations.

A. [6.54] Decanting by Trustee with Absolute Discretion

An "authorized trustee" with "absolute discretion" may distribute part or all of the principal of the trust to a second trust for the benefit of one or more of the current beneficiaries of the first

trust and for the benefit of one or more of the successor and remainder beneficiaries of the first trust. 760 ILCS 5/16.4(c). An "authorized trustee" is an entity or individual, other than the settlor, who has the authority under the terms of the trust instrument to distribute principal for the benefit of one or more current beneficiaries. 760 ILCS 5/16.4(a). A trustee has "absolute discretion" if the trustee's right to distribute principal to or for the benefit of the beneficiaries is not limited or modified in any manner, regardless of whether the term "absolute" is used in the trust instrument. *Id.* A power to distribute principal that includes purposes such as best interests, welfare, or happiness constitutes absolute discretion for purposes of the Illinois decanting statute. *Id.* The authorized trustee may grant one or more of the current beneficiaries of the first trust a power of appointment over the second trust as long as the beneficiary being granted such power could receive the principal of the first trust outright under the terms of the first trust. 760 ILCS 5/16.4(c)(1). If the authorized trustee grants a power of appointment over the second trust, the class of permissible appointees may be different or broader than the current, successor, or presumptive remainder beneficiaries of the first trust. 760 ILCS 5/16.4(c)(2).

B. [6.55] Limited Decanting Available to Trustee Without Absolute Discretion

If an authorized trustee does not have absolute discretion to distribute the principal of the first trust, then the trustee's ability to decant is more limited than that of a trustee with absolute discretion. 760 ILCS 5/16.4(d). An authorized trustee without absolute discretion may distribute part or all of the principal of the first trust to a second trust, but only if the second trust has the same current, successor, and remainder beneficiaries and income and principal distribution language as the first trust. 760 ILCS 5/16.4(d)(1). If the beneficiaries of the first trust are described as a class of persons, then the beneficiaries of the second trust must include all persons who become includable in the class after the decanting. 760 ILCS 5/16.4(d)(2). If the first trust grants a power of appointment to a beneficiary, the second trust must also do so, and the class of permissible appointees in favor of whom the power may be exercised must be the same as under the first trust. 760 ILCS 5/16.4(d)(3).

C. [6.56] Decanting to Supplemental-Needs Trust

An authorized trustee may distribute part or all of the principal of the interest of a disabled beneficiary in a trust to a supplemental-needs trust if the trustee determines that doing so would be in the best interests of such beneficiary. 760 ILCS 5/16.4(d)(4). The "best interests" of a beneficiary with a disability include, without limitation, consideration of the financial impact to the family of the beneficiary. *Id.* For purposes of the Illinois decanting statute, a "supplemental needs trust" is a trust that, relative to the first trust, contains either lesser or greater restrictions on the trustee's power to distribute trust income or principal and which the authorized trustee believes would, if implemented, allow the beneficiary with a disability to receive a greater degree of governmental benefits than the beneficiary will receive if no distribution is made. *Id.* The supplemental-needs trust may name remainder and successor beneficiaries other than the estate of the beneficiary with a disability, provided that the supplemental-needs trust must name the same remainder beneficiaries and successor beneficiaries to the interest of the beneficiary with a disability, and in the same proportions, as exist in the first trust. *Id.* In addition, if the first trust was created by the beneficiary with a disability or the trust property has been distributed directly

to or is otherwise under the control of the beneficiary with a disability, the authorized trustee may decant to a "pooled trust" as defined by federal Medicaid law for the benefit of the beneficiary with a disability or the supplemental-needs trust must contain payback provisions complying with Medicaid reimbursement requirements of federal law. *Id.*

D. [6.57] Limitations on Trustee's Power To Decant

A trustee may not use the Illinois decanting statute to decant a trust if the terms of the trust instrument expressly prohibit the trustee from doing so. 760 ILCS 5/16.4(m). However, the inclusion of a spendthrift clause or a provision prohibiting amendment or revocation in a trust instrument will not preclude the trustee from exercising the power to decant the trust under the Illinois decanting statute. *Id.* The decanting power cannot be used (1) to reduce, limit, or modify the rule against perpetuities provision of the first trust or to extend the permissible perpetuities period that applied to the first trust (unless the terms of the first trust expressly allow otherwise); (2) to reduce, limit, or modify a beneficiary's current right to receive a mandatory distribution of, or to withdraw, income or principal (except to create a supplemental-needs trust); (3) to decrease or indemnify against a trustee's liability or to exonerate a trustee from liability for failure to exercise reasonable care, diligence, and prudence (except that, if the second trust modifies the governance structure to divide and separate fiduciary and nonfiduciary responsibilities among several parties, then a party may be indemnified or exonerated from liability for the actions of another party, provided, however, that the modified governance structure of the second trust may reallocate fiduciary responsibilities from one party to another but may not reduce them); (4) to eliminate a person's right to remove or replace the authorized trustee (unless a separate independent, non-subservient individual or entity, acting in a nonfiduciary capacity, retains the right to remove or replace the authorized trustee); (5) to distribute part or all of a trust's S corporation stock to a second trust that is not a permitted shareholder under §1361 of the Internal Revenue Code, 26 U.S.C. §1, *et seq.*; (6) to distribute part or all of a trust's interest in property subject to the minimum distribution rules of §401(a)(9) of the Internal Revenue Code to a second trust that would result in the shortening of the minimum distribution period to which the property is subject under the first trust; or (7) solely to change the provisions regarding the trustee's compensation (although the trustee's compensation can be modified to reasonable levels in conjunction with other changes). 760 ILCS 5/16.4(g), 5/16.4(n), 5/16.4(p), 5/16.4(q)(1). Further, if any contribution to the first trust was a direct skip under §2642(c) of the Internal Revenue Code or qualified for any specific tax benefit (such as a marital or charitable deduction or the annual gift tax exclusion) that would be lost by the existence of the authorized trustee's power to decant, then the authorized trustee may not decant the trust property in a manner that would prevent the contribution to the first trust from qualifying for or would reduce the exclusion, deduction, or other tax benefit that was originally claimed with respect to that contribution. 760 ILCS 5/16.4(p). The trustee may not receive any commission or other compensation imposed on assets distributed due to the decanting of the trust assets. 760 ILCS 5/16.4(q)(2).

E. [6.58] Exercise of Power To Decant

A trustee's exercise of the power to decant under the Illinois decanting statute must be made by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the first trust and the second trust. 760 ILCS 5/16.4(r). No court approval is necessary for

decanting as long as (1) "there are one or more legally competent current beneficiaries," (2) "there are one or more legally competent presumptive remainder beneficiaries" of the first trust, (3) the authorized trustee sends written notice of the manner in which the trustee intends to exercise the decanting power and the prospective effective date of distribution to all of the legally competent current beneficiaries and presumptive remainder beneficiaries of the first trust, and (4) no beneficiary objects to the decanting by written instrument delivered to the trustee within 60 days of the trustee's notice. 760 ILCS 5/16.4(e). A "presumptive remainder beneficiary" is "a beneficiary of a trust, as of the date of determination and assuming non-exercise of all powers of appointment, who either (i) would be eligible to receive a distribution of income or principal if the trust terminated on that date, or (ii) would be eligible to receive a distribution of income or principal if the interests of all beneficiaries currently eligible to receive income or principal from the trust ended on that date without causing the trust to terminate." 760 ILCS 5/16.4(a). If a charity is a current or presumptive remainder beneficiary of the first trust, the trustee must also give notice to the Illinois Attorney General's Charitable Trust Bureau. 760 ILCS 5/16.4(e). However, the trustee is not required to provide notice to a beneficiary that cannot be located with due diligence. *Id.* For any reason, a trustee can petition the court to order decanting. 760 ILCS 5/16.4(f)(1). For example, a trustee may wish to petition the court to order decanting if there are no legally competent current or presumptive remainder beneficiaries and therefore the trustee is not able to decant under the Illinois decanting statute. *Id.* If a beneficiary objects to the proposed decanting within 60 days of the trustee's notice, the trustee or the beneficiary may petition the court to approve, modify, or deny the trustee's exercise of the decanting power. 760 ILCS 5/16.4(f)(2). The trustee has the burden of proving that the proposed decanting furthers the purposes of the first trust. *Id.* In a judicial proceeding regarding a proposed decanting, the trustee may, but is not required to, present the trustee's opinions and reasons for supporting the decanting, including whether the trustee believes that decanting would enable the trustee to better carry out the purposes of the first trust, and any position taken by the trustee will not be a violation of the trustee's duty of impartiality, unless the court determines that the trustee is acting in bad faith. 760 ILCS 5/16.4(f)(3).

F. [6.59] Terms of Second Trust

The second trust may have a term (duration) that is longer than the term set forth in the first trust, including, but not limited to, a term measured by the lifetime of a current beneficiary. 760 ILCS 5/16.4(g). However, the second trust shall be limited to the same permissible rule against perpetuities period that applied to the first trust, unless the first trust expressly permits the trustee to extend or lengthen the perpetuities period. *Id.* The second trust can be created by the trustee or it can be a new or existing trust created by the settlor of the first trust. The settlor of the first trust is considered for all purposes to be the settlor of any second trust established in accordance with the Illinois decanting statute. 760 ILCS 5/16.4(t). If the settlor of the first trust is not also the settlor of the second trust, then the settlor of the first trust shall be considered the settlor of the second trust, but only with respect to the portion of the second trust distributed from the first trust pursuant to the Illinois decanting statute. *Id.*

G. [6.60] Limitations on Trustee's Responsibility for Decanting

A trustee who elects to exercise the power to decant under the Illinois decanting statute must do so in the trustee's fiduciary capacity in furtherance of the purposes of the trust, regardless of

whether the trustee's discretion to distribute the principal of the first trust is absolute or is limited to ascertainable standards. 760 ILCS 5/16.4(b). A trustee may exercise the power to decant under the Illinois decanting statute whether or not there is a current need to distribute principal under the terms of the first trust. 760 ILCS 5/16.4(k). A trustee has no duty to (1) exercise the trustee's decanting power under the Illinois decanting statute, (2) inform beneficiaries of the availability of the Illinois decanting statute, or (3) review the trust to determine whether any action should be taken under the Illinois decanting statute, and no inference of impropriety may be made as a result of an authorized trustee not exercising the power to decant under the Illinois decanting statute. 760 ILCS 5/16.4(*l*). A trustee who reasonably and in good faith takes or omits to take any action under the Illinois decanting statute is not liable to any person interested in the trust for doing so, and a trustee's actions or omissions are presumed to be taken or omitted reasonably and in good faith unless the court determines that the trustee has abused his or her discretion. 760 ILCS 5/16.4(u). The only remedy available to a person disagreeing with a trustee's reasonable and good-faith action or omission under the Illinois decanting statute is to obtain a court order directing the trustee to exercise the decanting power "in such manner as the court determines necessary or helpful for the proper functioning of the trust, including without limitation prospectively to modify or reverse a prior exercise of such authority." *Id.* Any person claiming that a trustee's decanting or failure to decant under the Illinois decanting statute was an abuse of discretion must assert such claim in a proceeding commenced within two years after the trustee has sent that person (or his or her personal representative) written notice sufficiently disclosing facts fundamental to the claim such that the person knew or reasonably should have known of the claim (although, excluding decanting done by agreement in accordance with the Illinois virtual representation statute (760 ILCS 5/16.1), this rule does not apply to a person under legal disability at the time the notice was sent and who then had no personal representative). 760 ILCS 5/16.4(u).

H. [6.61] Other Authority To Decant

The Illinois decanting statute does not abridge a trustee's right to decant that arises under the terms of the trust instrument, any provision of applicable law, or a court order. 760 ILCS 5/16.4(j). Further, a trust may be decanted pursuant to an agreement between the trustee and all primary beneficiaries of the first trust, acting either individually or by their respective representatives in accordance with the Illinois virtual representation statute. *Id.*

I. [6.62] Application of Decanting Statute

The Illinois decanting statute is available to any trust in existence on or after January 1, 2013, that is administered in Illinois under Illinois law or that is governed by Illinois law (including a trust whose governing law has been changed to Illinois), unless the governing instrument expressly prohibits the use of the Illinois decanting statute. 760 ILCS 5/16.4(v). A provision in a trust instrument in the form "Neither the provisions of Section 16.4 of the Trusts and Trustees Act nor any corresponding provision of future law may be used in the administration of this trust" or a similar provision demonstrating that intent is sufficient to preclude the use of the Illinois decanting statute. *Id.*

VI. OTHER TYPES OF TRUST MODIFICATION

A. [6.63] Total Return Trust

Section 5.3 of the Trusts and Trustees Act, 760 ILCS 5/1, *et seq.,* allows the trustee, the trustee and beneficiaries, or a court to convert a trust to a total return trust. A total return trust is a trust for which the trustee invests and manages the "trust assets seeking a total return without regard to whether that return is from income or appreciation of principal." 760 ILCS 5/5.3(a)(2). The income beneficiary then receives a certain specified percentage of the trust assets, usually between three and five percent. When it is a charitable trust that is being converted to a total return trust, this percentage amount depends on what the Illinois Attorney General will be willing to agree to. When a trust is a total return trust, "[e]xpenses, taxes, and other charges that would be deducted from income if the trust were not a total return trust shall not be deducted from the distribution amount." 760 ILCS 5/5.3(f)(1).

A trustee may convert a trust to a total return trust upon written notice to the beneficiaries, assuming that there is at least one legally competent income beneficiary and one legally competent remainder beneficiary, and that no beneficiary objects when "[t]he trust describes the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines that conversion to a total return trust will enable the trustee to better carry out the purposes of the trust and the conversion is in the best interests of the beneficiaries." 760 ILCS 5/5.3(a)(1). Section 5.3(d) of the Trusts and Trustees Act requires that (1) the trustee "make income distributions in accordance with the governing instrument" (subject to the provisions of §5.3(d)), (2) the term "income" in the governing instrument be defined to mean an annual amount equal to a certain percentage of the net fair market value of the trust's assets averaged over the lesser of the three preceding years or the time during which the trust has existed (the distribution percentage), and (3) such distribution percentage for any trust converted to a total return trust by a trustee be four percent. 760 ILCS 5/5.3(d)(1) – 5/5.3(d)(3).

A trust may also be converted to a total return trust by an agreement between the trustee and all of the primary beneficiaries of the trust under the virtual representation provisions of §16.1 of the Trusts and Trustees Act, if those provisions otherwise apply. 760 ILCS 5/5.3(b). The distribution percentage established in such an agreement must not be lower than three percent or higher than five percent. *Id.*

A trustee or beneficiary may also petition the court to convert a trust to a total return trust, to adjust the distribution percentage of a total return trust, or to reconvert a total return trust back to a normal trust. 760 ILCS 5/5.3(c). In a proceeding brought pursuant to §5.3(c), the court has the power to select a distribution percentage other than four percent. 760 ILCS 5/5.3(g)(1).

B. [6.64] Satisfaction and Advancement

Another way that a will or testamentary trust could be modified is by a lifetime gift to a beneficiary. Under the doctrine of satisfaction, a lifetime gift of the testator or settlor can reduce the amount received upon the donor's death. The doctrine of advancement is the equivalent of satisfaction in the intestacy context.

In Illinois, under the common-law doctrine of satisfaction, the amount of a pecuniary legacy under a decedent's will may be fully or partially reduced by a transfer from the testator to the beneficiary during the period between the execution of the testator's will and the testator's death. Nevertheless, long-established caselaw provides that a gift will be a satisfaction only if the testator intended it to be so, and it is the testator's will that "expresses the testator's intentions, and it is the writing which serves as a guide to determine whether [a transfer] is a gift or [a satisfaction]. If it is silent as to the gift being [a satisfaction], it will not be so regarded." *Meppen v. Meppen,* 392 Ill. 30, 63 N.E.2d 755, 757 (1945). *See also In re Estate of Pridmore,* 187 Ill.App. 301, 308 (1st Dist. 1914) (stating that language of Illinois advancement statute, which requires writing to demonstrate intestate decedent's intent to make advancement, seems "to justify the inference that the intention of a testator to make [a satisfaction] should not be presumed in the face of any reasonable evidence to the contrary").

The current Illinois advancement statute (*i.e.,* §2-5 of the Probate Act of 1975, 755 ILCS 5/1-1, *et seq.*) defines an advancement as property given by a decedent during the decedent's lifetime that is applied against the share ultimately distributed to the recipient from the decedent's intestate estate. A gift is not an advancement unless so expressed in writing by the (intestate) decedent or unless so acknowledged in writing by the person to whom the gift was made. 755 ILCS 5/2-5(a).

Therefore, in order for satisfaction or advancement to apply, the testator's or settlor's intent must be that a lifetime gift reduces an after-death gift, and, in the absence of such a demonstration, the beneficiary will be permitted to accept both gifts.

VII. [6.65] TRUST SEVERANCE AND CONSOLIDATION

Trust severance and consolidation in Illinois are governed by the Trusts and Trustees Act, which grants a trustee the power "[t]o sever any trust estate on a fractional basis into 2 or more separate trusts for any reason." 760 ILCS 5/4.25. It additionally grants the trustee the power "to segregate by allocation to a separate account or trust a specific amount or gift made from any trust." *Id.* The Trusts and Trustees Act specifically contemplates severance "to satisfy any federal tax requirement . . . or to reduce potential generation-skipping transfer tax liability." *Id.* The trustee may also "consolidate 2 or more trusts having substantially similar terms into a single trust." *Id.*

Although the Trusts and Trustees Act provides the default rules, it also allows the settlor to opt out of the statutory defaults. To do so, a settlor must expressly limit the power of the trustee in the instrument creating the trust. 760 ILCS 5/3(1). Additionally, the Trusts and Trustees Act does not apply to any "(a) land trust; (b) voting trust; (c) security instrument such as a trust deed or mortgage; (d) liquidation trust; (e) escrow; (f) instrument under which a nominee, custodian for property or paying or receiving agent is appointed; or (g) a trust created by a deposit arrangement in a banking or savings institution." 760 ILCS 5/3(2).

VIII. [6.66] TRUST TERMINATION

There are many different ways that a trust can be terminated in Illinois. A trust may terminate (a) at the end of a certain time period or upon the occurrence of a specific event; (b) by the action of a settlor or another person; (c) by consent of the beneficiaries (including by a settlement agreement resolving litigation), which may require court approval; or (d) by a court decree.

A. [6.67] Termination upon the Expiration of a Specified Time Period or upon the Occurrence of a Specific Event

Generally, a trust will terminate upon the expiration of a specific time period or upon the occurrence of a certain event, such as the accomplishment of trust purposes, the death of certain parties to the trust, the merger of the legal and equitable title of the trust, or the point at which the trust assets reach a certain small size.

1. [6.68] Termination upon the Expiration of a Specified Time Period

The general rule is that if a settlor expressly specifies in a trust instrument a fixed duration for which he or she wishes the trust to remain in existence, the settlor's directions will be given effect as long as they do not violate the rule against perpetuities. *LaSalle Nat. Bank v. MacDonald,* 2 Ill.2d 581, 119 N.E.2d 266, 269 (1954); *LaSalle National Bank v. Khan,* 191 Ill.App.3d 41, 547 N.E.2d 472, 476, 138 Ill.Dec. 305 (1st Dist. 1989). See also RESTATEMENT (THIRD) OF TRUSTS §61 (2003) ("trust will terminate in whole or in part upon the expiration of a period or the happening of an event as provided by the terms of the trust"). The rule against perpetuities, a common-law doctrine designed "to prevent the remote vesting of contingent interests in property," states that an interest in property is not valid unless it "vests, if at all, within 21 years of a life or lives in being at the time of the creation of the interest." *Marcy v. Markiewicz,* 233 Ill.App.3d 801, 599 N.E.2d 1051, 1057, 175 Ill.Dec. 37 (1st Dist. 1992). One exception to the rule that a trust will terminate when a settlor directs is that a trust will not terminate upon the expiration of the stated period if, at that time, the purposes of the trust have not yet been accomplished, and the settlor intended the trust to continue until the accomplishment of the trust purposes. *MacDonald, supra,* 119 N.E.2d at 269.

An ambiguity in a duration provision can be construed by the court. *See Wechter v. Chicago Title & Trust Co.,* 385 Ill. 111, 52 N.E.2d 157 (1943). As in constructions of other provisions, the construction of a trust's duration depends largely on the settlor's intention as determined by the trust instrument and the trust's nature and purposes. *See Corwin v. Rheims,* 390 Ill. 205, 61 N.E.2d 40, 48 (1945). See also the discussion of will and trust construction in §§6.2 – 6.26 above.

2. [6.69] Accomplishment of Trust Purposes

In the absence of a specified time for a trust's duration or termination, the trust will remain in existence until the purposes for which the settlor created it are accomplished. *Wood v. Continental Illinois Nat. Bank & Trust Co. of Chicago,* 411 Ill. 345, 104 N.E.2d 246, 250 (1952); RESTATEMENT (THIRD) OF TRUSTS §61 (2003) (in absence of provisions tying trust's duration to a specific time period or event, "termination will occur in whole or in part when the purpose(s) of the trust or severable portion thereof are accomplished").

3. [6.70] Termination upon Death of Parties

Trust provisions sometimes dictate that a trust will terminate upon the death of certain parties to the trust, such as the settlor or beneficiary. *Mohler v. Wesner,* 382 Ill. 225, 47 N.E.2d 64, 67 (1943) (discussing trust instrument that provided for termination of trust upon death of beneficiary). When a trust's sole purpose is to provide an income for a beneficiary during the lifetime of that beneficiary, then the trust will terminate upon the death of the beneficiary in the absence of a provision to the contrary in the trust instrument. *Wiener v. Severson,* 11 Ill.2d 347, 143 N.E.2d 225, 227 (1957).

4. [6.71] Termination by Merger of Legal and Equitable Title

It is possible for a trust to terminate through merger; however, there are several limitations on this doctrine under Illinois law. Under the doctrine of merger, it is possible for a trust to terminate when one person holds all of the legal and equitable interests in the trust. RESTATEMENT (THIRD) OF TRUSTS §69 (2003). This situation occurs when the trustee, originally holding all of the legal interest in the trust, also becomes the beneficiary and the owner of all equitable interest under the trust, or when the sole beneficiary acquires the interest of the trustee. George Gleason Bogert et al., THE LAW OF TRUSTS AND TRUSTEES §1003 (3d ed. 2006). In some cases, a trust can be terminated if its income and remainder beneficiaries become one; however, merger of income and remainder interests will not cause termination when a purpose of the settlor (*e.g.,* a support or spendthrift purpose) remains to be carried out (*id.*), or when a contingent interest exists in a different beneficiary. A trustee can be the sole income beneficiary under the trust without triggering the application of merger and termination if there is a remainderperson who will succeed to the trust property upon the grantor's death. *See Wood v. Gridley,* 217 Ill.App. 579 (3d Dist. 1920).

Termination by merger is a limited remedy that courts apply automatically. Instead, they will consider, on a case-by-case basis, the effect that would likely result from termination, refusing to apply the doctrine if injustice or frustration of the settlor's intent would result. *See Wechter v. Chicago Title & Trust Co.,* 385 Ill. 111, 52 N.E.2d 157, 162 (1943). If "the intention of the party acquiring is that such estates shall not merge, or if it appears that such party will be benefited by keeping both estates alive, no merger will result." 52 N.E.2d at 163. The rationale behind this is that "[m]ergers are not . . . favored, either in courts of law or in equity," and that whether there will be a merger "depends upon the intention of the parties, and a variety of other circumstances." 52 N.E.2d at 162, quoting *Clark v. Glos,* 180 Ill. 556, 54 N.E. 631, 634 (1899).

5. [6.72] Small Trust Termination

Effective June 1, 2008, P.A. 95-605 amended the Trusts and Trustees Act regarding small trust termination. See 760 ILCS 5/4.26. Section 4.26 provides a trustee with the authority to terminate a trust and distribute its assets if he or she determines, in his or her discretion and with the recipients' consent, that the trust's market value is less than $100,000, and that the administrative costs connected with carrying on the trust will significantly impair the accomplishment of the trust's purpose. Upon the occurrence of such trust termination as provided for in §4.26, the trustee shall distribute the trust assets to the individuals "entitled to receive or eligible to have the benefit of the income from the trust in the proportions in which they are

entitled thereto, or if their interests are indefinite . . . per stirpes if they have a common ancestor, or if not, then in equal shares." *Id.* In addition, the trustee must notify these individuals at least 30 days before the effective date of the trust termination. *Id.*

B. [6.73] Termination by the Action of a Settlor or Another Person

Through the inclusion of an express provision in the trust instrument, a settlor may grant the power to terminate the trust to himself or herself, the trustee, a beneficiary, or some other individual. THE LAW OF TRUSTS AND TRUSTEES §1000. This power can be granted either generally and without a condition precedent or narrowly by providing the authority to terminate only under certain circumstances, such as the occurrence of a specific event. *Id. See also Bear v. Millikin Trust Co.,* 336 Ill. 366, 168 N.E. 349, 358 (1929).

1. [6.74] By Whom

When a settlor retains the power to terminate a trust, the trust is a revocable trust. THE LAW OF TRUSTS AND TRUSTEES §1000. If a settlor has not specified the mode in which he or she may revoke the trust, this power "can be exercised in any way that provides clear and convincing evidence of the settlor's intention to do so." RESTATEMENT (THIRD) OF TRUSTS §63(3) (2003).

A settlor may confer a termination power, through express provision in the trust instrument, to the trustee. THE LAW OF TRUSTS AND TRUSTEES §1000. If a settlor chooses to do so, he or she may grant the trustee authority to terminate the trust either (a) at the trustee's discretion, (b) upon the consent of another individual or individuals, or (c) upon the existence of certain specified circumstances. *See, e.g., Storkan v. Ziska,* 406 Ill. 259, 94 N.E.2d 185, 187 (1950), in which the settlor of a trust had provided the trustee with authority to terminate the trust 21 years after the death of the settlor or earlier only upon the receipt of written consent from the five beneficiaries.

A settlor also may expressly grant to the trustee the power to pay all or part of the trust corpus to a beneficiary if and when needed by the beneficiary. *See Spengler v. Kuhn,* 212 Ill. 186, 72 N.E. 214 (1904); *Lord v. Comstock,* 240 Ill. 492, 88 N.E. 1012 (1909). Although this power necessarily gives the trustee the authority to terminate the trust in part, as payments from time to time may eventually result in the entire trust's termination, the power is not meant to allow the trustee to terminate the whole of the trust at one time by disbursing all of the trust corpus at one time. THE LAW OF TRUSTS AND TRUSTEES §1000. This power is also limited by a requirement that the trustee act in good faith; the court will review and overrule the trustee's decision to terminate if it is found to be arbitrary or made in bad faith. *See Colket v. St. Louis Union Trust Co.,* 52 F.2d 390 (8th Cir. 1931) (finding that trustee made arbitrary decision). RESTATEMENT (THIRD) OF TRUSTS §64, cmt. b, provides that unless the trust terms provide otherwise, "a power of termination or modification that runs with the office of trustee is held by the trustee in a fiduciary capacity, even in the absence of express standards by which the reasonableness of the trustee's judgment can be measured."

A trustee also may be able to terminate the trust by merging it with another trust. The power to merge the trust may be granted to the trustee by the settlor through an express provision in the trust instrument. If the settlor does not expressly grant to the trustee the power to merge the trust, the trustee may still be able to do so pursuant to the provisions of §4.25 of the Trusts and Trustees Act, provided that the trusts being merged have substantially similar provisions. 760 ILCS 5/4.25.

In addition to granting a power of trust termination to the trustee, a settlor may confer this power to some or all of the beneficiaries, thus giving them the right to demand from the trustee the conveyance of the trust corpus either (a) at their discretion or (b) upon the occurrence of a specified condition or event. Furthermore, a settlor may confer the power to terminate the trust through an express provision in the trust instrument to anyone, even someone who is not a party to the trust. If a third party has this power, it "is presumed to be held in a fiduciary capacity." RESTATEMENT (THIRD) OF TRUSTS §64(2).

2. [6.75] Exercise of the Grant of Power To Terminate

When an attempt is made to terminate a trust, the trustee must determine whether the termination power actually exists and is being properly exercised. If the attempt at termination is improper, a trustee should resist such an attempt. THE LAW OF TRUSTS AND TRUSTEES §1001.

If a settlor provides the method by which the power to terminate should be exercised through a specific provision in the trust instrument, this provision must be followed. *See Yardley v. Yardley,* 137 Ill.App.3d 747, 484 N.E.2d 873, 880, 92 Ill.Dec. 142 (2d Dist. 1985); *Whittaker v. Stables,* 339 Ill.App.3d 943, 791 N.E.2d 588, 591, 274 Ill.Dec. 496 (2d Dist. 2003). There has been a great deal of litigation concerning the question of whether the actions of the donee of the power to terminate amounted to actual termination under the terms of the trust instrument. See THE LAW OF TRUSTS AND TRUSTEES §1001. For an example of such a case, *see Olson v. Rossetter,* 399 Ill. 232, 77 N.E.2d 652 (1948), in which the Illinois Supreme Court determined that an express provision regarding a specified manner and method of trust termination could not be overridden by the trustees' action to extend the duration of a trust pursuant to a power to amend granted to them in a trust instrument.

C. Termination by Consent

1. [6.76] Termination upon Agreement of Beneficiaries

A trust may terminate upon the consent of all parties with an interest in the trust, as long as all of these parties are competent (*i.e.,* of full age and under no legal incapacity). *Altemeier v. Harris,* 403 Ill. 345, 86 N.E.2d 229, 234 (1949). When the settlor and all of the beneficiaries of a trust are competent and before the court and request that the court terminate the trust, "they can compel the termination or modification although the purposes of the trust have not been fully accomplished." *Botzum v. Havana Nat. Bank,* 367 Ill. 539, 12 N.E.2d 203, 205 (1937). See also RESTATEMENT (THIRD) OF TRUSTS §65 (2003); Uniform Trust Code §411. The theory behind this termination is that the settlor has deserted his or her original purposes for creating the

trust and has taken a new approach toward the disposition of the trust property. THE LAW OF TRUSTS AND TRUSTEES §1005. The trust cannot be terminated, however, when there are holders of contingent interests that have not consented or beneficiaries who are legally disabled and therefore cannot consent. *Botzum, supra,* 12 N.E.2d at 205.

If the settlor is unavailable or does not consent to termination of the trust, the trust may be terminated by agreement of its beneficiaries alone unless the trust's primary purposes necessitate its continuance. *Disher v. Fulgoni,* 161 Ill.App.3d 1, 514 N.E.2d 767, 775, 112 Ill.Dec. 949 (1st Dist. 1987); RESTATEMENT (THIRD) OF TRUSTS §65. If, however, one of the trust's primary purposes requires the trust to be continued, as when the trust instrument contains provisions for the distribution of trust property to contingent beneficiaries or upon the occurrence of uncertain conditions, the trust cannot be terminated, regardless of whether there is unanimous consent of all beneficiaries (including all prospective beneficiaries) before the expiration of the time period fixed by the trust instrument. *Altemeier, supra,* 86 N.E.2d at 234.

Although they have not been cited by Illinois courts in the trust termination context, the RESTATEMENT (THIRD) OF TRUSTS and the Uniform Trust Code both loosen the restrictions on termination by beneficiary consent. RESTATEMENT (THIRD) OF TRUSTS §65(2) uses a balancing test that permits a court to terminate a trust upon consent of the beneficiaries after the settlor's death, even if termination would be inconsistent with a material purpose of the trust, if the court finds that the benefits of termination outweigh the benefits of any potential continuing material purpose. Uniform Trust Code §411(e) allows a court to approve termination even if all of the beneficiaries do not consent,

if the court is satisfied that:

(1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) the interests of a beneficiary who does not consent will be adequately protected.

2. [6.77] Termination upon Court Approval of a Settlement

When a trust litigation action is pending, the parties to the litigation may reach a compromise to avoid unnecessary delay and costly litigation expenses. THE LAW OF TRUSTS AND TRUSTEES §1009. Such a compromise can often lead to the formation of a plan regarding trust termination. Once such a plan is finalized and agreed on by the entire class of beneficiaries who are competent to execute the agreement, the parties must apply for court approval of the settlement and the distribution of property pursuant to the terms of the settlement. *Id.*

There are hurdles that consenting beneficiaries must overcome before a court will approve a settlement agreement that terminates the trust. First, before a court approves such a settlement agreement, it will consider whether the initial litigation bringing about the compromise was undertaken in good faith and on reasonable grounds. *See generally Tree v. St. Luke's Hospital,* 347 Ill.App. 368, 106 N.E.2d 834 (1st Dist. 1952). Second, courts are reluctant to approve

settlements without the consent of all of the parties interested in the trust when the settlement disregards the terms of the trust. *Stephens v. Collison,* 274 Ill. 389, 113 N.E. 691 (1916) (refusing to approve settlement because it subverted intent of settlor, and explaining that decision regarding approval of settlement could not rest on whether settlement was beneficial to beneficiaries). Finally, the court must find a way to address and secure (or become comfortable with the lack of) the consent of beneficiaries who are not sui juris. For a discussion of this final requirement, see §§6.103 – 6.106 below.

D. [6.78] Termination by Court Decree

Through the exercise of its equity power, a court may terminate a trust. *See generally Hazlett v. Moore,* 372 Ill. 192, 23 N.E.2d 57 (1939). Situations in which this power may be used to terminate a trust include, but are not limited to, (1) when the trust's purposes have been fulfilled, (2) when the trust's purposes are or become impossible, or (3) when the purpose or administration of the trust is illegal or against public policy.

The necessary parties in trust termination actions are the same as in other estate and trust lawsuits. See §6.102 below. The only parties that have standing to sue for trust termination are those individuals who have a beneficial interest in the subject matter of the suit (the trust) and the relief sought therein. *Schlosser v. Schlosser,* 247 Ill.App.3d 1044, 618 N.E.2d 360, 363, 187 Ill.Dec. 769 (1st Dist. 1993). Furthermore, in an action to terminate a trust, all beneficially interested parties to the trust are necessary parties to the action. *Botzum v. Havana Nat. Bank,* 367 Ill. 539, 12 N.E.2d 203 (1937). The general rules concerning the weight and sufficiency of evidence in civil proceedings apply in trust termination actions as well. *See generally Albert v. Albert,* 334 Ill.App. 440, 80 N.E.2d 69 (1st Dist. 1948).

1. [6.79] Fulfillment of Trust Purpose

The fulfillment of the purposes for which the settlor created the trust results in a natural termination of the trust, rather than a premature termination. *See generally Fox v. Fox,* 250 Ill. 384, 95 N.E. 498 (1911); *Murphy v. Westhoff,* 386 Ill. 136, 53 N.E.2d 931, 936 (1944) (holding that when trust is created for support of settlor during settlor's life and payment of burial expenses, its purpose is accomplished at settlor's death and trust terminates). See also THE LAW OF TRUSTS AND TRUSTEES §1002. If the settlor has specifically fixed a duration for the trust either in terms of years or lives but, because of changed circumstances, the trust purpose is accomplished before the expiration of the specified trust duration, the court will declare the trust terminated. However, a mere change in circumstances alone does not allow for such trust termination. *Id.*

2. [6.80] Trust Purpose Impossible To Fulfill

If the settlor's purpose or objective in creating the trust becomes impossible to accomplish because of a change in circumstances, a court can terminate the trust. *See Suiter v. McWard,* 328 Ill. 462, 159 N.E. 799, 801 (1927); *Harris Trust & Sav. Bank v. Wanner,* 326 Ill.App. 307, 61 N.E.2d 860, 873 (1st Dist. 1944). See also the discussion of reformation in §§6.27 – 6.51 above.

The rationale for this is that the continuation of such a trust would bring no intended advantage to the beneficiaries and would possibly run the risk of inequitably affecting any remainderpersons. THE LAW OF TRUSTS AND TRUSTEES §1002.

3. [6.81] Trust Purpose or Performance Illegal

If a trust's purpose or administration is illegal or against public policy, the trust can be terminated. *See Hall v. Eaton,* 259 Ill.App.3d 319, 631 N.E.2d 805, 197 Ill.Dec. 583 (4th Dist. 1994) (discussing when conditions on marriage can render devise void); Uniform Trust Code §410; RESTATEMENT (THIRD) OF TRUSTS §29 (2003); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§7.1, 7.2 (1983); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices,* 1999 U.Ill.L.Rev. 1273. A change in the law can make trust terms illegal, and this illegality can create a sufficient basis for termination of the trust. THE LAW OF TRUSTS AND TRUSTEES §1002. For example, a change in the law may make it illegal to continue to use or operate a trust asset in the same manner as provided for in the trust instrument. *Id.*

4. [6.82] Termination by Equitable Deviation

It may also be possible to use the doctrine of equitable deviation to terminate a trust. For a discussion of equitable deviation, see §6.52 above.

IX. [6.83] JUDICIAL REVOCATION

In general, a trust cannot be revoked if the settlor does not specifically retain the power to revoke in the trust instrument. Nevertheless, the court may use two possible bases to judicially revoke an otherwise irrevocable document: (a) when the settlor and all beneficiaries consent; and (b) when there is a mistake of fact. *See Pernod v. American National Bank & Trust Company of Chicago,* 8 Ill.2d 16, 132 N.E.2d 540 (1956).

A. [6.84] Consent

To revoke an irrevocable document by consent, the settlor must consent, and all of the beneficiaries must be ascertained, be under no incapacity, and consent to the revocation. *Pernod v. American National Bank & Trust Company of Chicago,* 8 Ill.2d 16, 132 N.E.2d 540, 542 (1956). Thus, when some beneficiaries are incompetent or not yet in being, as in *Pernod,* then a trust cannot be revoked by consent. Likewise, beneficiaries of a trust cannot revoke an irrevocable trust if the beneficiaries do not have the consent of the settlor or if the settlor is deceased.

Despite this seemingly inflexible restriction, Illinois courts have appeared to be flexible in interpreting who qualifies as a beneficiary and, thus, whose consent is required for a trust revocation. For example, in *Stewart v. Merchants National Bank of Aurora,* 3 Ill.App.3d 337, 278 N.E.2d 10 (2d Dist. 1972), the settlor, who was also the sole beneficiary, left the remainder of his trust to the residuary beneficiaries under his will or, if he left no will, to his heirs at law. If the

settlor's heirs had been considered beneficiaries, revocation would have been impossible since some of them would be unborn or under an incapacity. However, the court concluded that the settlor's heirs at law did not hold such an interest in the trust as would require their consent for revocation. 278 N.E.2d at 13.

B. [6.85] Mistake

Even if consent is not possible, the settlor may revoke an irrevocable trust on the grounds of mistake (*i.e.,* that the power to revoke was mistakenly omitted or that other key terms were mistakenly included or omitted). It is important to note that there is no Illinois caselaw allowing beneficiaries to assert mistake as grounds for revocation; it must be the settlor who alleges mistake in an action for judicial revocation.

The evidence requirements for judicial revocation are similar to the evidentiary requirements for reformation. The evidence of mistake must be clear and convincing to justify revocation. It is not precisely apparent what evidence is required, although parol evidence can be admissible. *See Pernod v. American National Bank & Trust Company of Chicago,* 8 Ill.2d 16, 132 N.E.2d 540, 543 (1956), and *Stewart v. Merchants National Bank of Aurora,* 3 Ill.App.3d 337, 278 N.E.2d 10 (2d Dist. 1972), in both of which the court considered parol evidence regarding the question of mistake.

At the very least, the settlor's claim of mistake must be corroborated by strong independent evidence before a court will "overturn a solemnly executed deed" based on the likely self-serving testimony of the settlor seeking to revoke it. *Pernod, supra,* 132 N.E.2d at 542. Thus, the evidence cannot be merely equivocal, as in *Pernod,* when the settlor's attorney admitted it was "possible" that the settlor did not understand the trust document. 132 N.E.2d at 543. Likewise, the evidence cannot rest on the assertion that the settlor did not understand the trust document because it was "couched in precise and formal legal phraseology." *Id.* However, evidence that the settlor instructed the drafter to include a power to revoke, that the settlor stated at the time of the creation of the trust that he or she thought that he or she had the power to revoke, or that the settlor's attorney or another third party told the settlor that such a power was included is more likely to be sufficient to warrant revocation. RESTATEMENT (SECOND) OF TRUSTS §332, cmts. d – f (1959).

On the other hand, evidence that the settlor's attorney explained to the settlor the allegedly mistaken provisions of the trust will counsel against a finding of mistake. *Pernod, supra,* 132 N.E.2d at 543. Similarly, evidence that the settlor created the trust to protect himself or herself from creditors or to avoid estate taxes tends to show that the settlor did not intend to reserve a power of revocation and that there was no mistake. RESTATEMENT (SECOND) OF TRUSTS §332, cmt. i.

X. [6.86] CHARITABLE TRUSTS

A charitable trust is a trust established for donating to a charity either wholly or in part. To qualify as a charitable trust, the trust must benefit a group of persons, either by advancing

education, religion, health, or relief from poverty, sickness, or disease or by otherwise providing services to lessen the burdens of government. *See Crerar v. Williams,* 145 Ill. 625, 34 N.E. 467 (1893); *People ex rel. Hartigan v. National Anti-Drug Coalition,* 124 Ill.App.3d 269, 464 N.E.2d 690, 79 Ill.Dec. 786 (1st Dist. 1984).

Charitable trusts are generally subject to the same requirements applicable to private trusts. Unlike other trusts, however, charitable trusts are not bound by the rule against perpetuities. Moreover, a charitable trust can remain valid even when its beneficiaries are not definitely ascertainable, either because the trust is not clear or because a change in circumstances has rendered the strict execution of the trust impossible. Furthermore, charitable trusts are subject to governmental regulations from the Internal Revenue Service and State Attorney General. *See In re Estate of Stern,* 240 Ill.App.3d 834, 608 N.E.2d 534, 181 Ill.Dec. 461 (1st Dist. 1992).

A. [6.87] Construction of Charitable Trusts

In Illinois, charitable trusts are administered according to the Charitable Trust Act, 760 ILCS 55/1, *et seq.,* the Solicitation for Charity Act, 225 ILCS 460/0.01, *et seq.,* the Trusts and Trustees Act, and the same common-law legal doctrines that apply to private trusts (see §§6.2 – 6.26 above).

B. Enforcement of Charitable Trusts

1. [6.88] Attorney General's Supervision

In Illinois, the Attorney General supervises the administration of charitable trusts, ensuring that the trusts are enforced in a manner that benefits the community. When necessary, the Attorney General may intervene and take charge of the portion of the trust relating to the public right. *See In re Estate of Tomlinson,* 65 Ill.2d 382, 359 N.E.2d 109, 3 Ill.Dec. 699 (1976); *McGee v. Vandeventer,* 326 Ill. 425, 158 N.E. 127 (1927); *Stowell v. Prentiss,* 323 Ill. 309, 154 N.E. 120 (1926). The Charitable Trust Act requires that the Attorney General be informed of these responsibilities and allows the Attorney General to institute any necessary proceedings to ensure compliance. 760 ILCS 55/12. The supervision of the Attorney General is funded by the Illinois Charity Bureau Fund, which was established by the Charitable Trust Act. 760 ILCS 55/19.

2. [6.89] Enforcement by Grantor

The grantor of a trust may have the right to file suit for the enforcement of the terms and conditions of the trust, especially when the grantor reserved a possibility of reverter if the terms of the trust are not satisfied. *See McGee v. Vandeventer,* 326 Ill. 425, 158 N.E. 127 (1927). Furthermore, these rights pass on to the heirs of the grantor upon his or her death. *Id.* However, many courts have held that if the grantor does not specify conditions for the trust or otherwise reserve a possibility of reverter, the grantor cannot bring action for the trust's enforcement or seek redress for its breach. *See, e.g., Skokie Valley Professional Building, Inc. v. Skokie Valley Community Hospital,* 74 Ill.App.3d 569, 393 N.E.2d 510, 30 Ill.Dec. 474 (1st Dist. 1979) (holding that unrestricted contribution to charity does not give donors standing to challenge ultra vires acts of charity); *Smith v. Thompson,* 266 Ill.App. 165 (1st Dist. 1932) (holding that grantor

lacks standing to bring action against trustees of charity when trust specifies no conditions beyond mere contribution to charity). Nevertheless, grantors may alert the Attorney General to any violations, and the Attorney General may bring proceedings against the trustees for the enforcement of a trust. *See Smith, supra.*

3. [6.90] Enforcement by Beneficiaries

Illinois caselaw conflicts over whether beneficiaries of a charitable trust have the right to enforce the trust. Still, the majority of courts have held that expressly named beneficiaries, either specified charitable organizations or named individuals, do maintain such a right. However, when there is no named beneficiary, as is often the case with wholly charitable trusts in which the trustee is given discretion to choose the charitable beneficiaries, Illinois courts have generally held that individuals who stand to benefit as citizens have no standing to enforce proper administration of the trust. *See, e.g., Art Institute of Chicago v. Castle,* 9 Ill.App.2d 473, 133 N.E.2d 748 (1st Dist. 1956); *People ex rel. Courtney v. Wilson,* 327 Ill.App. 231, 63 N.E.2d 794 (1st Dist. 1945).

A cotrustee is permitted to bring an enforcement action against another cotrustee. *Eurich v. Korean Foundation, Inc.,* 31 Ill.App.2d 474, 176 N.E.2d 692 (1st Dist. 1961). However, an individual assigned to the administration of a charitable trust may not bring such an action against a grantor or beneficiary. *Barker v. Hauberg,* 325 Ill. 538, 156 N.E. 806 (1927); *People ex rel. Replogle v. Julia F. Burnham Hospital,* 71 Ill.App. 246 (3d Dist. 1896).

4. [6.91] Enforcement by the Court

Illinois chancery courts have the authority to ensure the enforcement of the terms of charitable trusts. Trustees of a charitable trust who are concerned about its administration may petition the circuit court for instructions. However, the court may not enter a judgment that conflicts with the intentions of the donor or the discretion of the beneficiary if the donor entrusted the beneficiary with this discretion. *See Continental Illinois Nat. Bank & Trust Co. of Chicago v. Sever,* 393 Ill. 81, 65 N.E.2d 385 (1946).

C. [6.92] Reformation and Modification of Charitable Trusts

As is the case with private trusts, the grantor of a charitable trust will specify the trust's beneficiaries, including the charitable organization, as well as the general manner in which the trust should be administered. However, sometimes the grantor's intentions cannot be carried out precisely, either because circumstances have changed or because the trust itself contains some error. In these situations, Illinois law allows for exceptions to the strict limitations regarding the reformation or modification of trusts and other irrevocable documents. When an issue regarding the administration of a charitable trust arises, a trustee may petition the court to recognize the grantor's general intentions and modify the trust accordingly. The Attorney General supervises these proceedings and ensures that the interests of the community and charitable organizations are protected.

The two doctrines under which charitable trusts can be modified in Illinois are equitable deviation and cy pres:

1. The doctrine of equitable deviation allows courts to modify trusts when the specific administration detailed by the testator cannot legally or practically be carried out or, due to a change in circumstances not anticipated by the testator, literal compliance with the terms of the will would defeat the purposes of the trust. *See Burr v. Brooks,* 83 Ill.2d 488, 416 N.E.2d 231, 48 Ill.Dec. 200 (1981); RESTATEMENT (SECOND) OF TRUSTS §381 (1959). See also §6.52 above.

2. Cy pres requires the court to recognize the testator's general charitable intent and prevent the trust from failing by altering the terms of the trust or bequest when a specific charitable intent cannot be fulfilled. To invoke the doctrine of cy pres, the trustee must demonstrate (a) the impossibility, impracticality, or illegality of administering the trust per the terms specified by the grantor; (b) the grantor's general charitable intent rather than an intention to benefit only the named institution; and (c) the availability of an alternate charitable purpose that aligns with the grantor's general charitable intent. A trustee must always bring a court proceeding to implement the doctrine of cy pres and may never make modifications to the trust without the court's approval. *Continental Illinois Nat. Bank & Trust Co. of Chicago v. Sever,* 393 Ill. 81, 65 N.E.2d 385 (1946); *In re Petition of Village of Mount Prospect, Illinois,* 167 Ill.App.3d 1031, 522 N.E.2d 122, 118 Ill.Dec. 667 (1st Dist. 1988).

For a more thorough discussion of reformation and modification of charitable trusts, see Chapter 14 of this handbook.

D. [6.93] Charitable Trust Termination

The Charitable Trust Act governs the termination of trusts that are subject to its provisions. It provides that if a trustee of a trust that is subject to the Charitable Trust Act decides that a trust's continued administration has become impractical due to its small size or changed circumstances that have negatively affected the charitable purpose of the trust, he or she may, after notifying any and all named charitable organizations that the trust was created to benefit and after receiving the Attorney General's consent, amend the terms of the governing trust instrument to terminate the trust and to transfer the trust assets. 760 ILCS 55/15.5(a). The Attorney General shall consent to the trust's termination and the transfer of its property only after the Attorney General has determined that this action is necessary or appropriate either (1) because of the small size of the trust, to realize the charitable purpose of the trust; or (2) because of changed circumstances, to satisfy the settlor's general intent as expressly noted in the trust instrument. *Id.* A trustee does not need to obtain the approval of the court before terminating a trust and transferring its property. 760 ILCS 55/15.5(e).

"Small size" is defined in the Charitable Trust Act to "mean a trust for which the annual expenses of administration, including the trustee's fees, the investment management and accounting fees and excise taxes would, if charged entirely against income, exceed 25% of the income of the trust." 760 ILCS 55/15.5(b). "Changed circumstances" refers to "a condition in

which the charitable purpose or purposes of the trust shall, in the judgment of the trustee, have become illegal, unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community." *Id.*

XI. TAX IMPLICATIONS OF CONSTRUCTION, REFORMATION, REVOCATION, AND MODIFICATION OF WILLS AND TRUSTS

A. [6.94] General Tax Considerations

Actions to construe or reform irrevocable trusts or wills may result in adverse tax consequences unintended by the settlor or testator. Tax planning is usually a significant consideration in estate planning, and no attempt to reform or construe an irrevocable document should be made without understanding the tax implications of such an action. A comprehensive discussion of the tax implications of trust and estate litigation (including actions for construction, reformation, or other modification of wills or irrevocable trusts) is beyond the scope of this chapter and can be found in Chapter 16 of this handbook. Certain tax aspects of the actions discussed in this chapter, however, are specific to this subject matter and merit special mention.

In any state court action for the construction, reformation, or other modification of an irrevocable trust or will, it is important to understand that lower state court determinations are not binding on federal authorities for federal tax purposes. This rule was explained by the United States Supreme Court in *Commissioner v. Estate of Bosch,* 387 U.S. 456, 18 L.Ed.2d 886, 87 S.Ct. 1776 (1967). In *Bosch,* the Court held that when federal tax liability turns on the character of a property interest held and transferred under state law, federal authorities are not bound by determinations of this interest at any state court level below that of the highest state court. The determinations of lower state courts may be given some weight, but they are not controlling when the highest court of the state has not ruled on the point as "the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." 87 S.Ct. at 1783.

As a practical matter, lower court decisions construing or modifying wills or trusts do carry some weight with the IRS and, although not binding, may be persuasive. Such lower court decisions will certainly be considered by the IRS as it proceeds in giving proper regard to state law. Whether the IRS elects to follow a lower state court decision may depend on a number of factors, including the question of whether the lower court decision came about as a result of a bona fide adversarial dispute and the extent of the record in state court evidencing the depth of the court's consideration of the matter. The IRS will not be persuaded if it appears that the lower state court decision was merely a rubber stamp and does not reflect a reasoned consideration of applicable state law.

Even intermediate appellate state court decisions are not totally compelling, although these rulings are "not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." 87 S.Ct. at 1782, quoting *West v. American Telephone & Telegraph Co.,* 311 U.S. 223, 85 L.Ed. 139, 61 S.Ct. 179, 183 (1940).

Note that the *Bosch* rule is merely an elaboration of the essential theory of the *Erie* doctrine (*see Erie R. v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938)) that a federal court must decide substantive questions in diversity cases in the same way that a state trial judge sitting in the same location would. *National Can Corp. v. Whittaker Corp.,* 505 F.Supp. 147 (N.D.Ill. 1981). The only absolute assurance that the IRS will follow a state court decision reforming or construing an instrument is to obtain a decision from the highest court in the state. This is not always possible, practical, or desirable.

Absent a ruling from the state Supreme Court, parties seeking judicial construction or reformation of an instrument should consider seeking a ruling from the IRS if any concern exists regarding the federal tax effect of such an action. In addition, if substantial adverse tax consequences could be triggered by a lower state court ruling construing or modifying an irrevocable will or trust, the petitioners should consider seeking such judicial action only if it is contingent on an appropriate ruling by the IRS regarding the tax effect of the state court action. State court orders that are contingent on the favorable ruling of the IRS are not uncommon to the courts or to the IRS.

B. [6.95] Retroactive Tax Effect of Construction and Reformation Actions

State court decisions construing or modifying irrevocable instruments have different retroactive effectiveness for federal tax purposes. Even if a federal tax authority is bound by, or chooses to follow, a state court decision modifying a will or trust, the decision will not apply retroactively and will not change the tax effect of the instrument prior to the state court modification. A state court's construction of an irrevocable instrument is different and may have retroactive application for tax purposes because a construction does not actually change the instrument; it merely interprets the instrument as it was intended at its inception.

1. [6.96] Reformation Actions Generally Not Effective Retroactively for Tax Purposes

Even when a state court decision reforming an irrevocable trust or will is binding on, or followed by, federal tax authorities, it generally will not be effective retroactively as to the federal tax consequences of the instrument before reformation. Judicial reformation or other modification of an irrevocable instrument results in actual changes to the instrument and, with certain exceptions, is binding only on the parties to the action and not on third parties, such as the IRS. *See M.T. Straight's Trust v. Commissioner,* 245 F.2d 327, 329 (8th Cir. 1957) ("it is both inequitable and beyond the power of a State Court to change retroactively the status of a federal revenue measure with a resulting loss of revenue to the government"); *Van Den Wymelenberg v. United States,* 397 F.2d 443 (7th Cir.), *cert. denied,* 89 S.Ct. 377 (1968); *American Nurseryman Publishing Co. v. Commissioner,* 75 T.C. 271 (1980), *aff'd without op.,* 673 F.2d 1333 (7th Cir. 1981).

In *Van Den Wymelenberg,* the Seventh Circuit Court of Appeals held that reformation of a trust to conform it to the requirements of 26 U.S.C. §2503(c) did not change the federal tax effect of the original trust, stating that "not even judicial reformation can operate to change the federal

tax consequences of a completed transaction." 397 F.2d at 445. The court went on to describe the rationale for its holding:

> **As to the parties to the reformed instrument the reformation relates back to the date of the original instrument, but it does not affect the rights acquired by non-parties, including the Government. Were the law otherwise there would exist considerable opportunity for "collusive" state court actions having the sole purpose of reducing federal tax liabilities. Furthermore, federal tax liabilities would remain unsettled for years after their assessment if state courts and private persons were empowered to retroactively affect the tax consequences of completed transactions and completed tax years.** *Id.*

The court in *American Nurseryman, supra,* cited the *Van Den Wymelenberg* language to hold that a court decision determining a stock transfer under a trust that destroyed a corporation's Subchapter S status to be void ab initio did not bind the IRS because the general rule is that "a reformation of an instrument has retroactive effect as between the parties to the instrument, but not as to third parties who previously acquired rights under the instrument." 75 T.C. at 276.

2. [6.97] Reformation or Modification Not Permitted Solely for Tax Benefit

Except when authorized by statute, discussed in §6.98 below, Illinois courts will not reform an irrevocable instrument solely to minimize or avoid the tax consequences that result from terms that were otherwise intended by the creator of the instrument. Reformation that results in tax benefits to the parties is available under Illinois law only if a valid basis exists to do so to give effect to the settlor's intent, as discussed in §§6.94 and 6.95 above. A party may seek a reformation resulting in tax benefits only if the tax benefits occurred as a result of the changes needed to give effect to the intent of the settlor. *Lake Shore National Bank v. Coyle,* 296 F.Supp. 412, 418 (N.D.Ill. 1968), *rev'd on other grounds,* 419 F.2d 958 (7th Cir. 1969); Pvt.Ltr.Rul. 9517020 (Apr. 28, 1995); *Howard v. Chapman,* 101 Ill.App.2d 135, 241 N.E.2d 492, 494 (1st Dist. 1968) ("the benign and beneficent objective of lawfully avoiding the payment of income taxes furnishes no sound basis for rewriting the will of the testator").

Even when subsequently imposed and unexpected tax laws alter the tax liability of a will or trust, courts do not allow parties to adjust documents to the new circumstances through reformation. "Taxes subsequently imposed and not anticipated or provided for in the agreement 'must fall where for public reasons the sovereign power of the government has seen fit to place them.' " *Chicago Title & Trust Co. v. Schwab,* 347 Ill.App. 233, 106 N.E.2d 857, 869 (1st Dist. 1952), quoting *Holcombe v. Ginn,* 296 Mass. 415, 6 N.E.2d 351, 354 (1937). Thus, for example, in *Howard, supra,* the appellate court refused to rewrite a will to lower income tax liabilities even though the will was written in 1904 — a time when the testator could not possibly have contemplated the income tax implications of his will. 241 N.E.2d at 494.

Like reformations, other modifications and revocations affect tax liability only if undertaken because of factors independent from tax considerations. The courts have distinguished between situations involving good-faith will contests and settlements among beneficiaries that happen to result in modifications of a will or trust and situations in which termination or modification of a

will or trust is attempted solely to gain eligibility for tax benefits. *Estate of Burdick v. Commissioner,* 96 T.C. 168, 171 (1991). Thus, for example, the fiduciary duty to conserve trust assets cannot justify modifying a will or trust unless, in light of the circumstances, the fiduciary duty provides a reason for the modification sufficiently independent of tax considerations. *Estate of La Meres v. Commissioner,* 98 T.C. 294, 308 (1992).

3. [6.98] Statutory Exceptions Permit Reformation for Certain Tax Purposes

Limited statutory exceptions exist to the general rule prohibiting reformation of irrevocable instruments solely to achieve a tax advantage. For example, reformation of certain irrevocable interests is permitted under §2056(d)(5) of the Internal Revenue Code to comply with the requirements necessary to qualify for the marital deduction. Similarly, reformation is permitted in certain circumstances to allow a trust to comply with the requirements for a qualified domestic trust in order to qualify for the marital deduction. 26 C.F.R. §20.2056A-4(a). Reformation is also permitted in certain cases under §2055(e)(3) of the Internal Revenue Code to comply with the requirements for the charitable deduction. In each of these cases, the exceptions were created to prevent the significant potential adverse tax consequences of legislation that could not have been anticipated by the creator of the will or trust. The IRS may also honor judicial modifications to qualify a trust as an eligible S corporation shareholder. Although the IRS generally will not recognize such a reformation retroactively for tax purposes, the trust will qualify as an eligible S corporation shareholder going forward. Rev.Rul. 93-79, 1993-2 Cum.Bull. 269.

4. Reformation of Charitable Trusts for Tax Purposes

a. [6.99] Charitable Estate Tax Deduction

Beyond the reasons for modification set forth in §6.98 above, trusts are sometimes modified so that they meet the requirements of a charitable trust, thereby qualifying for favorable tax treatment. Split-interest trusts may be reformed only if they meet the following requirements: (1) the split-interest rules of Internal Revenue Code §2055(e)(2) prevented the interest from qualifying for a charitable deduction in the first place; (2) the interest of the income beneficiaries is expressed either as a dollar amount or as a fixed percentage of the fair market value of the trust; and (3) the reformed charitable interest is at least 95 percent of the value of the unreformed charitable interest. 26 U.S.C. §2055(e)(3).

Furthermore, the reformation to the trust must occur within 90 days of the due date of the estate tax return under which the grantor seeks the charitable deduction. If no estate tax return is required, the reformation must occur within 90 days of the first income tax return for the trust. *Id. See also Estate of Hall v. Commissioner,* 941 F.2d 1209 (6th Cir. 1991) (text available in Westlaw). A noncompliant trust may be reformed only into either a charitable remainder unitrust or a charitable remainder annuity trust. 26 U.S.C. §2055(e)(3).

b. [6.100] Charitable Trust Tax Law Conformance Act

The Charitable Trust Tax Law Conformance Act, 760 ILCS 60/0.01, *et seq.,* allows a trustee to seek reformation of a charitable trust so that it qualifies for the estate tax charitable deduction

if the trustee has the consent of all parties holding an interest in the trust. The trust must have a remainder interest in a charitable organization, and the lead, noncharitable interest must not have expired prior to the reformation. The Charitable Trust Tax Law Conformance Act fits squarely within the Internal Revenue Code provisions discussed in §6.99 above. See generally 26 U.S.C. §2055(e)(3).

C. [6.101] Tax Considerations in the Construction, Reformation, or Modification of Effective-Date Generation-Skipping Transfer Tax-Exempt Trusts

Special care must be taken before seeking construction, reformation, or other modification of irrevocable trusts that are exempt, because of their effective date, from the application of certain taxes under the Internal Revenue Code. Changes to these trusts could cause the loss of their exempt status if not made consistent with the applicable provisions of the Code and regulations. Most notably, transfers made from certain trusts that were irrevocable on September 25, 1985, are exempt under the Code from the application of the federal generation-skipping transfer (GST) tax. 26 C.F.R. §26.2601-1(b)(1)(i). These trusts are known as "effective-date GST tax-exempt" trusts. Additions of corpus to an effective-date GST tax-exempt trust after September 25, 1985, are not exempt from the GST tax. 26 C.F.R. §26.2601-1(b)(1)(iv). The exempt status of an effective-date GST tax-exempt trust could be lost in part or altogether if any changes are made to the trust that do not comply with the specific requirements of the Code. A full discussion of the requirements necessary to maintain the exempt status of an effective-date GST tax-exempt trust is beyond the scope of this chapter. Practitioners should be fully aware of the requirements to maintain the exempt status of these trusts, however. Any action, by judicial decree or otherwise, to construe, reform, modify, terminate, partition, merge, or change in any way the provisions of an effective-date GST tax-exempt trust should be done only after a thorough analysis of the applicable provisions of the Code. The loss of a trust's exempt status from the GST tax could result in significant tax liability.

Final regulations were issued in 2001 regarding changes to effective-date GST tax-exempt trusts that will not result in the loss of the trust's exempt status. 26 C.F.R. §26.2601-1(b)(4)(i). The final regulations provide that certain changes to an effective-date GST tax-exempt trust, including changes as a result of judicial construction, settlement, or reformation, will not cause the trust to lose its exempt status provided that those changes fall within four safe harbors as follows:

> **(4) Retention of trust's exempt status in the case of modifications, etc. — (i) In general. This paragraph (b)(4) provides rules for determining when a modification, judicial construction, settlement agreement, or trustee action with respect to a trust that is exempt from the generation-skipping transfer tax under paragraph (b)(1), (2), or (3) of this section (hereinafter referred to as an exempt trust) will not cause the trust to lose its exempt status. In general, unless specifically provided otherwise, the rules contained in this paragraph are applicable only for purposes of determining whether an exempt trust retains its exempt status for generation-skipping transfer tax purposes. Thus (unless specifically noted), the rules do not apply in determining, for example, whether the transaction results in a gift subject to gift tax, or may cause the trust to be included in the gross estate of a beneficiary, or may result in the realization of gain for purposes of section 1001.**

(A) Discretionary powers. The distribution of trust principal from an exempt trust to a new trust or retention of trust principal in a continuing trust will not cause the new or continuing trust to be subject to the provisions of chapter 13, if —

(1) Either —

(i) The terms of the governing instrument of the exempt trust authorize distributions to the new trust or the retention of trust principal in a continuing trust, without the consent or approval of any beneficiary or court; or

(ii) At the time the exempt trust became irrevocable, state law authorized distributions to the new trust or retention of principal in the continuing trust, without the consent or approval of any beneficiary or court; and

(2) The terms of the governing instrument of the new or continuing trust do not extend the time for vesting of any beneficial interest in the trust in a manner that may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date the original trust became irrevocable, extending beyond any life in being at the date the original trust became irrevocable plus a period of 21 years, plus if necessary, a reasonable period of gestation. For purposes of this paragraph (b)(4)(i)(A), the exercise of a trustee's distributive power that validly postpones or suspends the vesting, absolute ownership, or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date the original trust became irrevocable) will not be considered an exercise that postpones or suspends vesting, absolute ownership, or the power of alienation beyond the perpetuities period. If a distributive power is exercised by creating another power, it is deemed to be exercised to whatever extent the second power may be exercised.

(B) Settlement. A court-approved settlement of a bona fide issue regarding the administration of the trust or the construction of terms of the governing instrument will not cause an exempt trust to be subject to the provisions of chapter 13, if —

(1) The settlement is the product of arm's length negotiations; and

(2) The settlement is within the range of reasonable outcomes under the governing instrument and applicable state law addressing the issues resolved by the settlement. A settlement that results in a compromise between the positions of the litigating parties and reflects the parties' assessments of the relative strengths of their positions is a settlement that is within the range of reasonable outcomes.

(C) Judicial construction. A judicial construction of a governing instrument to resolve an ambiguity in the terms of the instrument or to correct a scrivener's error will not cause an exempt trust to be subject to the provisions of chapter 13, if —

(1) The judicial action involves a bona fide issue; and

(2) The construction is consistent with applicable state law that would be applied by the highest court of the state.

(D) Other changes. (1) A modification of the governing instrument of an exempt trust (including a trustee distribution, settlement, or construction that does not satisfy paragraph (b)(4)(i)(A), (B), or (C) of this section) by judicial reformation, or nonjudicial reformation that is valid under applicable state law, will not cause an exempt trust to be subject to the provisions of chapter 13, if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the modification, and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.

(2) For purposes of this section, a modification of an exempt trust will result in a shift in beneficial interest to a lower generation beneficiary if the modification can result in either an increase in the amount of a GST transfer or the creation of a new GST transfer. To determine whether a modification of an irrevocable trust will shift a beneficial interest in a trust to a beneficiary who occupies a lower generation, the effect of the instrument on the date of the modification is measured against the effect of the instrument in existence immediately before the modification. If the effect of the modification cannot be immediately determined, it is deemed to shift a beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the modification. A modification that is administrative in nature that only indirectly increases the amount transferred (for example, by lowering administrative costs or income taxes) will not be considered to shift a beneficial interest in the trust. In addition, administration of a trust in conformance with applicable local law that defines the term income as a unitrust amount (or permits a right to income to be satisfied by such an amount) or that permits the trustee to adjust between principal and income to fulfill the trustee's duty of impartiality between income and principal beneficiaries will not be considered to shift a beneficial interest in the trust, if applicable local law provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust and meets the requirements of §1.643(b)-1 of this chapter. 26 C.F.R. §26.2601-1(b)(4)(i).

The rules regarding effective-date GST tax-exempt trusts are complicated, and the safe harbors under the final regulations do not guarantee protection from the loss of a trust's exempt status from the GST tax. The application of these rules is not always clear. If a modification or construction of a trust results in a partial transfer in violation of the rules, it is not clear whether the entire trust would lose its exempt status or whether the GST tax would apply only to the tainted transfer. For example, a judicial reformation may cause changes to a number of provisions in a trust, only one of which results in a transfer to a generation lower than the person or persons who held the beneficial interest prior to the modification and therefore falls outside the requirements of the applicable safe harbor under the regulations. The regulations do not specify the tax result in such circumstances, and no authority exists that provides guidance on this issue.

Extreme caution should be exercised when seeking the construction, reformation, or other modification of a trust that is exempt from the GST tax or from any other transfer tax. If any doubt exists regarding the tax effect of the action, a ruling from the IRS should be considered before taking action.

Not all requests for a ruling will be considered by the IRS. In response to numerous requests for IRS rulings regarding the modification of GST tax-exempt trusts, on January 2, 2007, the IRS issued a Revenue Procedure stating that it would no longer rule on any "modification of a trust, change in the administration of a trust, or a distribution from a trust in a factual scenario that is similar to a factual scenario set forth in one or more of the examples contained in §26.2601-1(b)(4)(i)(E)." Rev.Proc. 2007-3, 2007-1 Cum.Bull. 108. Rev.Proc. 2015-3, 2015-1 Int.Rev.Bull. 129, confirms that this is still the case.

XII. NECESSARY PARTIES AND VIRTUAL REPRESENTATION

A. [6.102] Necessary Parties

Like other civil lawsuits, will and trust lawsuits are governed by the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.* Therefore, like the petitioner in any other action in Illinois, the petitioner in a will or trust lawsuit must determine all necessary parties to the action and bring those parties into the suit. See generally 735 ILCS 5/2-404, 5/2-405; *Illinois Nat. Bank of Springfield v. Gwinn,* 390 Ill. 345, 61 N.E.2d 249 (1945). Additionally, courts are required to direct that persons be made parties if they have interests that may be affected by the court's judgment. 735 ILCS 5/2-406(a). Under the common law in Illinois, "[a]ll persons whose interest[s] will be directly affected by [a] decree should be made parties." *Rodisch v. Moore,* 253 Ill. 296, 97 N.E. 654, 655 (1912). This includes all legatees and devisees in a will contest suit. 97 N.E.2d at 656. The rule for trusts "is that in all suits respecting trust property, whether brought by or against a trustee, the beneficiaries are necessary parties. The trustee is a necessary party because he holds the legal title. The beneficiary is a necessary party because he has the equitable and ultimate interest to be affected by the decree." *Gwinn, supra,* 61 N.E.2d at 254 – 255.

Under the Probate Act of 1975, notice must be provided to all heirs and legatees in an action regarding probate of a will. 755 ILCS 5/6-10. In actions regarding will contests, §8-1 of the Probate Act requires that notice be provided to all heirs and legatees whose names are listed in

the petition to admit the will to probate. 755 ILCS 5/8-1. Section 8-1, prior to its amendment by P.A. 89-364 (eff. Aug. 18, 1995), also had defined the necessary parties to will contest actions: "The representative, if any, and all heirs and legatees of the testator must be made parties to the proceeding" in will contest actions. 755 ILCS 5/8-1(a) (1994). *See also In re Estate of Tobin,* 152 Ill.App.3d 965, 505 N.E.2d 17, 105 Ill.Dec. 891 (4th Dist. 1987); *Forys v. Bartnicki,* 107 Ill.App.3d 396, 437 N.E.2d 706, 63 Ill.Dec. 57 (5th Dist. 1982). The 1995 amendment deleted this language.

B. [6.103] Guardians ad Litem

Parties in will and trust actions who are not sui juris can be represented by guardians ad litem. In Illinois, "the power to appoint a guardian ad litem is one which is inherent in every court of justice." *In re Estate of Viehman,* 47 Ill.App.2d 138, 197 N.E.2d 494, 500 (5th Dist. 1964). In suits involving wills, the court may appoint a guardian ad litem to represent an interested minor or person with a disability (*i.e.,* one who is entitled to notice under §6-20 or §6-21 of the Probate Act of 1975, 755 ILCS 5/6-20, 5/6-21)

> **if the court finds that (a) the interests of the ward are not adequately represented by a personal fiduciary acting or designated to act pursuant to Section 28-3 or by another party having a substantially identical interest in the proceedings and the ward is not represented by a guardian of his estate and (b) the appointment of a guardian ad litem is necessary to protect the ward's interests.** 755 ILCS 5/6-12.

It is important to note, however, that even when minors are represented by a guardian ad litem in probate proceedings, a judgment will not be binding and res judicata as to them for all purposes; a minor's claim is not barred by a statute of limitations until two years after the minor reaches majority. *Eiseman v. Lerner,* 64 Ill.App.3d 185, 380 N.E.2d 1033, 20 Ill.Dec. 824 (1st Dist. 1978). When a lawsuit involves a will or trust that has unborn beneficiaries, the court may appoint a guardian ad litem to protect their interests "whenever it may deem it necessary for the proper and complete determination of such cause." 735 ILCS 5/2-501. The duties of a guardian ad litem are defined by the Probate Act; the guardian ad litem must "file an answer, appear and defend on behalf of the ward or person not in being whom he represents." 755 ILCS 5/27-3.

Although the role of a guardian ad litem is defined by statute in Illinois, it is unclear to what extent guardians ad litem have the power to consent to modification or termination of trusts on behalf of their wards. For one Illinois court that addressed this issue, the court had to determine the validity of a prior court-approved settlement agreement that modified the terms of a trust, which was challenged in part on the basis that consent to the agreement by unborn beneficiaries was not properly obtained. *Riggs v. Barrett,* 308 Ill.App. 549, 32 N.E.2d 382 (1st Dist. 1941). The court found that the settlement was not invalidated by the lack of consent of minor and unborn beneficiaries because "[g]uardians ad litem and trustees were appointed for all possible contingent remaindermen or those having mere expectancies [who] were required by the court to report whether the settlement proposed was in the best interests of the minors." 32 N.E.2d at 387. The court stated that the "record shows that the rights and interests of the minors were brought to the attention of the court, and that the court, on behalf of the minors and unborn persons, consented to have them bound." 32 N.E.2d at 389.

Because the caselaw on this issue is sparse, it is helpful to examine how other jurisdictions have dealt with the issue of whether a guardian ad litem can consent to trust modification or termination on behalf of minor, unborn, and unascertained beneficiaries. The courts seem to support the idea of this consent. In *Hatch v. Riggs National Bank,* 361 F.2d 559 (D.C.Cir. 1966), the settlor of an irrevocable spendthrift trust petitioned the court for approval of a partial early termination. The settlor was to receive the income of the trust for her lifetime and had the power to appoint the principal through her will. In the absence of this appointment, the principal was to pass through intestacy. Because of this provision, the court refused to grant termination on consent of the settlor alone because it found that her heirs' (including unborn or unascertained beneficiaries') interests could be impacted. Nevertheless, the court suggested that she could accomplish her goal by securing the consent of present heirs directly and unborn or unknown heirs through the use of a guardian ad litem. 361 F.2d at 565 ("basic principles of trust law are in accord with appointment of a guardian ad litem to represent interests of unborn or unascertained beneficiaries, for purposes of consent to modification or revocation of a trust"). The court then recommended that the settlor offer a quid pro quo, to obtain this consent. 361 F.2d at 566.

Although it is sometimes a useful method, appointment of a guardian ad litem is not a panacea to achieve modification or termination of a trust. The courts will not accept the consent of a guardian ad litem if the proposed termination or modification adversely affects the interests of his or her wards. *Abbott v. Rhode Island Hospital Trust Co.,* 49 R.I. 87, 140 A. 356, 359 (1928) (refusing to accept consent of guardian ad litem to agreement that was "an unnecessary compromise of doubtful advantage to the infant"). Similarly, they will not accept the consent of a guardian ad litem if he or she has not sufficiently represented his or her wards. *Wogman v. Wells Fargo Bank & Union Trust Co.,* 123 Cal.App.2d 657, 267 P.2d 423, 429 – 430 (1954) (holding that when guardian ad litem had merely filed answer and consented to trial, his failure to "act" on behalf of his unborn and unascertained wards was grounds for refusing to terminate trust); *Friedman v. Teplis,* 268 Ga. 721, 492 S.E.2d 885, 887 (1997) (stating that guardian ad litem must "give articulable reasons and may not give merely pro forma consent" to trust modification and holding that trial court had not abused its discretion in refusing to accept consent of guardian ad litem when "[t]he reasons supporting his consent were described in the briefest form"). Additionally, courts will take seriously the refusal of a guardian ad litem to consent to a trust modification or termination. *In re Trust Created by Schroll,* 297 N.W.2d 282 (Minn. 1980). This objection will not be overridden if it is not "arbitrary or capricious or patently contrary to the best interests" of the beneficiaries. 297 N.W.2d at 284.

C. Virtual Representation

1. [6.104] Common-Law Virtual Representation

The common-law doctrine of virtual representation existed in Illinois long before it was ever codified in a statute. The common-law doctrine of virtual representation provides that when "a particular party . . . is so far represented by others that his interests receive actual and efficient protection," that party may be bound by a judgment even though he or she is not personally in front of the court. *Ludwig v. Sommer,* 53 Ill.App.2d 72, 202 N.E.2d 337, 338 (3d Dist. 1964), quoting *Weberpals v. Jenny,* 300 Ill. 145, 133 N.E. 62, 65 (1921). Generally, "[i]t must appear

that he stands in the same situation as parties before the court and that he has a common right or interest with them." *Ludwig, supra,* 202 N.E.2d at 338 – 339, quoting *Weberpals, supra,* 133 N.E. at 65.

Virtual representation is generally invoked when minor, unborn, unknown, or mentally ill beneficiaries or beneficiaries with a disability have an interest in the will or trust at issue. Its purpose is to allow the court to enter a complete decree in situations in which "persons in being are before the court, who have the same interest, and are equally certain to bring forward the entire merits of the question, and thus give such interests effective protection [because] the dictates both of convenience and justice require that there should be a complete decree," as "the interests of all parties in being require a decree which will completely and finally dispose of the subject-matter of the litigation." *Hale v. Hale,* 146 Ill. 227, 33 N.E. 858, 868 (1893). In *Hale,* the court was dealing with unborn beneficiaries and explained that "[s]uch possible parties cannot, as a matter of course, be brought before the court in person; and it would be highly inconvenient and unjust that the rights of all parties in being should be required to await the possible birth of new claimants, until the possibility of such birth has become extinct." *Id. See also In re Estate of Mayfield,* 288 Ill.App.3d 534, 680 N.E.2d 784, 788 – 789, 223 Ill.Dec. 834 (4th Dist. 1997) (stating that "[i]t is desirable, in the area of estates and trusts, that present-day disputes be resolved without waiting many years for interests to vest," and holding that when "a parent and children have a common right or interest, where there is no conflict between the parent and any child, where the parent effectively protects the rights of the children, the parties should be able to make a full and lasting settlement of their dispute").

2. [6.105] Illinois' Revised Virtual Representation Statute

In 2010, Illinois revised its virtual representation statute, and the new statute, 760 ILCS 5/16.1, provides significantly more flexibility to beneficiaries and trustees wishing to enter into nonjudicial settlement agreements to modify the administration or terms of a trust or even to terminate a trust in certain situations. This statute was further revised effective January 1, 2015, and effective July 27, 2015.

Specifically, the revised virtual representation statute permits a beneficiary having a substantially similar interest as, and no conflict of interest with, a minor, unborn, or unascertainable beneficiary or beneficiary with a disability to represent and bind the latter with regard to a particular question or dispute. 760 ILCS 5/16.1(a)(1). The comment to the section of the Uniform Trust Code on which the statute is based explains that while the interests of the representative and the person represented are typically identical, they do not have to be and only must be substantially similar with respect to the particular question or dispute. Uniform Trust Code §304, cmt.

Additionally, the revised statute permits all primary beneficiaries of a trust, if they have legal capacity or have "representatives" who have legal capacity, to represent and bind all other beneficiaries who "have a successor, contingent, future, or other interest in the trust." 760 ILCS 5/16.1(a)(2). A "primary beneficiary" is a beneficiary who "is either: (i) currently eligible to receive income or principal from the trust, or (ii) is a presumptive remainder beneficiary." 760 ILCS 5/16.1(a)(3)(A). A " 'presumptive remainder beneficiary' means a beneficiary of a trust as

of the date of determination and assuming nonexercise of all powers of appointment, who either: (i) would be eligible to receive a distribution of income or principal if the trust terminated on that date, or (ii) would be eligible to receive a distribution of income or principal if the interests of all beneficiaries currently eligible to receive income or principal from the trust ended on that date without causing the trust to terminate." 760 ILCS 5/16.1(a)(3)(B).

A person is considered to have legal capacity unless the person is a minor or a "person with a disability." 760 ILCS 5/16.1(a)(3)(D). A person with a disability means a person with a disability within the meaning of §11a-2 of the Probate Act of 1975, 755 ILCS 5/11a-2, or a person who within the last preceding year was examined by a doctor and was determined to lack the capacity to make prudent financial decisions. This determination by the doctor must be in writing and signed by the doctor within 90 days after the date of the examination. 760 ILCS 5/16-1(a)(3)(C).

For purposes of this statute, the representative of a beneficiary who can act for and bind the beneficiary can be one of a number of different people:

a. If the trust beneficiary is represented by a court-appointed guardian of the estate or, if none, guardian of the person, that guardian shall represent and bind the beneficiary. 760 ILCS 5/16.1(a)(4).

b. If the beneficiary is a person with a disability, an agent under a property power of attorney who has authority to act with respect to the particular question or dispute and who does not have a conflict of interest with respect to such question or dispute may represent and bind the principal. Note that the agent's power to settle claims and exercise powers with respect to trusts and estates will constitute authority to act. Also note that absent a court order under the Illinois Power of Attorney Act directing a guardian to exercise the principal's powers in an agency that survives the principal's disability, an agent under the property power of attorney takes precedence over the court-appointed guardian unless the court specifies otherwise. *Id.*

c. The parent of the beneficiary may represent and bind the beneficiary if the beneficiary is a minor or a person with a disability and no guardian or agent is acting. The parent cannot have a conflict of interest in so acting and if the two parents both want to act, the parent who is (1) the lineal descendant of the settlor of the trust or (2) a beneficiary of the trust takes precedence. 760 ILCS 5/16.1(a)(5).

d. Any such representative listed above can also represent other beneficiaries who are minors, persons with disabilities, or unascertainable and who have substantially similar interests to the represented beneficiary and who do not otherwise have a representative. 760 ILCS 5/16.1(c)(6).

Actions taken by such representative are binding on the represented beneficiary. 760 ILCS 5/16.1(a)(7). The parent of a minor beneficiary may not be able to represent the child if the parent and the child do not have a common interest and the parent does not protect the rights of the child. *See In re Estate of Ostern,* 2014 IL App (2d) 131236, ¶24, 23 N.E.3d 391, 387 Ill.Dec. 699 (parent was precluded from being trust beneficiary because of conviction under financial exploitation statute, 755 ILCS 5/2-6.6, and could not represent her children who were beneficiaries of such trust).

Note that for purposes of the virtual representation statute, the Illinois Attorney General may represent and bind any charity, although a specifically named charity can also represent itself. 760 ILCS 5/16.1(c). Also, if a charity is a current beneficiary, is a presumptive remainder beneficiary, or has a vested interest in the trust, notice of the proposed nonjudicial settlement agreement must be given to the Attorney General at least 60 days before the effective date, and if the Attorney General objects in writing to the agreement, the parties must seek court approval of the agreement. 760 ILCS 5/16.1(d)(4.5).

3. [6.106] Nonjudicial Settlement Agreements

In addition to codifying the use of virtual representation in the judicial context, Illinois' revised virtual representation statute also provides explicit guidance to trustees and beneficiaries wishing to enter into binding nonjudicial settlement agreements. According to the comment to §111 of the Uniform Trust Code on which the nonjudicial settlement portion of the Illinois virtual representation statute is based, the purpose of the section "is to allow for such binding representation even if the agreement is not submitted for approval to a court." Uniform Trust Code §111, cmt.

The virtual representation statute provides that "interested persons" (or their representatives) may enter into a binding nonjudicial settlement agreement regarding the following trust matters:

(A) Validity, interpretation, or construction of the terms of the trust.

(B) Approval of a trustee's report or accounting.

(C) Exercise or nonexercise of any power by a trustee.

(D) The grant to a trustee of any necessary or desirable administrative power [that**] does not conflict with a clear material purpose of the trust.**

(E) Questions relating to property or an interest in property held by the trust, provided the resolution does not conflict with a clear material purpose of the trust.

(F) Removal, appointment, or removal and appointment of a trustee, trust advisor, investment advisor, distribution advisor, trust protector or other holder, or committee of holders, of fiduciary or nonfiduciary powers, including without limitation designation of a plan of succession or procedure to determine successors to any such office.

(G) Determination of a trustee's compensation.

(H) Transfer of a trust's principal place of administration, including without limitation to change the law governing administration of the trust.

(I) Liability or indemnification of a trustee for an action relating to the trust.

> **(J) Resolution of bona fide disputes related to administration, investment, distribution or other matters.**
>
> **(K) Modification of terms of the trust pertaining to administration of the trust.**
>
> **(L) Termination of the trust . . . .**
>
> **(M) Any other matter involving a trust to the extent the terms and conditions of the nonjudicial settlement agreement could be properly approved under applicable law by a court of competent jurisdiction.** 760 ILCS 5/16.1(d)(4).

Note that parties wishing to terminate a trust through such an agreement must seek court approval of such trust termination within 60 days of the agreement. 760 ILCS 5/16.1(d)(4)(L). A court will approve a trust termination only if "the court . . . conclude[s] continuance of the trust is not necessary to achieve any clear material purpose of the trust;" "[u]pon such termination the court may order the trust property distributed as agreed by the parties to the agreement or otherwise as the court determines equitable [and] consistent with the purposes of the trust." *Id.* See §§6.66 – 6.82 above for a discussion of legal justifications for trust termination. Also note that a spendthrift clause in the trust is a factor for the court to consider but does not preclude the court from terminating the trust because a spendthrift clause is not necessarily a "clear material purpose of the trust." *Id.*

For purposes of this statute, an interested person includes the trustee, all beneficiaries or their representatives who would need to consent to or be joined in an action to achieve a binding settlement agreement if the settlement agreement was to be approved by a court, and any other person (distribution advisors, investment advisors, etc.) holding powers in the trust relevant to the issues being resolved in the agreement.

Any nonjudicial settlement agreement validly entered into pursuant to the terms of the Illinois virtual representation statute is "final and binding on the trustee, on all beneficiaries of the trust, both current and future, and on all other interested persons as if ordered by a court with competent jurisdiction over the trust, the trust property, and all parties in interest." 760 ILCS 5/16.1(d)(6). However, the statute permits any party to the nonjudicial settlement agreement to request court approval of such "agreement, including whether any representation is adequate and without conflict of interest, provided that the petition for such approval must be filed before or within 60 days after the effective date of the agreement." 760 ILCS 5/16.1(d)(5). The virtual representation statute also permits a trustee considering whether to enter into any nonjudicial settlement agreement, in its sole discretion, to

> **obtain and rely upon an opinion of counsel on any matter relevant to this Section, including, without limitation: (i) where required by this Section, that the agreement proposed to be made in accordance with this Section does not conflict with a clear material purpose of the trust or could be properly approved by the court under applicable law; (ii) in the case of a trust termination, that continuance of the trust is not necessary to achieve any clear material purpose of the trust; (iii) that there is no conflict of interest between a representative and the person represented with respect**

to the particular question or dispute; or (iv) that the representative and the person represented have substantially similar interests with respect to the particular question or dispute. 760 ILCS 5/16.1(d)(7).

The virtual representation statute applies to any trust administered in Illinois or governed by Illinois law unless the trust instrument specifically prohibits its application by specific reference to the virtual representation statute using such language as "[n]either the provisions of Section 16.1 of the Illinois Trusts and Trustees Act nor any corresponding provision of future law may be used in the administration of this trust." 760 ILCS 5/16.1(f).

XIII. ABILITY TO RECOVER ATTORNEYS' FEES FROM ESTATE OR TRUST

A. Fiduciaries May Recover Attorneys' Fees from an Estate or Trust

1. [6.107] Recovery of Fees Under the Probate Act

The Probate Act of 1975 states that "[t]he attorney for a representative is entitled to reasonable compensation for his services." 755 ILCS 5/27-2(a). As a prerequisite to recovery of attorneys' fees from an estate under §27-2, the party seeking recovery must be a "representative," and his or her actions must have been performed in the interest of and to the benefit of the estate. *See In re Estate of Goffinet,* 318 Ill.App.3d 152, 742 N.E.2d 874, 879, 252 Ill.Dec. 336 (4th Dist. 2001).

The term "representative" seems to be synonymous with fiduciary and encompasses executor, administrator, administrator to collect, standby guardian, guardian, and temporary guardian. 755 ILCS 5/1-2.15.

2. [6.108] Recovery of Fees Under the Trusts and Trustees Act

The Trusts and Trustees Act allows a trustee "[t]o appoint attorneys, auditors, financial advisers and other agents and to pay reasonable compensation to such appointees." 760 ILCS 5/4.09.

3. Requirements That Must Be Satisfied for a Fiduciary's Attorneys' Fees To Be Paid from an Estate or Trust

a. [6.109] Benefit to the Estate or Trust

In order for a fiduciary's attorneys' fees to be payable from an estate or trust, the work done by the attorney for the fiduciary must be for the benefit of the estate or trust.

If the work is not in the interest of or to the benefit of the estate, then attorneys' fees will not be recoverable from the estate. *See In re Estate of Minsky,* 59 Ill.App.3d 974, 376 N.E.2d 647, 651, 17 Ill.Dec. 501 (1st Dist. 1978); *Fifth Third Bank, N.A. v. Rosen,* 2011 IL App (1st) 093533, 957 N.E.2d 956, 354 Ill.Dec. 362. In general, the court will take into account all potential benefits

resulting from the representative's actions. *See, e.g., In re Estate of Shull,* 295 Ill.App.3d 687, 693 N.E.2d 489, 492, 230 Ill.Dec. 360 (4th Dist. 1998) (finding presence of benefit to estate when representative's actions minimized time and expense of guardianship proceedings and prevented any potential abuses of fiduciary duties). Furthermore, success in litigation is not absolutely necessary as long as the representative's actions benefit the estate in some other manner. *Estate of Roselli,* 70 Ill.App.3d 116, 388 N.E.2d 87, 92, 26 Ill.Dec. 463 (1st Dist. 1979). However, counsel fees will be rejected when the legal services rendered were not in the interest of or did not benefit the estate or when the executor involved the estate in unnecessary litigation. *Minsky, supra,* 376 N.E.2d at 651.

A fiduciary's attorneys' fees will be paid from a trust when they are "expenses incident to the preservation of a trust or for the benefit thereof." *Brown v. Commercial National Bank of Peoria,* 94 Ill.App.2d 273, 237 N.E.2d 567, 571 (3d Dist. 1968). *See also Wool v. LaSalle National Bank,* 89 Ill.App.3d 560, 411 N.E.2d 1135, 44 Ill.Dec. 769 (1st Dist. 1980). This means that attorneys' fees are awarded when "the trust as an entity is protected or increased in tangible form, either monetarily or with property." *Wool, supra,* 411 N.E.2d at 1139 (holding that fees could not be paid in litigation to obtain permission for owner-beneficiaries to elect trustees because right of beneficiaries to indirectly control their property by directly controlling election of those who manage it was not this kind of clear benefit).

Work preparing and litigating a fee petition will not be paid for by an estate or trust, as a fee petition does not provide a benefit to the estate or trust. *In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 1285, 111 Ill.Dec. 639 (1st Dist. 1987).

b. Fees Must Be Reasonable

(1) [6.110] Court determines reasonableness of fees

The reasonableness of attorneys' fees incurred by an executor or trustee is determined by the court. Court approval is required before any attorneys' fees may be paid out of the estate. *In re Estate of Blickenstaff,* 2012 IL App (4th) 120480, ¶57, 980 N.E.2d 1285, 366 Ill.Dec. 926.

The Probate Act of 1975 permits a representative to recover only "reasonable" attorneys' fees. 755 ILCS 5/27-2. It is the court's role to determine whether the representative's attorneys' fees are reasonable. While an executor or administrator is allowed "credit in his account for reasonable attorney's fees . . . the amount paid for attorney's fees is to be determined by the court in exercise of judicial discretion." *Estate of James,* 10 Ill.App.2d 232, 134 N.E.2d 638, 641 – 642 (3d Dist. 1956). Not only does the court have the power to fix the fees, but it possesses wide discretion in doing so. For example, "[t]he court is not bound by testimony as to the amount of fees to be allowed," and in determining the proper amount, the court "should take into consideration its own knowledge of the value of the services rendered." 134 N.E.2d at 642. Billing statements are relevant to the determination of the reasonableness of attorneys' fees and thus fall within the permissible scope of discovery by a party challenging the fees. *Blickenstaff, supra,* 2012 IL App (4th) 120480 at ¶57.

The Trusts and Trustees Act also permits a trustee to pay his or her appointed attorneys only "reasonable compensation." 760 ILCS 5/4.09. This is a part of the general rule "that a trustee not at fault is entitled to be reimbursed for all his expenses properly incurred in the administration of his trust." *Patterson v. Northern Trust Co.,* 286 Ill. 564, 122 N.E. 55, 56 (1919). *See also Union Bank of Chicago v. Wormser,* 256 Ill.App. 291, 303 – 304 (1st Dist. 1930) (allowing attorneys' fees to be paid from trust because it was reasonable for attorney executor to employ his own firm to represent him and fees incurred were not excessive). This includes attorneys' fees paid by a trustee to defend the trust against groundless lawsuits. The court has the discretion to charge these fees against a share of a particular beneficiary. *Patterson, supra,* 122 N.E. at 56 – 57 (permitting trustee's attorneys' fees to be charged against share of beneficiary who brought frivolous lawsuit).

(2) [6.111] Relevant factors

Reasonableness of fees is a question of fact in both the estate and trust contexts.

In the estate context, several factors are typically cited by a court to determine whether attorneys' fees are reasonable:

a. the work involved;

b. the size of the estate;

c. the skill evidenced by the work;

d. the time expended;

e. the success of the efforts;

f. the presence of good faith; and

g. the efficiency with which the work was done.

See, e.g., In re Estate of Shull, 295 Ill.App.3d 687, 693 N.E.2d 489, 492, 230 Ill.Dec. 360 (4th Dist. 1998).

The court usually will weigh each factor before making a general assessment of reasonability concerning the attorneys' fees. Additionally, although no single factor is dispositive, courts will give more weight to some factors, such as good faith. *In re Estate of Breault,* 63 Ill.App.2d 246, 211 N.E.2d 424, 430 – 431 (1st Dist. 1965) (fiduciary entitled to recover attorneys' fees incurred in good-faith defense of estate, regardless of outcome of litigation). In *Shull, supra,* the appellate court relied on several of the above-listed factors when it reversed the trial court on the issue of attorneys' fees. The appellate court found that the requested amount of fees met the "reasonable" standard, as the case presented unusual circumstances such as a complex power of attorney issue that increased the work required of the attorney, the estate was relatively large, the attorney's

work ultimately benefited his client, and good faith on the part of the attorney was shown. The combination of these factors with the court's wide discretion on the matter of attorneys' fees resulted in the granting of the requested fees. 693 N.E.2d at 492 – 493.

While *Shull* presents an example of a situation in which a court is likely to grant fees, the absence of the above factors naturally leads to the opposite result. For example, bad faith on the part of the party seeking recovery of fees, inefficiency in allocation of attorney hours and resources, unnecessary work and research, and inaccurate or incomplete attorney time records each may lead to a denial of fees. *See, e.g., In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 111 Ill.Dec. 639 (1st Dist. 1987) (affirming judgment awarding law firm only $535,000 of the law firm's requested $957,099.05).

In the trust context, it appears that courts use a similar standard:

> **[**T**]rustees are entitled to fair, just, and reasonable compensation in the discretion of the court; and the question of what is a reasonable compensation to trustees depends largely on the circumstances of each particular case, taking into consideration the risk and responsibility incurred, the amount and character of the estate, and the nature and extent of the services necessarily performed, and the statutory rates of compensation for executors and administrators. Proper elements for consideration in fixing compensation have been more specifically stated, and include the value of the property, the size of the income whether large or [**small**], the amount of interest earned, the nature and value of services rendered, the usual price of such services or the amount reasonably contemplated, the ability of the trustee to render a special service, good faith in administering the trust, unexpected profit earned through skill of the trustee, the object which the trust was established to attain, and sometimes, but not usually, the giving of a bond by the trustee.** *Smith v. Stover,* 15 Ill.App.2d 78, 145 N.E.2d 515, 523 (2d Dist. 1957), quoting 90 C.J.S. *Trusts* §401(a).

4. Specific Cases in Which Fiduciaries' Attorneys' Fees Are Generally Not Allowed

a. [6.112] When Multiple Attorneys Are Retained

When an estate or trust has multiple fiduciaries, these fiduciaries often cannot recover fees if they each retain separate counsel. Under Illinois law, "co-executors and co-trustees must act as an entity in matters pertaining to the administration of the estate; any other rule would lead to confusion and chaos and create unnecessary charges against estate funds." *In re Estate of Greenberg,* 15 Ill.App.2d 414, 146 N.E.2d 404, 408 (1st Dist. 1957). The one exception to this rule is that attorneys' fees incurred by multiple fiduciaries acting separately may be charged against an estate or trust if the employment of separate legal counsel is necessary to protect the estate's interests and to ensure its proper administration. 146 N.E.2d at 409; *Northern Trust Co. v. Continental Illinois National Bank & Trust Company of Chicago,* 43 Ill.App.3d 169, 356 N.E.2d 1049, 1071, 1 Ill.Dec. 767 (1st Dist. 1976) (holding that "irreconcilable conflict between the corporate and individual trustees necessitated a final judicial resolution" and that this honest

difference of opinion justified retention of separate counsel at expense of trust), *rev'd in part on other grounds sub nom. Stuart v. Continental Illinois National Bank & Trust Company of Chicago,* 68 Ill.2d 502, 369 N.E.2d 1262, 12 Ill.Dec. 248 (1977).

b. [6.113] When Attorneys Are Retained for the Fiduciary's Personal Benefit

A fiduciary's attorneys' fees are not payable from an estate or trust when the fiduciary has employed an attorney for his or her individual benefit and not for the benefit of the estate or trust. *In re Estate of Dyniewicz,* 271 Ill.App.3d 616, 648 N.E.2d 1076, 1082 – 1083, 208 Ill.Dec. 154 (1st Dist. 1995); *Barth v. Reagan,* 146 Ill.App.3d 1058, 497 N.E.2d 519, 100 Ill.Dec. 541 (2d Dist. 1986); *Fifth Third Bank, N.A. v. Rosen,* 2011 IL App (1st) 093533, 957 N.E.2d 956, 354 Ill.Dec. 362. A court also may hold the fiduciary responsible for fees and costs as punitive damages when there is a breach of fiduciary duties and disregard of a beneficiary's rights. *In re Estate of Elias,* 408 Ill.App.3d 301, 946 N.E.2d 1015, 1036, 349 Ill.Dec. 519 (1st Dist. 2011).

B. Recovery of Attorneys' Fees for Beneficiaries and Other Parties from a Trust

1. [6.114] General Rule: No Recovery of Attorneys' Fees for Beneficiaries and Third Parties in Estate and Trust Litigation

In estate and trust litigation, the general rule (in the absence of a contract or statute) holds that only the fiduciary's counsel fees are charged against the will or trust property, while the beneficiaries and other parties are required to pay their own fees. *Trustees of Wheaton College v. Peters,* 286 Ill.App.3d 882, 677 N.E.2d 25, 28, 222 Ill.Dec. 212 (2d Dist. 1997). An exception to the general rule exists in construction cases in which ambiguity within an instrument and an honest difference of opinion concerning construction of that instrument are present. *See Orme v. Northern Trust Co.,* 25 Ill.2d 151, 183 N.E.2d 505, 513 (1962). This exception applies subject to several conditions discussed in §§6.118 – 6.121 below.

Therefore, in cases involving revocation, modification, or termination, the general rule applies, and parties (other than the fiduciary) will be held responsible for their own attorneys' fees. The rationale for this is unclear. In construction cases, the reason that beneficiaries' fees are paid from the estate or trust is twofold: (a) the estate or trust is benefited by an action to clarify an ambiguous term of a will or trust document; and (b) it is unfair to force beneficiaries to pay attorneys' fees to protect their rights when the ambiguity is the fault of the grantor.

These rationales apply with equal force in certain reformation, modification, and termination actions. The clearest analogy is reformation based on mistake or scrivener's error. In this type of action, it (a) benefits the estate or trust to have the will or trust be error free and (b) seems unfair to force beneficiaries to pay attorneys' fees to protect their rights when the error lies with the creator or drafter of the trust.

2. Construction Case Exception: Fees Generally Paid for Both Fiduciaries and Nonfiduciaries

a. [6.115] Estate or Trust Generally Pays Fees in Construction Cases

In a construction suit, the general rule (see §6.114 above) will not apply when there exists a bona fide ambiguity requiring court interpretation. In such a case, "the costs of litigation are borne by the estate on the theory that the testator expressed his intention so ambiguously as to necessitate construction of the instrument in order to resolve adverse claims to the property." *Orme v. Northern Trust Co.,* 25 Ill.2d 151, 183 N.E.2d 505, 513 (1962). Therefore, even an ultimately unsuccessful party may obtain attorneys' fees through the estate, but only when the court's construction proves necessary (*i.e.,* there exists "an honest difference of opinion"). *Id.*

b. [6.116] Fiduciaries' Attorneys' Fees in Construction Cases

The general rule holds that a fiduciary's attorneys' fees may be charged against the estate when the fiduciary properly seeks construction of an ambiguous provision. *Orme v. Northern Trust Co.,* 25 Ill.2d 151, 183 N.E.2d 505, 513 (1962). However, if a representative supports an interpretation that favors one group of beneficiaries above another, it breaches its fiduciary duty of impartiality, and its fees will not be paid. *Northern Trust Co. v. Heuer,* 202 Ill.App.3d 1066, 560 N.E.2d 961, 965, 148 Ill.Dec. 364 (1st Dist. 1990). An impartial fiduciary will not recover fees "in excess of those incurred in preparing and filing the complaint for construction . . . and in gathering and presenting the information necessary to interpret" the document. *Id.*

c. [6.117] Fees for Nonfiduciaries

Sections 6.118 – 6.121 below discuss factors that are especially relevant to the attorneys' fees inquiry.

(1) [6.118] Ambiguity

Whether attorneys' fees will be charged against a trust or estate largely rests on the presence of ambiguity. If there is little or no dispute or ambiguity, fees will not be granted to the party that generated the disagreement. For example, in *McCabe v. Hebner,* 410 Ill. 557, 102 N.E.2d 794, 799 (1951), the Illinois Supreme Court refused to grant the plaintiffs' request for costs after it was determined that the basis of the plaintiffs' contentions clearly lacked merit. In other cases, a lack of ambiguity precluded attorneys' fees. *See, e.g., Bartlett v. Mutual Ben. Life Ins. Co.,* 358 Ill. 452, 193 N.E. 501, 503 (1934); *Merchants National Bank of Aurora v. Old Second National Bank of Aurora,* 164 Ill.App.3d 11, 517 N.E.2d 652, 656, 115 Ill.Dec. 241 (2d Dist. 1987).

Determination of whether a bona fide ambiguity exists turns on "whether or not there is an honest difference of opinion" as to the proper construction. *Ingalsbe v. Gough,* 2 Ill.App.3d 681, 277 N.E.2d 149, 150 (4th Dist. 1971). An ambiguity alone will not serve as a basis for recovery of attorneys' fees; rather, there must also be an "honest difference of opinion." *Trustees of Wheaton College v. Peters,* 286 Ill.App.3d 882, 677 N.E.2d 25, 28, 222 Ill.Dec. 212 (2d Dist. 1997). Therefore, in addressing the issue of ambiguity, a court will apply a two-part test: (a)

whether an ambiguity exists within the issue at hand; and (b) whether there is also an honest difference of opinion between the parties with regard to the resolution of the ambiguity. *See, e.g., Ingalsbe, supra.* If the court is satisfied on these counts, then payment of attorneys' fees at the expense of the trust or estate is likely to follow.

The mere suggestion of ambiguity will not serve as a basis for obtaining fees, as the court also will focus on whether the alleged ambiguity is genuine. *See, e.g., Estate of Carlson v. Carlson,* 39 Ill.App.3d 281, 350 N.E.2d 306, 310 (2d Dist. 1976) (denying plaintiffs' claim for attorneys' fees based solely on allegation of ambiguity when no actual ambiguity existed). Thus, asserting an artificial ambiguity in an attempt to establish a construction suit will not lead to the payment of attorneys' fees from a trust or estate.

Finally, it should be noted that a court may grant attorneys' fees only for those services relating to the ambiguous portions of an agreement. If a testamentary agreement is clear and unambiguous in part and ambiguous in another part, attorneys' fees are typically allowed only for services rendered with the construction of the ambiguous provision. *Northern Trust Co. v. Winona Lake School of Theology,* 61 Ill.App.3d 966, 377 N.E.2d 1182, 1189, 18 Ill.Dec. 546 (1st Dist. 1978).

(2) [6.119] Winning/losing

Whether a party wins or loses in a construction suit is relevant to the ability to recover attorneys' fees from a trust or estate. In general, a successful party is allowed to recover fees. *See, e.g., Home for Destitute Crippled Children v. Boomer,* 320 Ill.App. 541, 51 N.E.2d 830, 834 – 835 (1st Dist. 1943).

If the party loses, however, the court will base recovery on whether the litigation stemmed from an honest attempt to resolve an ambiguity. Thus, a losing party may recover only if the court determines that a bona fide ambiguity exists and there was an honest difference of opinion between the parties. *See, e.g., Northern Trust Co. v. Continental Illinois National Bank & Trust Company of Chicago,* 43 Ill.App.3d 169, 356 N.E.2d 1049, 1072, 1 Ill.Dec. 767 (1st Dist. 1976), *rev'd in part on other grounds sub nom. Stuart v. Continental Illinois National Bank & Trust Company of Chicago,* 68 Ill.2d 502, 369 N.E.2d 1262, 12 Ill.Dec. 248 (1977); *Hinckley v. Beardsley,* 28 Ill.App.2d 379, 171 N.E.2d 401, 404 (2d Dist. 1961). See §6.114 above for further discussion of this standard. If, however, there is no honest difference of opinion and the suit is groundless, legal fees "are to be paid out of the share of the complainant in the trust estate, and not charged against the estate generally." *Patterson v. Northern Trust Co.,* 286 Ill. 564, 122 N.E. 55, 56 (1919).

(3) [6.120] Interest in construction

Only attorneys representing parties having an interest in the construction of the instrument are entitled to reasonable fees from the estate. *Northern Trust Co. v. Winona Lake School of Theology,* 61 Ill.App.3d 966, 377 N.E.2d 1182, 1189, 18 Ill.Dec. 546 (1st Dist. 1978). The manner in which a party joined an action is particularly relevant to whether the party has an interest. A party named in a testamentary agreement and made a party defendant in a complaint to

construe that agreement has a sufficient interest in the construction of the agreement to claim reasonable attorneys' fees. *Id.* On the other hand, if a party voluntarily intervenes in an action, "it does so at its own peril and should not be allowed attorney fees and expenses payable out of the trust when it does not prevail." *Hinckley v. Beardsley,* 28 Ill.App.2d 379, 171 N.E.2d 401, 404 (2d Dist. 1961).

(4) [6.121] Appeals

If an unsuccessful litigant decides to appeal a lower court decision on the construction of a will or trust, the party "litigate[s] beyond the court of original jurisdiction . . . at [its] own risk and costs." *Glaser v. Chicago Title & Trust Co.,* 401 Ill. 387, 82 N.E.2d 446, 449 (1948). Thus, a court will not charge a trust or estate with unsuccessful appellants' attorneys' fees for the appeal of a construction case, regardless of whether the construction of the instrument is necessary or reasonable. *See, e.g., NC Illinois Trust Co. v. Madigan,* 351 Ill.App.3d 311, 812 N.E.2d 1038, 1042, 286 Ill.Dec. 23 (4th Dist. 2004) ("When a trustee . . . brings a reasonable but unsuccessful appeal, [the court sees] no reason why the cost of that appeal should be allocated to the estate instead of to the trustee."); *Rosenthal v. First National Bank of Chicago,* 127 Ill.App.2d 371, 262 N.E.2d 262, 264 – 265 (1st Dist. 1970). Nevertheless, the *NC Illinois* court stated that it was not prepared to conclude that precedent "would foreclose the circuit court's power to award fees in the presence of extraordinary circumstances." 812 N.E.2d at 1042.

Although appellants in a construction suit can rarely recover fees, the reasonable attorneys' fees and costs of the appellee may be paid as a cost of administration of the trust or estate. *Landmark Trust Co. v. Aitken,* 224 Ill.App.3d 843, 587 N.E.2d 1076, 1086, 167 Ill.Dec. 461 (5th Dist. 1992); *Dyslin v. Wolf,* 347 Ill.App. 80, 106 N.E.2d 193, 195 (2d Dist. 1952) (appellees "were involuntary parties in the Supreme Court," and "it was their duty to defend the decree and to point out to the Supreme Court what they thought was a proper construction of the will in question"). This is also true when the appellee is the executor or trustee whose interest in the appeal is "to sustain the judgment of the lower court." *Landmark Trust, supra,* 587 N.E.2d at 1086.

XIV. [6.122] CONCLUSION

Estate and trust litigation has become commonplace and continues to increase. Many attorneys worry about the potential threat of litigation to their clients' estate plans. Understanding the rationale behind, and the legal elements of, the various options available under Illinois law to modify, reform, terminate, or construe irrevocable instruments is important so that counsel can address disputes that might be corrected by one of these options. A thorough understanding of the tax implications of such actions is critical as well.

7 Representing Fiduciaries in Trust and Estate Litigation

JAMES W. HITZEMAN
JESSICA R. KRULL
Sidley Austin LLP
Chicago

This chapter includes material provided by Susan W. Drewke and Richard A. Naski II for previous editions of this handbook.

I. [7.1] INTRODUCTION

The potential for litigation is an ever-present reality as fiduciaries perform their required duties and engage in discretionary decision-making. Disputes frequently arise against fiduciaries, especially trustees and executors, as a result of the unique relationship and natural imbalance of power between the fiduciary and beneficiaries. Such disputes often involve the transfer of wealth in families, including challenges to estate planning techniques, will and trust contests, contested lifetime gifts, and allegations of breach of fiduciary duty in estate and trust administration.

A number of factors have contributed to the fiduciary litigation explosion. The increasing codification and modernization of fiduciary law — while intended to protect the parties in a fiduciary relationship — have provided fuel for new causes of action. High-profile cases have brought a higher awareness of these potential claims to an increasingly litigious — and aging — populace. Great wealth has accumulated in recent decades, and great wealth had been lost as well. Both circumstances provide further fuel for fiduciary litigation. It is estimated that wealth of approximately $59 trillion will be transferred from 2007 through 2061. See John J. Havens and Paul G. Schervish, *A Golden Age of Philanthropy Still Beckons: National Wealth Transfer and Potential for Philanthropy Technical Report* (May 28, 2014), www.bc.edu/content/dam/files/research_sites/cwp/pdf/A%20Golden%20Age%20of%20Philanthropy%20Still%20Beckons.pdf (case sensitive). Whether these transfers occur at death or as a result of lifetime gifts, they likely will involve families, perhaps family businesses, and almost always fiduciaries.

Much fiduciary litigation is predictable and avoidable. Common warning signs can be learned and should be heeded by fiduciaries and their attorneys. Disputes among fiduciaries and beneficiaries should be addressed early in an attempt to resolve them quickly. If left unchecked, however, such a dispute that matures into litigation can be devastating to the fiduciary, family relationships, and the assets under the protection of the fiduciary. The parties to fiduciary litigation actions often are driven by powerful and emotional family issues that can cloud judgment. Often, disputes escalate quickly, and parties become bitterly entrenched in their positions even when the litigation does not make economic sense. With this understanding, commonsense preventative measures should be employed by the fiduciary and active communication is key. For example, establishing a policy of open communication between the fiduciary and the beneficiaries from the outset can be an effective deterrent to the disputes that lead to litigation. In addition to performing his or her duties diligently and competently, a fiduciary should strive to establish a true fiduciary relationship of trust and confidence between the fiduciary and the beneficiaries.

This chapter provides guidelines to assist attorneys representing fiduciaries in anticipating and minimizing fiduciary liability and effectively managing fiduciary litigation if it arises. The chapter combines caselaw, Illinois statutory law, and published guidance with advice on how to best apply such precedent to the fiduciary context. The analysis contained in this chapter is not a complete review of all relevant law, but rather is meant to serve as a guide to avoiding and, if necessary, preparing for litigation. With this in mind, attorneys and fiduciaries should be proactive and adopt commonsense practices from the beginning of the representation designed to minimize risk and avoid disputes with beneficiaries that can lead to litigation and fiduciary liability.

II. FUNDAMENTALS OF FIDUCIARY REPRESENTATION

A. [7.2] "Fiduciary" Defined

Illinois courts have long held that a fiduciary is one who has a duty "to act primarily for another's benefit in matters connected with [the fiduciary] undertaking. A fiduciary relationship exists where special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests of one reposing the confidence." *Orr v. Shepard,* 171 Ill.App.3d 104, 524 N.E.2d 1105, 1111, 121 Ill.Dec. 57 (1st Dist. 1988), citing BLACK'S LAW DICTIONARY, pp. 563 – 564 (5th ed. 1979). The trust relationship is a form of a fiduciary relationship. RESTATEMENT (THIRD) OF TRUSTS §2, cmt. b (2003). Other relationships that courts consider fiduciary as a matter of law include guardian-ward, executor/administrator-beneficiary, agent-principal, and attorney-client. *Id. See also Svanoe v. Jurgens,* 144 Ill. 507, 33 N.E. 955 (1893). The mere existence of one of the above relationships establishes the existence of a fiduciary relationship. 35 I.L.P. *Trusts* §52 (2008). In addition to fiduciary relationships as a matter of law, other relationships may constitute fiduciary relationships depending on the circumstances of the parties. For example, Illinois law states that a fiduciary relationship "may arise as a result of the special circumstances of the parties' relationship, where one party places trust in another so that the latter gains superiority and influence over the former." *Ransom v. A.B. Dick Co.,* 289 Ill.App.3d 663, 682 N.E.2d 314, 321, 224 Ill.Dec. 753 (1st Dist. 1997).

Once this relationship is established, the fiduciary owes duties toward the persons or entities whose beneficial interests or assets he or she is charged with protecting. Because a fiduciary is in a position of power over property for the benefit of another, the fiduciary is held to the highest standard of conduct. "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon,* 249 N.Y. 458, 164 N.E. 545, 546 (1928) (Cardozo, C.J.).

Representing a fiduciary (which, for purposes of this chapter, refers generally to trustees and representatives of decedents' estates) involves multiple fiduciary relationships and a complex web of fiduciary duties and potential liability. The attorney owes fiduciary duties to the fiduciary-client and must be aware of certain ethical responsibilities. Because the client is a fiduciary, the attorney also owes certain duties to the beneficiaries to whom the fiduciary-client owes duties, even when the beneficiaries are not technically the attorney's clients. The attorney must advise the fiduciary of his or her fiduciary duties and of the attorney's own responsibilities. The attorney for the fiduciary should advise the beneficiaries of his or her role as well, including, when appropriate, the possibility that the beneficiaries may need to consult independent counsel on certain issues as the administration of the estate or trust advances.

B. [7.3] Role of Attorney for Fiduciary

The role of an attorney for a fiduciary varies depending on the applicable state law, but in many jurisdictions, there is no clear distinction between (1) the fiduciary relationship between the attorney and the fiduciary and (2) the fiduciary relationship between the attorney and the beneficiaries to whom the fiduciary owes fiduciary duties. Although the scope of this chapter is primarily limited to a discussion of Illinois law, the jurisdictions differ in their views regarding

the character of the attorney-client relationship between attorneys and fiduciaries, specifically as to whether the attorney-client relationship extends beyond the client-fiduciary to the beneficiaries. In all cases, issues of confidentiality, attorney-client privilege, and disclosure obligations are implicated.

In the United States, jurisdictions typically follow one of two approaches in defining the identity of the client when the attorney represents a fiduciary: (1) a jurisdiction will treat the beneficiaries as the true client; or (2) a jurisdiction will treat the fiduciary as the only client. Illinois is something of a hybrid in which the fiduciary is the client, but the attorney owes certain fiduciary duties to the beneficiaries.

1. [7.4] Beneficiaries of Estate or Trust Are True Clients

A number of jurisdictions follow the theory that the attorney representing the fiduciary actually represents the estate or trust and, consequently, its beneficiaries in general administration matters. The first case to advance this position in trust law was *Talbot v. Marshfield,* 12 L.T.R. 761 (Ch. 1865). In *Talbot,* the court found that the beneficiaries could discover legal opinions provided to a trustee and paid for by the trust during administration and before litigation had ensued, but that legal opinions provided to counsel for the trustee as to the proper course to take in litigation, paid for by the trustee's own funds, could not be discovered by the beneficiaries. This decision implied that legal work performed for a trustee and paid for by the trust was really work performed for the benefit of the beneficiaries and thus discoverable. See generally Austin Wakeman Scott et al., SCOTT AND ASCHER ON TRUSTS §17.5 (5th ed. 2005) (multivolume set, year varies by volume) (SCOTT AND ASCHER ON TRUSTS).

The leading U.S. case following this theory is *Riggs National Bank of Washington, D.C. v. Zimmer,* 355 A.2d 709 (Del.Ch. 1976). The *Riggs* court held that beneficiaries were entitled to compel production of a memorandum prepared by a lawyer who had been retained by a trustee and paid out of the trust because they were the real clients of the lawyer, and therefore the memorandum was not protected either by the attorney-client privilege or the attorney work-product doctrine.

This theory has been applied by some courts in the context of employee benefit trusts (*Donovan v. Fitzsimmons,* 90 F.R.D. 583 (N.D.Ill. 1981); *Wildbur v. ARCO Chemical Co.,* 974 F.2d 631, 645, *reh'g denied,* 979 F.2d 1013 (5th Cir. 1992); *United States v. Evans,* 796 F.2d 264 (9th Cir. 1986)) and in the estate context (*Estate of Torian v. Smith,* 263 Ark. 304, 564 S.W.2d 521 (applying joint-client exception to attorney-client privilege and finding communication between executor and executor's attorney may be discovered by beneficiary of estate), *cert. denied,* 99 S.Ct. 223 (1978)). See also Rust E. Reid et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary,* 30 Real Prop.Prob. & Tr.J. 541 (1996); *In re Hoehl's Estate,* 181 Wis. 190, 193 N.W. 514, 516 (1923) (in estate matter, lawyer serves estate, court, and administrator, and "[i]n his relations to the estate and the court his duties [are] not confidential or private").

2. [7.5] Fiduciary Is Client, Not Beneficiaries

In other jurisdictions, courts adhere to the rule that the fiduciary, rather than the beneficiaries, is the real client of the attorney. In these jurisdictions, the attorney-client relationship is given priority, and both the attorney-client privilege and the attorney work-product doctrine may be invoked if appropriate to protect certain communications or work product. *See Thompson v. Vinson & Elkins,* 859 S.W.2d 617 (Tex.App. 1993) (*but see Alpert v. Gerstner,* 232 S.W.3d 117, 130 (Tex.App. 2006)); *Huie v. DeShazo,* 922 S.W.2d 920, 925 (Tex. 1996) (stating that "the trustee who retains an attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries"); *Wells Fargo Bank, N.A. v. Superior Court of Los Angeles County,* 22 Cal.4th 201, 990 P.2d 591, 91 Cal.Rptr. 716 (2000).

3. [7.6] Illinois' Derivative Fiduciary-Duty Rule

Under Illinois law, the nature and extent of the duties an attorney for a fiduciary may owe to the beneficiaries are not always clear. Even so, as discussed in §7.3 above and more fully below, under Illinois law the fiduciary is the client, although the attorney for the fiduciary owes a duty to beneficiaries.

The analysis in Illinois begins with the question of to whom the attorney owes a duty. The general rule in Illinois is that an attorney owes a duty to his or her client and not to non-client third parties. *Pelham v. Griesheimer,* 92 Ill.2d 13, 440 N.E.2d 96, 64 Ill.Dec. 544 (1982). In this analysis, Illinois adheres to a position that is based on the third-party beneficiary concept. In *Schechter v. Blank,* 254 Ill.App.3d 560, 627 N.E.2d 106, 111, 193 Ill.Dec. 947 (1st Dist. 1993), the court stated:

> **The fact that a third party may benefit from an attorney's representation of his client does not mean that the attorney thereby owes a duty to the third party. ([***First National Bank of Moline v. Califf, Harper, Fox & Dailey,* 193 Ill.App.3d 83, 548 N.E.2d 1361, 1363, 139 Ill.Dec. 547 (3d Dist. 1989)**].) As stated above, the law only imposes a duty upon an attorney for the benefit of a third party when the "primary purpose and intent" of the attorney-client relationship is to benefit the third party. It would strain the meaning of the "primary purpose and intent" language in *Pelham* for a third party to come within that category simply because he may benefit from the attorney's representation of his client. (See *Pelham v. Griesheimer,* 92 Ill.2d at 21, 64 Ill.Dec. at 548, 440 N.E.2d at 100; *First National Bank,* 193 Ill.App.3d at 86, 139 Ill.Dec. at 649, 548 N.E.2d at 1363.)**

The principle underlying the limited liability of attorneys to third parties is the protection of the personal and highly confidential nature of the attorney-client relationship. *Kopka v. Kamensky & Rubenstein,* 354 Ill.App.3d 930, 821 N.E.2d 719, 290 Ill.Dec. 407 (1st Dist. 2004).

Despite this personal and highly confidential nature, a professional obligation is established between an attorney and a third party if the attorney was hired by the client with the intent and purpose of benefiting that third party. *Pelham, supra.* To establish whether the third party is the intended beneficiary of the relationship, there must be a showing that the primary purpose of the

attorney-client relationship was to have benefited that third party. An example of an intended beneficiary is a legatee under an estate plan when the decedent retained the attorney to create an estate plan for the benefit of the legatee. *Petersen v. Wallach,* 198 Ill.2d 439, 764 N.E.2d 19, 261 Ill.Dec. 728 (2002). At times, the benefit a third party receives from the actions of a lawyer may exceed that received by the lawyer's client. Receipt of such an incidental benefit, however, does not suffice to impose a duty on an attorney to a third party. *See Jewish Hospital of St. Louis, Missouri v. Boatmen's National Bank of Belleville,* 261 Ill.App.3d 750, 633 N.E.2d 1267, 199 Ill.Dec. 276 (5th Dist.), *appeal denied,* 157 Ill.2d 503 (1994); *Schechter, supra; Orr v. Shepard,* 171 Ill.App.3d 104, 524 N.E.2d 1105, 121 Ill.Dec. 57 (1st Dist. 1988); *York v. Stiefel,* 99 Ill.2d 312, 458 N.E.2d 488, 76 Ill.Dec. 88 (1983); *Pelham, supra.*

Several Illinois appellate court decisions (discussed below) found that an attorney for an executor of an estate does not represent the beneficiaries of the estate, although the attorney does owe a duty to act with due care as to those beneficiaries; however, these cases based their findings on the notion that an attorney for an executor is frequently adverse to the beneficiaries in will contest situations. Although an attorney may owe a fiduciary duty to beneficiaries of an estate, an attorney representing an estate must give his first and only allegiance to the fiduciary of the estate when an adversarial situation arises between the executor and beneficiaries. *Jewish Hospital, supra,* 633 N.E.2d at 1277; *In re Estate of Kirk,* 292 Ill.App.3d 914, 686 N.E.2d 1246, 1249 – 1250, 227 Ill.Dec. 90 (2d Dist. 1997). This can occur, for example, when the beneficiary contests the will, makes a claim against the estate, or petitions to have the executor removed or held liable for mismanagement of the estate. *Jewish Hospital, supra,* 633 N.E.2d at 1277. And even though the beneficiaries of a decedent's estate are intended to benefit from the estate, an attorney cannot be held to have a duty to those beneficiaries, due to this potential adversarial relationship. 633 N.E.2d at 1278. Therefore, while the attorney for the executor owes a fiduciary duty to act with due care to protect the interests of the beneficiaries, the attorney does not have an attorney-client relationship with the beneficiaries. *See Estate of Vail v. First of America Trust Co.,* 309 Ill.App.3d 435, 722 N.E.2d 248, 253, 242 Ill.Dec. 759 (4th Dist. 1999); *Kirk, supra; Rutkoski v. Hollis,* 235 Ill.App.3d 744, 600 N.E.2d 1284, 175 Ill.Dec. 826 (4th Dist. 1992) (finding that legal malpractice claim could not be based on lawyer's breach of duty to estate beneficiaries because lawyer's primary duty was to executor); *Neal v. Baker,* 194 Ill.App.3d 485, 551 N.E.2d 704, 141 Ill.Dec. 517 (5th Dist. 1990); *In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 1280, 111 Ill.Dec. 639 (1st Dist. 1987).

In 2003, the First District Appellate Court, in a somewhat unique situation, found that when an attorney represented an executor with respect to an estate with a sole beneficiary in a non-adversarial context, the beneficiary was a client. *Gagliardo v. Caffrey,* 344 Ill.App.3d 219, 800 N.E.2d 489, 497, 279 Ill.Dec. 421 (1st Dist. 2003). The estate's sole beneficiary was held to have an attorney-client relationship with the attorney for the executor of the estate because the sole beneficiary's interests were, "for all practical purposes, coextensive with those of the estate: [the beneficiary's] interests are aligned with the estate, not against it." 800 N.E.2d at 496. The author believes the outcome in *Gagliardo* is likely to be limited to its specific facts and situations in which there is a single-beneficiary probate estate. Even when there is a single-beneficiary trust, the interests of the beneficiary and trustee typically will not be coextensive, as there will almost always be restrictions on the beneficiary's access to his or her interest, as a result of which the interests of the trustee and beneficiary will not necessarily be aligned.

In *Halas, supra,* 512 N.E.2d at 1280, the court held that, though the attorney did not have an attorney-client relationship with the beneficiaries, the fiduciary's attorney had a derivative fiduciary duty to the beneficiaries that derived from the duty of the fiduciary to the beneficiaries. The *Halas* court found that the attorney for the executor of an estate "must act with due care and protect the interests of the beneficiaries." *Id.* The attorney's fiduciary duty to the beneficiaries of the estate is "derived from the executor's duty." *Id.* The fact that an attorney may have a derivative fiduciary duty to individuals other than his or her client raises numerous ethical and practical considerations for an attorney advising a fiduciary. Conflicts between the fiduciary and the beneficiaries can and do arise. The attorney can easily find himself or herself in a position in which the duties of loyalty and confidentiality to the client-fiduciary potentially conflict with the derivative fiduciary duty to the beneficiaries. If the attorney becomes aware that the fiduciary is acting against the best interests of the beneficiaries, at a minimum the attorney's duty to both the fiduciary and the beneficiaries is to counsel the fiduciary regarding the inappropriateness of his or her conduct and instruct him or her to stop if the attorney believes the fiduciary is breaching a duty to the beneficiaries.

PRACTICE POINTERS

- ✓ There are strategies that should be considered by every attorney who is representing a fiduciary. It is important for attorneys to be mindful of the potential conflicting duties owed to the fiduciary and the beneficiaries so that they can be addressed immediately when a potential conflict begins to surface. If the fiduciary is also a beneficiary and there are disputes among the beneficiaries, the fiduciary may need to obtain counsel in his or her individual capacity, separate from his or her fiduciary counsel. Similarly, it may become advisable for the beneficiaries to obtain their own counsel. Beneficiaries are generally reluctant and dismayed to be advised that they may need individual counsel, and delivering that advice early in the representation may create doubt and suspicion among the beneficiaries. Though well intended, such advice suggests that the fiduciary and the beneficiaries may have conflicting interests (which may very well be the case in some instances, but often is not). This message generally is one to avoid unless a conflict is or becomes clear. As an attorney for a fiduciary, if a problem arises over some aspect of administration, you should consider advising the beneficiaries that you do not represent them and that they should seek the advice of separate counsel if they feel it necessary. If the need for the beneficiaries to obtain counsel is obvious, consider delivering a written recommendation that the beneficiaries obtain their own counsel.

- ✓ Often, the fiduciary's attorney has no way of knowing what the fiduciary is doing on his or her own. Individual fiduciaries from time to time disregard the advice of counsel and act as they wish, sometimes in breach of duty to the beneficiaries. Fiduciary conduct such as withdrawing trust or estate funds for the personal benefit of the fiduciary, making below-market loans to the fiduciary or certain beneficiaries, helping himself or herself to trust funds for personal use, self-dealing in business transactions with the trust or estate, mismanaging assets, and so on may not be known to the fiduciary's attorney unless the fiduciary discloses the conduct. In those kinds of circumstances, when beneficiaries discover the behavior of the fiduciary, they frequently blame the lawyer for not

preventing it or controlling the fiduciary. Because of the lawyer's derivative fiduciary duty to the beneficiaries, the lawyer is well advised to instruct the fiduciary, early and throughout the representation, of his or her fiduciary duties. In writing, the lawyer must also ask detailed questions regarding the administration of the estate or trust. Sometimes, the attorney may have to decide whether he or she has an obligation to inform the beneficiaries of wrongful fiduciary conduct, withdraw from the representation, or possibly inform the court. These are examples of difficult ethical circumstances that can arise during the representation of a fiduciary. And while considering any of these issues, the attorney should remember that despite the "derivative fiduciary duty" to beneficiaries, the attorney's first duty is to his or her client-fiduciary.

C. [7.7] Attorney-Client Privilege

Although Illinois law does not consider the attorney for a fiduciary to have an attorney-client relationship with the beneficiaries, as discussed in §7.6 above the attorney-client privilege may not always be invoked to protect communications between the attorney and the fiduciary from disclosure to the beneficiaries. *But see Garvy v. Seyfarth Shaw LLP,* 2012 IL App (1st) 110115, 966 N.E.2d 523, 359 Ill.Dec. 202 (noting that Illinois has not adopted "fiduciary exception" doctrine and finding that law firm's communications with its attorneys were privileged as to client-plaintiff in malpractice claim by client-plaintiff against law firm). A complete analysis of the attorney-client privilege is beyond the scope of this chapter; however, an overview of the rules related to this privilege is helpful in the more limited analysis of whether communications between attorney and fiduciary are protected against beneficiaries who seek this information and is provided in §§7.8 and 7.9 below.

1. [7.8] Overview of Attorney-Client Privilege

Customary notions of attorney-client privilege inform that

> **[**c**]onfidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. . . . As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. [**Citations omitted.**]** *Fisher v. United States,* 425 U.S. 391, 48 L.Ed.2d 39, 96 S.Ct. 1569, 1577 (1976).

The attorney-client privilege is not, however, absolute. The limitations on the attorney-client privilege are clearly set forth by the Illinois Supreme Court case *People v. Radojcic,* 2013 IL 114197, ¶40, 998 N.E.2d 1212, 376 Ill.Dec. 279, which notes the eight elements essential to the "creation and application of the attorney-client privilege":

> **(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in**

> **confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.** Quoting *People v. Adam,* 51 Ill.2d 46, 280 N.E.2d 205, 207 (1972).

See also Center Partners, Ltd. v. Growth Head GP, LLC, 2012 IL 113107, ¶30, 981 N.E.2d 345, 367 Ill.Dec. 20. Noting that this formulation of the privilege suggests that only communications "by the client" are protected from disclosure, the Illinois Supreme Court in *Radojcic* held the modern view to be one in which the privilege is a two-way street, protecting both the client's communications to the attorney and the attorney's advice to the client. 2013 IL 114197 at ¶40.

Even so, clients frequently assume that all communications with their attorneys are protected by the attorney-client privilege. This is not always true. The privilege has limited availability in any circumstance and particularly limited availability in the context of an attorney-fiduciary client relationship.

For example, the privilege applies only to qualified communications between attorney and client. "[T]he privilege attaches not to the information but to the communication of the information." *United States v. O'Malley,* 786 F.2d 786, 794 (7th Cir. 1986), quoting *United States v. James,* 708 F.2d 40, 44 n.3 (2d Cir. 1983). The communication may be oral, written, a wordless action, or the failure to communicate; however, the action in question must be intended as a means of communication between a client and his or her attorney. *See People v. Simms,* 192 Ill.2d 348, 736 N.E.2d 1092, 249 Ill.Dec. 654 (2000) (privilege did not apply to incident in which defendant struck wife in presence of attorney because court found that action was not intended to be confidential communication).

The attorney-client privilege is "based upon the confidential nature of" communications between attorney and client (*Simms, supra,* 736 N.E.2d at 1117) and "is limited solely to those communications which the client expressly made confidential or which he could reasonably believe under the circumstances would be understood by the attorney as such" (*In re Marriage of Johnson,* 237 Ill.App.3d 381, 604 N.E.2d 378, 386, 178 Ill.Dec. 122 (4th Dist. 1992)).

A thorough review of the nuances of the attorney-client privilege is beyond the scope of this chapter. Any attorney representing a fiduciary, whether in routine administration or in a contested matter, must know the general rules related to the application of the attorney-client privilege and the specific limitations when beneficiaries seek information related to otherwise privileged communications between the attorney and the fiduciary.

2. [7.9] Fiduciary Exception

The attorney-client privilege available to fiduciaries to protect attorney-client communications as to beneficiaries is often significantly limited by the fiduciary exception. "The fiduciary duty exception is based upon the notion that a communication between an attorney and a client is not privileged from those to whom the client owes a fiduciary duty*." Ferguson v. Lurie,* 139 F.R.D. 362, 365 (N.D.Ill. 1991), citing *International Insurance Co. v. Peabody International Corp.,* No. 87 C 464, 1988 WL 58611 (N.D.Ill. June 1, 1988). At the outset, it should be noted that the term "fiduciary exception" is somewhat of a misnomer. The word

"exception" suggests that the attorney-client privilege does not apply to communications between the fiduciary and the counsel. However, that is not the case. The rationale behind the fiduciary exception is that the beneficiary of a fiduciary estate is either the true client of the attorney or a joint client (together with the fiduciary) of the attorney. The privilege thus still applies in the fiduciary context, but it cannot be invoked against the beneficiary because the beneficiary is deemed to be included in the attorney-client relationship. David L.J.M. Skidmore and Laura E. Morris, *Whose Privilege Is It, Anyway? The Fiduciary Exception to the Attorney-Client Privilege,* 27 Prob. & Prop., No. 5, 20 (Sept./Oct. 2013).

The fiduciary exception has been specifically applied to the case in which a bank acts as a fiduciary, with the court finding that "the fiduciary's duty to exercise its authority without veiling its reasons from the grantor of that authority outweighs the fiduciary's interest in the confidentiality of its attorney's communications. . . . [B]ecause of the mutuality of interest between the parties, the faithful fiduciary has nothing to hide from his beneficiary." *Quintel Corporation, N.V. v. Citibank, N.A.,* 567 F.Supp. 1357, 1363 (S.D.N.Y. 1983).

The fiduciary exception has been recognized by federal courts in Illinois in shareholder actions seeking the disclosure of privileged corporate information. *See, e.g., Lawrence E. Jaffe Pension Plan v. Household International, Inc.,* 244 F.R.D. 412 (N.D.Ill. 2006) (applying fiduciary exception in nonderivative securities fraud case); *In re General Instrument Corp. Securities Litigation,* 190 F.R.D. 527 (N.D.Ill. 2000) (holding that fiduciary-duty exception was applicable to compel production of documents from defendants in derivative action); *Bailey v. Meister Brau, Inc.,* 55 F.R.D. 211 (N.D.Ill. 1972).

The fiduciary exception also has been extended from the corporate fiduciary context to cases brought under the Employee Retirement Income Security Act (ERISA), Pub.L. No. 93-406, 88 Stat., involving pension fund trustees (*see Donovan v. Fitzsimmons,* 90 F.R.D. 583, 586 (N.D.Ill. 1981) (noting that fiduciary exception "is not premised on concepts peculiar to corporate law, but rather has its underpinning in the common law of trust relationships")), to actions brought by limited partners seeking disclosure of privileged partnership documents (*see Ferguson, supra,* 139 F.R.D. at 366 (finding that fiduciary exception did not apply because limited partners failed to show good cause why attorney-client privilege should not be invoked against their document requests)), and to actions between an insurer and its policyholder (*see International Insurance, supra* (finding, based on fiduciary exception, that insurance company had right to discovery of its policyholder's arbitration file prepared by counsel for policyholder)).

Although federal courts in Illinois have recognized the fiduciary-duty exception to the attorney-client privilege in shareholder actions and ERISA cases, Illinois appellate courts have declined to apply the fiduciary exception on a number of occasions, stating that "Illinois has not yet adopted the fiduciary-duty exception" *Mueller Industries, Inc. v. Berkman,* 399 Ill.App.3d 456, 927 N.E.2d 794, 807, 340 Ill.Dec. 55 (2d Dist. 2010), *abrogated on other grounds by People v. Radojcic,* 2013 IL 114197, ¶62, 998 N.E.2d 1212, 376 Ill.Dec. 279. *See also Garvy v. Seyfarth Shaw LLP,* 2012 IL App (1st) 110115, ¶35, 966 N.E.2d 523, 359 Ill.Dec. 202; *MDA City Apartments LLC v. DLA Piper LLP (US),* 2012 IL App (1st) 111047, 967 N.E.2d 424, 359 Ill.Dec. 694.

Importantly, however, none of the facts of *Mueller, Garvy,* or *MDA City Apartments* arose in a trust context. Indeed, the courts in those cases stated that the fiduciary-duty exception "arose in the context of trust law and was based on the principle that the beneficiary of a trust had a right to the production of legal advice rendered to the trustee *relating to the administration of the trust.*" [Emphasis in original.] *Garvy, supra,* 2012 IL App (1st) 110115 at ¶31, citing *Mueller, supra,* 927 N.E.2d at 806. Accordingly, while the only relevant Illinois caselaw seems to support the notion that the fiduciary exception does not exist in Illinois, there are no Illinois cases in the trust context that would give practitioners sufficient comfort to believe that the fiduciary exception would not be applied in such a context. Careful practitioners should continue to be mindful of the fiduciary exception and, when possible, follow the Practice Pointer below to protect communications with a fiduciary to the greatest extent possible. In a *Gagliardo*-type situation in which there is a single-beneficiary estate (*see Gagliardo v. Caffrey,* 344 Ill.App.3d 219, 800 N.E.2d 489, 497, 279 Ill.Dec. 421 (1st Dist. 2003)), the attorney for the fiduciary should assume that the attorney-client privilege will not bar the beneficiary's access to otherwise privileged communications between the attorney and the fiduciary.

Even if the fiduciary exception to the attorney-client privilege were to apply, certain information need not be communicated to beneficiaries. The trustee "is privileged to refrain from communicating to the beneficiary opinions of counsel obtained by him at his own expense and for his own protection." RESTATEMENT (SECOND) OF TRUSTS §173, cmt. b (1959). And if there is a conflict of interest between the beneficiaries and the trustee procures an opinion of counsel for his or her own protection, specifically in the preparation of a lawsuit, the beneficiaries are not entitled to inspect the opinions of that attorney made for preparing for an adversarial lawsuit. *See Lewis v. UNUM Corporation Severance Plan,* 203 F.R.D. 615, 619 (D.Kan. 2001).

PRACTICE POINTER

✓ Given the fiduciary exception to attorney-client privilege, attorneys representing fiduciaries may do best to heed the following practical advice:

- Assume that all communications between the attorney and the fiduciary, and the attorney's internal work that is not protected by the work-product doctrine, are discoverable by the beneficiaries, and act accordingly. Advise the fiduciary to take care when sending e-mail communications to the attorney.

- For attorneys of fiduciaries, employ very careful practices with internal written work product or discussions among the legal team. And be especially careful with the content of all electronic communications! This should be a rule for lawyers under all circumstances. Consider advising your client to avoid casual e-mail discussions with third parties and also with the attorney.

- If a dispute arises between the fiduciary and the beneficiary, create a separate matter and segregate files. Mark all litigation documents and correspondence as privileged or attorney work product. Consider advising the fiduciary to engage separate counsel in his or her personal capacity.

- Last, when paying fees in the fiduciary litigation context, it may be best to have the fiduciary pay the fees from his or her personal funds and then seek reimbursement from the trust when appropriate. As a practical matter, however, fiduciaries are generally reluctant to pay attorneys' fees from their personal funds for legal work related to trust litigation, and in some cases will not have the financial wherewithal to do so. Given that the fiduciary exception clearly should not apply when the fiduciary is embroiled in litigation with a beneficiary, the fiduciary's inability to pay legal fees from the fiduciary's own pocket should not affect the availability of the attorney-client privilege.

III. BEGINNING REPRESENTATION

A. [7.10] Identify the Client

One of the first steps for an attorney beginning a fiduciary representation is to identify the client and the scope of the representation. Although this is a first step in any representation, there are special considerations when taking on the representation of a fiduciary. Because of the duties owed by the fiduciary to the beneficiaries, who are vulnerable to harm, the attorney and the fiduciary must understand whether and to what extent the attorney for the fiduciary has duties to those beneficiaries as well. To avoid misunderstandings, the attorney should be very clear in his or her engagement letter and in discussions with the fiduciary that the client is the fiduciary and not the beneficiaries. The beneficiaries should be informed of this as well. No matter how clearly defined the relationship may be, however, there are ethical and practical considerations for an attorney in a fiduciary representation that cannot be contracted away. Questions of confidentiality, fee issues, withdrawal obligations, and potential attorney malpractice are implicated.

B. [7.11] Establish Open Lines of Communication and True Fiduciary Relationship of Trust and Confidence with Beneficiaries

The importance of maintaining good communication practices between the fiduciary and the beneficiaries cannot be overemphasized. Beneficiaries are by definition the weaker parties in the fiduciary relationship — the fiduciary has control and legal title to property entrusted to his or her care for the benefit of the beneficiaries. A fiduciary should be advised at the outset of accepting office to communicate with the beneficiaries frequently and to continue to keep the lines of communication open. Maintaining a good relationship between the fiduciary, the fiduciary's attorney, and the beneficiaries is one of the most effective deterrents to litigation. Fiduciaries and attorneys should respond to a beneficiary's questions or concerns immediately and as completely as possible. It is always helpful to hold in-person meetings with the beneficiaries. Status reports are appreciated and should be provided to the beneficiaries frequently even if the operative document does not require the fiduciary to provide this information.

C. [7.12] Identify Potential Disputes Arising from Terms of Operative Document

Potential disputes are sometimes possible to anticipate from a review of the operative document, taking into consideration the fiduciary's knowledge of the facts, circumstances, and family relationships that are involved. Provisions that are ambiguous or legally ineffective comprise one category that can be expected to lead to disputes and possibly litigation. Another, less obvious, category includes otherwise valid provisions that, when considered in conjunction with the facts and family relationships, are likely to give rise to disputes, *e.g.,* provisions that direct disparate treatment of beneficiaries or successor fiduciary designations. Sections 7.13 – 7.26 below discuss some typical provisions that can lead to litigation.

1. [7.13] Ambiguities or Necessary Modifications

Ambiguities in the terms of a trust or will that could affect the nature or extent of the beneficiaries' rights or the fiduciary's duties should be identified and resolved either through employment of a virtual representation agreement under §16.1 of the Trusts and Trustees Act, 760 ILCS 5/1, *et seq.,* or through a judicial construction action. The virtual representation statute, which is discussed at length in Chapter 17 of this handbook, authorizes the use of a virtual representation agreement to resolve ambiguities, without the need for court proceedings, provided the requirements of the statue can be fulfilled.

There are two general classes of ambiguities — patent ambiguities and latent ambiguities. *Weir v. Leafgreen,* 26 Ill.2d 406, 186 N.E.2d 293 (1962). A patent ambiguity is an ambiguity that appears on the face of the writing itself. With a latent ambiguity, the writing on its face appears clear and unambiguous, but there is some collateral matter that may be raised by extrinsic evidence that makes the meaning uncertain. Extrinsic evidence must also be employed to resolve the ambiguity. In Illinois, extrinsic evidence can be submitted to show both patent and latent ambiguities. *Id.*

It may be that a document contains ambiguous terms that do not immediately affect the administration of the trust or the rights of any current beneficiaries. It may never be necessary for the fiduciary to resolve the ambiguity. The fiduciary should be aware of the issue, however, and be prepared to address it if the facts should bring the ambiguity into play.

If a judicial construction or reformation action is required, the fiduciary should keep in mind his or her duty of impartiality, discussed in §7.14 below. The fiduciary should not take a position in favor of one beneficiary against another and should maintain a neutral posture in seeking court assistance. Failure to maintain neutrality could result in surcharge to the fiduciary and denial of the payment of the fiduciary's litigation fees and costs from the trust or estate. *See Northern Trust Co. v. Heuer,* 202 Ill.App.3d 1066, 560 N.E.2d 961, 965, 148 Ill.Dec. 364 (1st Dist. 1990); *Spencer v. Di Cola,* 2014 IL App (1st) 121585, ¶1, 16 N.E.3d 1, 383 Ill.Dec. 819, *reh'g denied* (Aug. 18, 2014), *as modified on denial of reh'g* (Aug. 21, 2014).

2. [7.14] Disparities in Treatment of Beneficiaries

Settlors and testators occasionally favor some beneficiaries over others in their estate planning. While disparate treatment of beneficiaries by the fiduciary may be permitted under the law (*see Spencer v. Di Cola,* 2014 IL App (1st) 121585, ¶1, 16 N.E.3d 1, 383 Ill.Dec. 819, *reh'g denied* (Aug. 18, 2014), *as modified on denial of reh'g* (Aug. 21, 2014)), the disfavored beneficiary will not be happy and may look for ways to attack the distribution scheme. The fiduciary should be sensitive to this possibility. When faced with the conflicting claims of multiple beneficiaries, a trustee is not required to make a determination as to the rights of the beneficiaries, but instead should file an interpleader action. *Bornstein v. First United,* 232 Ill.App.3d 623, 597 N.E.2d 870, 173 Ill.Dec. 896 (1st Dist. 1992). Frequently, changes in an estate plan late in life that result in unequal treatment of beneficiaries are attacked on grounds of undue influence or incompetence.

3. [7.15] Designation of Trustees

Though family members are often designated as trustees or executors when they also have beneficial interests, it is well established that a fiduciary may occupy conflicting positions when the operative instrument contemplates, creates, or sanctions the conflict of interest. See 760 ILCS 5/3; *McCormick v. McCormick,* 118 Ill.App.3d 455, 455 N.E.2d 103, 111, 74 Ill.Dec. 73 (1st Dist. 1983) ("where acts which would ordinarily be viewed as a conflict of interest are contemplated, created or sanctioned within a trust instrument, . . . the trustee has no liability for following the trust's directives"); *Childs v. National Bank of Austin,* 658 F.2d 487, 490 (7th Cir. 1981); *Morris v. Broadview, Inc.,* 328 Ill.App. 267, 65 N.E.2d 605, 608 – 609 (1st Dist. 1946). *See also Goldman v. Rubin,* 292 Md. 693, 441 A.2d 713 (1982); *In re Flagg's Estate,* 365 Pa. 82, 73 A.2d 411 (1950). However, extreme caution should be exercised by a fiduciary who stands to benefit personally from a transaction. Authorization under an instrument may mean that a particular conflict is not by itself a breach of duty, but the fiduciary will be held to high standards by the court and should be certain not to exceed the scope of authorization granted within the instrument. *See, e.g., In re Estate of Muppavarapu,* 359 Ill.App.3d 925, 836 N.E.2d 74, 296 Ill.Dec. 659 (3d Dist. 2005) (when trustee was also beneficiary of trust, court found that even though instrument sanctioned such conflict of interest, duty of loyalty was not waived by instrument as it related to trustee borrowing money from trust for his personal use and benefit); *In re Estate of Halas,* 209 Ill.App.3d 333, 568 N.E.2d 170, 178, 154 Ill.Dec. 170 (1st Dist. 1991) ("Where a conflict of interest is approved or created by the testator, the fiduciary will not be held liable for his conduct unless the fiduciary has acted dishonestly or in bad faith, or has abused his discretion."); *Dick v. Peoples Mid-Illinois Corp.,* 242 Ill.App.3d 297, 609 N.E.2d 997, 1002, 182 Ill.Dec. 463 (4th Dist. 1993).

When a family member acts as a fiduciary for a family trust or estate, other problems can arise. It is important to know the family and be aware of any family problems. The fiduciary and the fiduciary's attorney should be aware of issues related to blended families, multiple marriages and stepchildren, favored children, estranged children, impaired family members, and so on. If the fiduciary is a family member, he or she may have been living with these issues and may not necessarily be as alert to the potential for dispute as the fiduciary's attorney. Even the most seemingly harmonious of families can dissolve over trust or estate issues, particularly after the common patriarch or matriarch has died.

4. Closely Held Family Businesses and Other Special Assets

a. [7.16] Retaining Special Assets

Provisions in trusts that direct the trustee to retain specific assets, such as family business interests or valuable artwork, particularly if these assets comprise a substantial part of the corpus, can raise concerns among beneficiaries and lead to objections or litigation against the fiduciary. As discussed below, the fact that a trust authorizes the retention of a specific asset does not completely insulate a trustee from liability for doing so. Common-law fiduciary duties of prudence and impartiality still must be adhered to. *See Mucci v. Stobbs,* 281 Ill.App.3d 22, 666 N.E.2d 50, 56, 216 Ill.Dec. 882 (5th Dist. 1996). Communication with the beneficiaries regarding these provisions and the trustee's investment objectives often can calm concerned beneficiaries and avoid a simmering problem.

The fact that a trust authorizes a trustee to retain a specific asset or closely held business is generally a defense to claims against the fiduciary for doing so, even if the retention of the asset would not otherwise comply with the requirements of the prudent investor rule, 760 ILCS 5/5. However, if circumstances change during the administration, such as serious problems with the business performance, or additional risks arise related to the investment of which the trustee is or should be aware, the trustee may be obligated to reevaluate and diversify. 19 ILLINOIS PRACTICE SERIES: ESTATE PLANNING AND ADMINISTRATION IN ILLINOIS §222:14 (4th ed. 2007). "In most instances, a trustee should not take a settlor's authorization to retain specific investments as special justification indefinitely if retention would otherwise be imprudent, especially if an apparent purpose of the authorization becomes outdated by changed circumstances or passage of time." RESTATEMENT (THIRD) OF TRUSTS §92, cmt. d(2) (2007). *See also Herget National Bank of Pekin v. Lampitt,* 133 Ill.App.3d 418, 478 N.E.2d 904, 905, 88 Ill.Dec. 413 (3d Dist. 1985). If diversification would be a direct violation of the terms of the trust, the trustee should consider entering into a virtual representation agreement to address the issue or should seek court approval or a judicial reformation of the trust.

b. [7.17] Closely Held Family Businesses

Quite frequently, estates or trusts hold interests in closely held family businesses. The attorney for the fiduciary and the fiduciary itself must be very careful in handling a trust or estate's interest in a closely held family business, even when authorized by the governing instrument.

The level of ownership in the business and the involvement by the trustee in the decisions regarding the business can raise issues regarding the trustee's duties. The trustee with the ability to control the business — either outright or as part of a control group — will owe duties to the trust, to the business, and potentially to the other equity holders, who may not even be beneficiaries of the trust. *See, e.g., In re Estate of Halas,* 209 Ill.App.3d 333, 568 N.E.2d 170, 174, 154 Ill.Dec. 170 (1st Dist. 1991).

Even in situations in which the trustee has no control or a limited voice in the entity, the trust may nevertheless be embroiled in conflict. The trust may find its interests directly affected or may find that a beneficiary is being squeezed out or oppressed in an individual capacity.

Fiduciaries often take on a role in the management of closely held businesses owned in part or entirely by the estate or trust. Sometimes, the fiduciary simply manages as a fiduciary, with shareholder rights as well as obligations to all of the beneficiaries. Other times, the fiduciary is not only a shareholder as a fiduciary but also an officer or director of the closely held business. Issues arise in these scenarios that are predictable and often preventable.

First, it is critical for the fiduciary to be sensitive to the fact that the entity involved is a family business. This is true whether the fiduciary is a family member, other individual, or corporate fiduciary. Usually, in family businesses, family members play different roles. Some family members may be in senior management. Others may hold lower positions. Some may not be involved in the business at all, but they are still trust beneficiaries whose interests are affected by the performance of the business. The fiduciary must get to know every one of the family members, if possible. More often than people realize, family issues explode into bigger issues and play out in the management of a business or a trust. Instead of handling the family issues separately, family members use the business or trust as an excuse to take a dispute to court. Litigation for these reasons should be avoided at all costs. It is driven by emotion rather than the bottom line and is extremely hard to control.

The fiduciary can often address the concerns of family members regarding the business simply by taking some proactive steps. A fiduciary should have personal contact with each family member. This is particularly important when a family member takes a backseat, skips family meetings, and appears uninterested in the business or the trust. It should always be assumed that the quiet family members and those who do not live close to the others are very interested. Simple things like contacting each family member personally, having lunch or dinner with them separately, offering information quickly, and always being responsive can help build the true fiduciary relationship that is necessary to calm suspicions and to anticipate problems.

It is important, for a host of reasons, including the protection of the fiduciary as well as the beneficiaries, to have a good team of professionals in place.

5. [7.18] Restrictions on Fiduciary Duties

Provisions in trusts that waive the trustee's duty to diversify investments can be problematic and should not be blindly relied on. Such a provision should insulate a trustee from liability based solely on a failure to diversify if there were good reasons not to, but it is not likely to protect a trustee whose failure to diversify has no prudent basis. Again, open communication regarding the trustee's investment plan is very important, particularly when it follows the directions of the trust but deviates from prudent investment standards. A fiduciary should be advised to monitor all investments regularly and keep appropriate records.

6. [7.19] Investment Advisors

It is not uncommon for a settlor to designate an individual as trustee and direct the trustee to consult with a designated investment advisor regarding the trust's investments. The goal of the settlor may have been to install an investment advisor because the designated trustee lacked sufficient experience in investments, or the settlor may have intended to relieve the trustee of the

burden and liability of making investment decisions. Regardless, the trustee is well advised to monitor the choices of the investment advisor, and the duty of care may require the trustee to seek court instruction if the recommendations of the investment advisor appear imprudent. If the investment advisor's decisions result in notable losses, the fiduciary should inform the beneficiaries immediately.

Illinois enacted a directed trust statute effective January 1, 2013. 760 ILCS 5/16.3. A full discussion of the statute is beyond the scope of this chapter, but if the statute applies, it can have a significant impact on the role of a trustee and the trustee's scope of liability. Under the statute, a trust instrument that appoints an investment advisor, a distribution advisor, or a trust protector may significantly alter the duties of the designated trustee and eliminate the trustee's liability for investment, distribution, and other decisions. Attorneys advising trustees should be familiar with the provisions of the statute.

7. [7.20] Family Dynamics

Whether the fiduciary is related to the family beneficiaries or is an independent corporate fiduciary, it is very important to become acquainted with the family and the beneficiaries. One of the most effective ways to avoid fiduciary litigation is to establish a true fiduciary relationship with the beneficiaries. This means that the fiduciary should become personally acquainted with the beneficiaries and earn their trust and confidence through responsible, responsive actions.

It is not uncommon for families to carry existing personal disputes or to have some element of dysfunction or discord. A fiduciary should ask appropriate questions and learn as much as possible about the relationships between the beneficiaries and the settler or testator. Having this background allows a fiduciary to handle communications with the beneficiary with a degree of sensitivity and awareness that can be very effective in avoiding or calming disputes.

8. [7.21] Discretionary Provisions

Often, a trust instrument will grant a trustee some level of discretion to exercise or not exercise powers granted the trustee under the trust. For the most part, "[t]he court will not control the exercise of such discretion, except to prevent the trustee from abusing it" or exercising it unreasonably. RESTATEMENT (SECOND) OF TRUSTS §183, cmt. a (1959). However, beneficiaries who are unhappy with the trustee's exercise of discretion may bring charges of abuse of discretion against the trustee. The manner in which a trustee exercises or fails to exercise discretion granted by the trust or Illinois law is another often litigated area.

As set forth by Illinois law, "[a] person establishing a trust may specify in the instrument the rights, powers, duties, limitations and immunities applicable to the trustee." 760 ILCS 5/3(1). In accordance with §3 of the Trusts and Trustees Act, 760 ILCS 5/3, trustees are often given the power and burden of determining the timing and extent to which benefits should be conferred on the beneficiaries of a trust. Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts,* 6 Colum.L.Rev. 1425 (1961). Such discretionary provisions are often favored as a means of facilitating death tax savings or avoiding high-income tax payouts, as well as a method of

providing flexibility to allow for adjustment to changing circumstances unforeseeable to the settlor upon the trust's drafting. See Charles L.B. Lowndes and Robert Kramer, FEDERAL ESTATE AND GIFT TAXES, pp. 946, 971 (1956).

The extent and scope of the discretion conferred on the trustee depend on the manifested intent of the settlor (RESTATEMENT (SECOND) OF TRUSTS §164, cmt. a (1959)), whose language will "be construed so as to effect to the intention of the parties." *Bear v. Millikin Trust Co.,* 336 Ill. 366, 168 N.E. 349, 355 (1929). However, even when it appears from the language that the trustee has nearly unlimited discretionary power, he or she is likely not authorized to act beyond the bounds of a reasonable judgment. RESTATEMENT (SECOND) OF TRUSTS §187, cmt. e (1959). Generally, the trustee will be required to act as a "prudent investor" would, considering the purposes, terms, distribution requirements, and other circumstances of the trust and exercising reasonable care, skill, and caution. 760 ILCS 5/5.

a. [7.22] Standard of Review for Discretionary Decisions

Illinois courts generally state that they will refrain from interfering with the exercise of discretionary powers by a trustee in the absence of fraud, bad faith, or abuse of discretion. *Flanagan State Bank v. BroMenn Healthcare,* 140 Ill.App.3d 137, 487 N.E.2d 1180, 94 Ill.Dec. 303 (4th Dist. 1986). Similarly, an Illinois court is not permitted to substitute its judgment and discretion for those of the trustee as long as the trustee's acts are within the bounds of reasonable judgment. *Martin v. McCune,* 318 Ill. 585, 149 N.E. 489 (1925); *Graham Hospital Ass'n v. Talley,* 29 Ill.App.3d 190, 329 N.E.2d 918 (3d Dist. 1975). But, as discussed more fully below, how these standards are applied will usually depend on the scope of the trustee's discretionary power. If the trustee's discretion is broad, the degree of court deference is greater. "The nature of the power conferred upon the trustee . . . may be such that there is no standard indicated by the terms of the trust by which the reasonableness of his conduct . . . can be judged." RESTATEMENT (SECOND) OF TRUSTS §187, cmt. i (1959). Confronted with such a case, "the court will not interpose if the trustee acts honestly and from proper motives." *Id.* If, however, the trustee's discretion is described in objective, ascertainable standards, the courts will be less deferential.

Under Illinois law, the boundaries of a trustee's discretion on issues of trust management may be drawn using the prudent investor standard. 760 ILCS 5/5. *See also In re Forty-Eight Insulations, Inc.,* 115 F.3d 1294 (7th Cir. 1997). The discretionary power given in a trust is often accompanied by some indication of the discretion's purpose and nature, and the provision will be construed to give effect to that intention of the settler. *See Bear v. Millikin Trust Co.,* 336 Ill. 366, 168 N.E. 349 (1929). For non-Illinois-specific guidance, see Kristen E. Caverly, *Help Clients Grant the Right Level of Trustee Discretion,* 39 Est.Plan., No. 12, 18, 22 (Dec. 2012), and Seth W. Krasilovsky, *Exercising Discretion In Administering Discretionary Trusts,* 36 Est.Plan., No. 6, 32 (June 2009). "If there is a standard by which the reasonableness of the trustee's judgment can be tested, the court will control the trustee in the exercise of a power where he acts beyond the bounds of a reasonable judgment, unless [his action] is otherwise provided by the terms of the

trust." RESTATEMENT §187, cmt. i. RESTATEMENT §187, cmt. d, sets forth factors to be considered when determining whether there has been an abuse of discretion on the part of a trustee, *i.e.,*

> **(1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.**

What constitutes abuse of discretion will depend on the scope of the discretionary provision contained in the trust document and the particular circumstances of the case at hand. In the absence of such words as "absolute" or "uncontrolled" enlarging a trustee's discretion, a court will intervene if the facts show that the distribution was an unreasonable means of carrying out the terms of the trust as construed by the court — in other words, if the "prudent investor" would have acted differently or more impartially. 760 ILCS 5/5. And, of course, a court will act to rectify abuses resulting from bad faith or improper motives, as well as to prevent abuse through non-exercise of discretion, regardless of the scope of discretion. *Flanagan State Bank, supra,* 487 N.E.2d at 1188. Accordingly, should it be shown that the trustee acted with improper motives or could not have acted with proper motives, the court is likely to intervene. RESTATEMENT §187, cmt. g. Likewise, should the trustee, in exercising or failing to exercise a power, do so "because of spite or prejudice or to further some interest of his own or of a person other than the beneficiary," or "if it is shown that [the trustee's] motives were improper or that he could not have acted from a proper motive, the court will interpose." *Id.* In the end, while courts are hesitant to interfere with a trustee's allotted discretion, it is extremely doubtful that a court would refrain from interfering with an unreasonable exercise of an absolute discretion, even if words like "absolute" are used.

b. [7.23] Absolute or Unfettered Discretion

In a trust document, the settlor may dispense with any standard by which the trustee's judgment can be measured. In so doing, the settlor may, if he or she so chooses, go as far as to "manifest an intention that the trustee's judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee's conduct can be judged." RESTATEMENT (SECOND) OF TRUSTS §187, cmt. j (1959). Words like "absolute," "unlimited," "unfettered," or "uncontrolled" modifying the trustee's discretionary power can accomplish this purpose. *See, e.g., Stein v. Scott,* 252 Ill.App.3d 611, 625 N.E.2d 713, 192 Ill.Dec. 558 (1st Dist. 1993). *See also Laubner v. JP Morgan Chase Bank, N.A.,* 386 Ill.App.3d 457, 898 N.E.2d 744, 751, 325 Ill.Dec. 697 (4th Dist. 2008). When operating under such a broad grant of discretion, the mere fact that the trustee has acted beyond the bounds of reasonable judgment is not a sufficient ground for court intervention, "so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act." RESTATEMENT §187, cmt. j.

However, even such broad discretionary provisions do not permit a trustee to act dishonestly, in bad faith, arbitrarily, or with some motive other than the accomplishment of the purposes of the trust. *Id. See also Sauvage v. Gallaway,* 331 Ill.App. 309, 73 N.E.2d 133 (4th Dist. 1947). Indeed, "[i]t is against public policy to permit the settlor to relieve the trustee of all accountability." RESTATEMENT §187, cmt. k. Further, fiduciaries who have absolute discretion should be counseled that no amount of discretion relieves them of complying with the common-law fiduciary duties that attach to their office. *See Mucci v. Stobbs,* 281 Ill.App.3d 22, 666 N.E.2d 50, 56, 216 Ill.Dec. 882 (5th Dist. 1996) ("No trustee has unrestricted authority. The requirements of loyalty and fair dealing and good faith are at the core of every trust instrument, whether specifically stated or not.").

c. [7.24] Specific-Purpose Trusts

Some trustee decisions made with regard to discretionary provisions will permit a court to analyze their reasonableness through objective factors. See generally RESTATEMENT (THIRD) OF TRUSTS §50 (2003). If the trust specifically provides for "health, education, support, or maintenance," the court can properly decide if the trustee's decisions adequately provided for these "ascertainable" standards, as identified in Internal Revenue Code §2041 and regulations thereunder. Therefore, in certain situations, a finding of abuse of discretion can be maintained, and the court may substitute its own judgment for that of the trustee. *See Walliser v. Northern Trust Co. of Chicago,* 338 Ill.App. 263, 87 N.E.2d 129 (2d Dist. 1949). For example, "a clause authorizing a trustee to draw upon the corpus where necessary for the adequate support and maintenance of the beneficiary, does not give the trustee absolute and unlimited power [to disregard his or her duty of impartiality], but sets forth a sufficient standard whereby a court of equity can determine whether the trustee abused the power authorized." 87 N.E.2d at 131. Alternatively, non-ascertainable standards, such as best interests, are set forth with broad, nonlimiting discretionary language and do not allow the court such leeway in second-guessing the decisions of the trustee. In such cases, the issue is not whether the court or someone else would have acted differently, but rather whether the trustee properly exercised his or her discretion. If discretion was exercised at all, the trustee's decision likely will be upheld. *See In re Estate of Thomson,* 139 Ill.App.3d 930, 487 N.E.2d 1193, 94 Ill.Dec. 316 (4th Dist. 1986).

d. [7.25] Non-Exercise of Discretion

A court will not ordinarily interfere with a trustee's failure to exercise a discretionary power as long as he or she does so within a reasonable time and the non-exercise itself is reasonable. *See Fischer v. Butz,* 224 Ill. 379, 79 N.E. 659 (1906). When powers are discretionary, "[t]he exercise of a power is discretionary except to the extent to which its exercise is required by the terms of the trust or by the principles of law applicable to the duties of trustees." RESTATEMENT (SECOND) OF TRUSTS §187, cmt. a (1959). A slightly different standard exists should the trust be for a specific purpose, such as maintenance or support. "[I]t may be the duty of the trustee to exercise a power conferred upon him, or, on the other hand, he may have discretion whether to exercise the power or not. Even though it is the duty of the trustee to exercise a power, he may have discretion as to the time, manner and extent of its exercise." *Id.* If the trustee fails to act reasonably, thereby frustrating the purposes of the specific-purpose trust, a court may intervene; however, courts are hesitant to exercise a discretionary power conferred on a trustee. *See French v. Northern Trust Co.,* 197 Ill. 30, 64 N.E. 105 (1902).

e. [7.26] Trustee Liability

If a trustee honestly and in good faith exercises his or her discretionary powers, he or she likely will not be held liable for the exercise of that discretion. *See Continental Illinois National Bank & Trust Company of Chicago v. Sax,* 199 Ill.App.3d 685, 557 N.E.2d 475, 145 Ill.Dec. 705 (1st Dist. 1990). The trustee also may be exonerated from personal liability by the trust itself for failure to act impartially, or for any conduct that is not the result of gross negligence or willful default. Such provisions are not favored by the law but will be upheld unless the case involves a breach of trust committed in bad faith or intentional or reckless indifference to the interests of a beneficiary. *Axelrod v. Giambalvo,* 129 Ill.App.3d 512, 472 N.E.2d 840, 844, 84 Ill.Dec. 703 (1st Dist. 1984). Finally, should the trustee delay in making a partial distribution of the trust property and thereby fail to act impartially, the trustee may be held liable for interest. *Gregory v. First National Bank & Trust Co.,* 84 Ill.App.3d 957, 406 N.E.2d 583, 588 – 589, 40 Ill.Dec. 577 (2d Dist. 1980). See also RESTATEMENT (SECOND) OF TRUSTS §222 (1959).

IV. [7.27] DUTIES OF FIDUCIARY

Once a fiduciary relationship is established, there are a number of duties that the fiduciary must fulfill. Such duties and responsibilities are extensive and are determined by the terms of a particular will or trust instrument, the applicable state statutes (to the extent that such statutes are not waived by the terms of the governing instrument), and the general principles of equity that have evolved over time.

A. [7.28] Duties Specified in Trust or Will

The first source to which a fiduciary must look in determining his or her duty to a beneficiary is the terms of the instrument appointing the fiduciary, whether it is a will, a trust instrument, or some other document, like a power of attorney. The significance of this cannot be overstated. The Trusts and Trustees Act provides: "A person establishing a trust may specify in the instrument the rights, powers, duties, limitations and immunities applicable to the trustee, beneficiary and others and those provisions where not otherwise contrary to law shall control, notwithstanding this Act." 760 ILCS 5/3(1). The same concept applies to a number of provisions in the Probate Act of 1975, 755 ILCS 5/1-1, *et seq*., which apply only to the extent the terms of the will are not inconsistent. See, *e.g.,* 755 ILCS 5/28-8 (independent administration), or 5/20-19 (supervised estates). The attorney for the estate representative should become familiar with these provisions.

B. [7.29] Statutory and Common-Law Fiduciary Duties

The duties of a fiduciary are not limited to those articulated in the governing instrument. In addition to the powers and duties set forth in the governing instrument, Illinois law is well settled that certain fiduciary duties attach to the fiduciary's office as a matter of common law or statutory law. *Humpa v. Hedstrom,* 341 Ill.App. 605, 94 N.E.2d 614, 619 (1st Dist. 1950) ("A trustee subjects himself to those obligations of fidelity and diligence that attach to his office, and any discretion vested in him under the trust instrument does not relieve him from obedience to the great principles of equity which are the life of every trust."), citing *Carrier v. Carrier,* 226 N.Y. 114, 123 N.E. 135 (1919); *Mucci v. Stobbs,* 281 Ill.App.3d 22, 666 N.E.2d 50, 56, 216 Ill.Dec.

882 (5th Dist. 1996) ("No trustee has unrestricted authority. The requirements of loyalty and fair dealing and good faith are at the core of every trust instrument, whether specifically stated or not."). These basic fiduciary duties exist separate and apart from the specific terms of a governing instrument. Although a governing instrument can limit or modify the extent of some fiduciary duties, such as the duty of loyalty or impartiality, other duties, such as the duty of good faith and fair dealing, cannot be contracted around.

In the case of a decedent's estate, the Probate Act automatically imposes a number of duties on the representative, beginning with the duty, within 30 days of the executor learning of his or her appointment, to either start a proceeding to have the decedent's will admitted to probate or indicate his or her refusal to serve as executor. 755 ILCS 5/6-3. Another duty imposed on the representative is the duty "to defend a proceeding to contest the validity of the will." 755 ILCS 5/8-1(e). *See Rutkoski v. Hollis,* 235 Ill.App.3d 744, 600 N.E.2d 1284, 175 Ill.Dec. 826 (4th Dist. 1992). A proceeding to contest the validity of the will could be initiated by any number of parties, from a disinherited heir to a creditor of the estate, and in virtually all cases the executor must defend the will's validity.

To highlight the many duties that a fiduciary owes to his or her beneficiaries, it is important to understand that, conceptually, a fiduciary is expected to meet many different duties, several of which are discussed by the courts in an overlapping fashion. As a brief overview, a trustee's duties include the following:

- During the administration of a trust, the trustee owes the beneficiaries (1) the duty of loyalty, (2) the duty of prudence (which encompasses the duty to exercise reasonable care, the duty to exercise skill, and the duty to exercise caution), (3) the duty to account, (4) the duty to preserve trust property, (5) the duty to defend trust assets against unfounded claims, (6) the duty to enforce claims, (7) the duty to take and keep control of trust assets, (8) the duty to keep trust property separate, (9) the duty to pay income beneficiaries according to trust terms, (10) the duty to deal impartially with all beneficiaries, and (11) various duties with respect to cotrustees.

- During such administration, the trustee also has several fiduciary duties owed in relation to trust investments. There are statutory duties under the Illinois prudent investor rule (which can be waived by the trust instrument), including (1) the duty to invest and manage trust assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust (which encompasses the duty to exercise reasonable care when managing the principal, the duty to exercise skill in selecting investments, and the duty to exercise caution in investment decisions irrespective of the trustee's own personal preference toward speculative ventures); (2) the duty to diversify the investment; (3) the duty to review trust assets upon acceptance of trusteeship; (4) the duty to pursue a prudent investment strategy; (5) the duty to incur only reasonable and appropriate costs; and (6) the duty not to delegate to others the performance of any acts involving exercise of judgment and discretion. See 760 ILCS 5/5.

- Coupled with these statutory fiduciary duties are several equitable fiduciary duties (which may also be waived by the trust instrument), including (1) the duty to sell unproductive property, (2) the duty to make trust property productive, (3) the duty to dispose of a business interest unless specifically authorized to retain such business by the trust instrument, and (4) the duty to diversify assets.

While an in-depth discussion of each of these duties is beyond the scope of this chapter, it is important for the fiduciary, and the attorney representing the fiduciary, to understand the breadth of duties owed to beneficiaries. Several of these statutory and common-law duties are discussed in detail in §§7.30 – 7.34 below.

1. [7.30] Duty of Loyalty

The duty of loyalty is a broad duty that governs many of a trustee's specific duties. Generally, the duty of loyalty requires the trustee to (a) administer the trust solely in the interest of the beneficiaries, (b) avoid self-dealing and conflicting transactions, and (c) communicate material information to any beneficiary with whom the trustee transacts. See RESTATEMENT (THIRD) OF TRUSTS §78 (2007).

A trustee has a duty to avoid serving his or her own or third parties' objectives in the administration of a trust. This duty is so absolute that Illinois courts have held:

> **A trustee stands in a fiduciary relation and in the absence of express authority to do so he can neither sell trust property to himself, nor buy property for the trust estate from himself, or from a company in which he has a substantial or controlling interest, or in which he is a principal officer. The consideration he pays for the property and his good faith are immaterial, and the transaction will be set aside, even though it would have been upheld if the dealings had been at arm's length with a third person.** *Kinney v. Lindgren,* 373 Ill. 415, 26 N.E.2d 471, 474 (1940), *abrogated on other grounds by Kreutzer v. Illinois Commerce Commission,* 2012 IL App (2d) 110619, 980 N.E.2d 1238, 366 Ill.Dec. 879.

In *Kinney,* the Illinois Supreme Court set aside a transaction in which trustees allegedly invested trust funds to buy bonds at above-market price from a company that they managed. The court reasoned that even if the trust had paid a fair price for the bonds, the transaction still would have been a breach of the trustees' fiduciary duty against self-dealing. (The court noted that no express authority was granted in the instrument to allow for such a self-interested transaction.) This per se rule is sometimes applied because the odds of disloyalty are increased when the same person (as trustee) sells to himself or herself (as a private person) trust assets. Meanwhile, the odds of detecting wrongdoing are low. See RESTATEMENT §78, cmt. b.

The exception to this rule occurs when a trust or other governing instrument specifically allows a conflict or a transaction that would otherwise be considered self-dealing.

> **It is well established that a trustee may occupy conflicting positions in handling the trust where the trust instrument contemplates, creates, or sanctions the conflict of interest. The creator of the trust can waive the rule of undivided loyalty by expressly conferring upon the trustee the power to act in a dual capacity, or he can waive the rule by implication where he knowingly places the trustee in a position which might conflict with the interest of the beneficiaries.** *Dick v. Peoples Mid-Illinois Corp.,* 242 Ill.App.3d 297, 609 N.E.2d 997, 1002, 182 Ill.Dec. 463 (4th Dist. 1993).

When the governing instrument allows for a conflict of interest, the standard of care to which the fiduciary is held, as it relates to that particular authorization, decreases greatly, and courts look to whether the trustee acted in bad faith or abused the trustee's discretion. *See, e.g., In re Estate of Halas,* 209 Ill.App.3d 333, 568 N.E.2d 170, 178, 154 Ill.Dec. 170 (1st Dist. 1991) ("Where a conflict of interest is approved or created by the testator, the fiduciary will not be held liable for his conduct unless the fiduciary has acted dishonestly or in bad faith, or has abused his discretion."); *Dick, supra.*

The duty of loyalty applies not just to the trustee's dealings with trust property, but also to dealings the trustee may have with a beneficiary. In such dealings, the trustee must serve the interests of the beneficiary with complete loyalty, excluding all self-interest. *Janowiak v. Tiesi,* 402 Ill.App.3d 997, 932 N.E.2d 569, 342 Ill.Dec. 442 (1st Dist. 2010). All such transactions are subject to the closest scrutiny, and the burden falls on the trustee to prove that the transaction was fair. This can be achieved by disclosing all relevant information, paying adequate consideration, and ensuring that the beneficiary has competent and independent advice related to the transaction. *Id.* Furthermore, when the instrument approves the conflict of interest, the burden of proof remains on the party challenging the trustee's conduct, as there is no presumption against the trustee despite the divided loyalty. *Halas, supra,* 568 N.E.2d at 178.

Moreover, even when the operative trust or other document may not explicitly allow conflict-of-interest transactions, courts are somewhat flexible in applying the requirement set forth in RESTATEMENT §78 that the trustee administer the trust solely in the interest of the beneficiaries. *See Bracken v. Block,* 204 Ill.App.3d 23, 561 N.E.2d 1273, 149 Ill.Dec. 577 (3d Dist. 1990). *See also In re Estate of Muppavarapu,* 359 Ill.App.3d 925, 836 N.E.2d 74, 296 Ill.Dec. 659 (3d Dist. 2005). This requirement, if interpreted too broadly, could stifle a trustee's ability to make optimal investments. For example, the trustee might second-guess transactions that would benefit the trust merely because the transactions would benefit the trustee or other related parties as well. See RESTATEMENT §78, cmt. c ("[In exceptional cases], although conflicting-interest temptations *do* exist for the trustee, generalized considerations of efficiency and beneficiary interest, as well as the minimal or manageable degrees of risk involved, justify departure from the trust law's strict, prophylactic approach to issues of fiduciary loyalty." [Emphasis in original.]). The trustee has at least some flexibility in determining which transactions are in the beneficiaries' best interests, even if they involve parties with which the trustee has other dealings. *Id.*

The self-dealing prohibition prevents the trustee from (a) investing or otherwise using the trust's property for personal gain without proper consent, or (b) engaging in conflicting transactions — *i.e.,* any transactions (whether they involve trust property) that would foreseeably create a conflict between the trustee's fiduciary duty and his or her personal interest — without proper consent. See RESTATEMENT §78, cmt. a. *See also Giagnorio v. Emmett C. Torkelson Trust,* 292 Ill.App.3d 318, 686 N.E.2d 42, 46, 226 Ill.Dec. 693 (2d Dist. 1997). As noted, the trustee may engage in transactions that appear to be self-dealing or conflicting as long as he or she has adequate consent. Consent may be given expressly or impliedly in the terms of the trust, by authorization of (usually) all of the beneficiaries or, finally, by court order. See RESTATEMENT §78, cmt. a.

Put differently, the duty of loyalty includes a duty to disclose potential conflicts of interest. The trustee is well advised to tell beneficiaries beforehand if he or she suspects that a particular transaction may create conflicts of interest. If the trustee is unable to disclose a conflict of interest, then he or she must find express or implied consent in the trust instrument in order to proceed. For example, in *Bracken, supra,* a court ruled that a trust instrument that granted a trustee-beneficiary broad discretionary powers to administer the trust allowed that trustee to buy a house owned by the trust (as a trustee empowered to self-deal by the terms of the trust) and then collect the money that the trust earned from the house (as a beneficiary of the trust).

Note that in some cases it will be difficult for the trustee to determine whether he or she is self-dealing or in a position of conflict. For example, suppose the trustee owns stocks in several companies, and the trust enters into a transaction with one of the companies. In the absence of an objective rule determining how much of a personal interest would impair the trustee's judgment in such a transaction, it is best for the trustee to seek protections (*i.e.,* adequate relief from fiduciary duties) in the trust instrument beforehand.

Even without a contractual exception to fiduciary duties, the Trusts and Trustees Act does allow a trustee to self-deal insofar as he or she merely deposits the trust's funds in a "bank or other deposit accounts . . . operated by or affiliated with the trustee." 760 ILCS 5/4.06. Moreover, when the trustee deposits the trust's funds in his or her own bank, he or she may collect "reasonable compensation for those services" through the bank as long as the decision to deposit meets the prudent person standard. *Id.*

Finally, the duty to communicate material information to beneficiaries with whom the trustee transacts is another disclosure requirement, and it is not limited to transactions involving the trust's assets. Since the law presumes a close relationship between the trustee and the beneficiary, the trustee, if challenged in court, must show that any transaction between him or her and the beneficiary was fair and that he or she disclosed all material information to the beneficiary. See RESTATEMENT §78(3), cmt. g. This duty, of course, does not apply to transactions that were entered into either before or after the life of the fiduciary relationship. See RESTATEMENT §78(3), cmt. h.

2. [7.31] Duty of Care

In actions relating to the administration of the trust, the trustee has a duty to exercise prudence, *i.e.,* to act with care, skill, and caution. RESTATEMENT (THIRD) OF TRUSTS §77(2) (2007); SCOTT AND ASCHER ON TRUSTS §17.6. It is not sufficient that a trustee use such diligence as a trustee ordinarily employs in the trustee's own affairs; instead, a trustee must comply with the objective standard of the prudent person. *McCormick v. McCormick,* 118 Ill.App.3d 455, 455 N.E.2d 103, 74 Ill.Dec. 73 (1st Dist. 1983).

The test of prudence is one of conduct, not of performance, and the trustee's conduct is to be judged as of the time of the decision or action in question. RESTATEMENT §77; SCOTT AND ASCHER ON TRUSTS §17.6. Whether a breach of trust has occurred depends purely on whether the trustee's decisions and actions were prudent, and not on the outcome of those decisions and actions. RESTATEMENT §77; SCOTT AND ASCHER ON TRUSTS §17.6. Moreover, the

trustee's conduct is to be assessed in light of the circumstances as they were at the time of the trustee's decisions and actions, rather than with the benefit of hindsight. RESTATEMENT §77, cmt. a. When a trustee fails to meet this standard of care, he or she is liable for all losses resulting from the trust estate. 19 ILLINOIS PRACTICE SERIES: ESTATE PLANNING AND ADMINISTRATION IN ILLINOIS §218:14 (4th ed. 2007). When the trustee meets this standard of care, he or she is not liable as an insurer of the trust estate or for losses arising in the administration of the trust from his or her errors or mistakes in judgment.

Additionally, the attorney representing the fiduciary should understand that the existence of an exculpatory clause in the trust instrument neither reduces nor expands the required standard of care, skill, and caution to which a fiduciary will be held. Rather, the clause may relieve the fiduciary of liability for losses resulting from his or her failure to meet the standard. An exculpatory provision is strictly construed and relieves the trustee of liability for a breach only to the extent the provision clearly provides. *See Axelrod v. Giambalvo,* 129 Ill.App.3d 512, 472 N.E.2d 840, 844, 84 Ill.Dec. 703 (1st Dist. 1984); RESTATEMENT (THIRD) OF TRUSTS §96, cmt. b (2012). Furthermore, an exculpatory clause cannot excuse a fiduciary for a breach in bad faith. RESTATEMENT §96, cmt. c; *Axelrod, supra; Vena v. Vena,* 387 Ill.App.3d 389, 899 N.E.2d 522, 530, 326 Ill.Dec. 305 (2d Dist. 2008).

a. [7.32] Illinois' Prudent Investor Rule

Illinois' prudent investor rule, codified at 760 ILCS 5/5, borrows its language from the common-law duty of prudence and requires the trustee to "exercise . . . reasonable care, skill, and caution," but only in dealing with "the trust portfolio as a whole" and not with investments "in isolation." 760 ILCS 5/5(a)(1). The statute further clarifies that "[n]o specific investment or course of action is, taken alone, prudent or imprudent," but rather that "[t]he trustee's investment decisions and actions are to be judged in terms of the trustee's reasonable business judgment." 760 ILCS 5/5(a)(2).

The prudent investor rule looks to the reasonableness of a trustee's overall investment strategy in determining whether the assets are invested in a manner consistent with the rule. This allows trustees to create efficient portfolios with the trust's assets, where various parts of the portfolio take on varying amounts of risk and return. Moreover, this allows trustees to make different investment decisions for themselves than for their trusts without incurring liability. For example, suppose a trustee has the trust invest in a company, the trustee invests a greater amount of the trustee's own money in the same company (as a private investor), and the company stock rises; the trustee does not breach his or her fiduciary duty by having invested too little of the trust's assets, because the trustee is free to choose different investment strategies for himself or herself and for the trust. *See Rubin v. Laser,* 301 Ill.App.3d 60, 703 N.E.2d 453, 234 Ill.Dec. 592 (1st Dist. 1998).

A governing instrument may modify the prudent investor rule and permit specific investments that would not otherwise qualify under the statute. For example, a settlor may permit a trustee to retain or invest in a specific asset — such as a family business — even though the risk may be higher than an ordinary prudent investor would take. 760 ILCS 5/5(b). A settlor may also

limit the trustee's duty to diversify. *Id.* Regardless of these types of limitations on a trustee's duty of prudent investment in the governing instrument, a settlor cannot waive a fiduciary's general duty of care.

Note that the fiduciary duty of care may impose liability on a trustee who invests imprudently. For example, in a case decided under the predecessor to Illinois' prudent investor rule (the prudent man rule), the court found that a trustee breached its duty by failing to sell stock in a bank that was about to crash, thereby failing to "employ such diligence and prudence as men of discretion and intelligence in such matters employ in their own like affairs." *Hatfield v. First Nat. Bank of Danville,* 317 Ill.App. 169, 46 N.E.2d 94, 98 (3d Dist. 1942). *See also Estate of Lindberg,* 69 Ill.App.3d 714, 388 N.E.2d 148, 157, 26 Ill.Dec. 524 (1st Dist. 1979).

The prudent investor rule sets forth the general standard of care for trustees who are persons of ordinary prudence. If a trustee has special expertise, then he or she accordingly will be held to a higher standard: "If the trustee possesses, or procured appointment by purporting to possess, special facilities or greater skill than that of a person of ordinary prudence, the trustee has a duty to use such facilities or skill." RESTATEMENT (THIRD) OF TRUSTS §77(3) (2007). *See also In re Busby's Estate,* 288 Ill.App. 500, 6 N.E.2d 451 (1st Dist. 1937). Practically, this means that sophisticated trustees, such as financial institutions, may be scrutinized more stringently than average trustees.

b. [7.33] Duty Not To Delegate

By the terms of a trust instrument, a settlor may authorize the trustee to entrust ministerial acts to agents. *See Tucker v. Soy Capital Bank & Trust Co.,* 2012 IL App (1st) 103303, ¶38, 974 N.E.2d 820, 363 Ill.Dec. 23; *McCormick v. McCormick,* 180 Ill.App.3d 184, 536 N.E.2d 419, 129 Ill.Dec. 579 (1st Dist. 1988); *In re Trusteeship Under Last Will & Testament of Hartzell,* 43 Ill.App.2d 118, 192 N.E.2d 697 (2d Dist. 1963). See also 76 AM.JUR.2D *Trusts* §377 (1975); ILLINOIS PRACTICE SERIES: ESTATE PLANNING AND ADMINISTRATION IN ILLINOIS §218:8 (4th ed. 2007); RESTATEMENT (SECOND) OF TRUSTS §225 (1959); George Gleason Bogert et al., THE LAW OF TRUSTS AND TRUSTEES §555 (2d ed. rev. 1980). The Trusts and Trustees Act provides that "[a] person establishing a trust may specify in the instrument the rights, powers, duties, limitations and immunities applicable to the trustee, beneficiary and others and those provisions where not otherwise contrary to law shall control, notwithstanding this Act." 760 ILCS 5/3(1). A provision in the Trusts and Trustees Act discussing the prudent investor rule further provides that "[t]he provisions of this Section may be expanded, restricted, eliminated, or otherwise altered by express provisions of the trust instrument." 760 ILCS 5/5(b).

In addition to the acts authorized by the trust instrument, if the trustee uses "reasonable care, skill and caution in the selection of [an] agent," the trustee may appoint an attorney, auditor, financial advisor, or other agent and "may rely upon the advice or recommendation of the agent without further investigation and, except as may otherwise be provided in subsection (b) of Section 5.1 with respect to investment agents, shall have no responsibility for actions taken or omitted upon the advice or recommendation of the agent." 760 ILCS 5/4.09. The authority granted in this section, however, is not the authority to "delegate." Unlike the investment agent

exception discussed below, §4.09 is not structured as an exception to the general rule against delegation of discretionary functions. As such, this provision should not be read to permit a trustee to act without liability on the advice of agents with respect to matters for which "the exercise of judgment and discretion" is required. Thus, for example, a trustee could not invoke these provisions in relying on an agent's advice regarding discretionary distributions to beneficiaries. A trustee probably could rely on the statute to avoid liability for losses caused by a broker's errors or malfeasance in placing securities trades ordered by the trustee, if the broker had been selected with reasonable care. Or the trustee presumably could safely rely on a lawyer's advice regarding purely legal questions regarding nondiscretionary trust administration matters. However, because many trustee functions involve the exercise of judgment and discretion to a degree, it is not apparent from the face of the statute how far the provision is intended to reach in light of the nondelegation rule of §5.1(a). See Michael K. Moyers, *Survey of Illinois Law: Trusts and Estates,* 20 S.Ill.U.L.J. 959, 982 (1996). To this point, there have been no cases in Illinois dealing with the scope and application of §4.09.

If an agent of the trustee is handling nondiscretionary administrative matters, the trustee is not normally liable to the beneficiary for the acts of the agent employed by him or her in the administration of the trust. Rather, the trustee is liable to the beneficiary for an act of such an agent that, if done by the trustee, would be a breach of trust, if the trustee (1) directs or permits the act of the agent, (2) delegates to the agent the performance of acts that he or she was under a duty not to delegate, (3) does not use reasonable care in the selection or retention of the agent, (4) does not exercise proper supervision over the conduct of the agent, (5) approves or acquiesces in or conceals the act of the agent, or (6) neglects to take proper steps to compel the agent to redress the wrong. RESTATEMENT §225(2); ILLINOIS PRACTICE SERIES: ESTATE PLANNING AND ADMINISTRATION IN ILLINOIS §218:9 (4th ed. 2007).

For acts in which a trustee must exercise judgment and discretion, the trustee is under a strict duty not to delegate to others the administrative responsibilities that the trustee is expected to perform. SCOTT AND ASCHER ON TRUSTS §17.31. In Illinois, this duty has been codified and more precisely defined in §5.1(a) of the Trusts and Trustees Act, which states that a trustee "has a duty not to delegate to others the performance of any acts involving the exercise of judgment and discretion." 760 ILCS 5/5.1(a)(1). An exception is made for the delegation of investment functions to investment agents reasonably selected and supervised by the trustee, subject to certain requirements detailed under 760 ILCS 5/5.1(b). In choosing to delegate such investment functions, it is imperative that the trustee fully and completely complies with the particular requirements of §5.1(b).

For a trustee to delegate investment functions properly under §5.1(b), all of the following requirements must be met:

(1) The trustee must exercise reasonable care, skill, and caution in selecting the investment agent, in establishing the scope and specific terms of any delegation, and in periodically reviewing the agent's actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.

(2) The trustee must conduct an inquiry into the experience, performance history, professional licensing or registration, if any, and financial stability of the investment agent.

(3) The investment agent shall be subject to the jurisdiction of the courts of the State of Illinois.

(4) The investment agent shall be subject to the same standards that are applicable to the trustee.

(5) The investment agent shall be liable to the beneficiaries of the trust and to the designated trustee to the same extent as if the investment agent were a designated trustee in relation to the exercise or nonexercise of the investment function.

(6) The trustee shall send written notice of its intention to begin delegating investment functions under this Section to the beneficiaries eligible to receive income from the trust on the date of initial delegation at least 30 days before the delegation. This notice shall thereafter, until or unless the beneficiaries eligible to receive income from the trust at the time are notified to the contrary, authorize the trustee to delegate the investment functions pursuant to this Section. 760 ILCS 5/5.1(b).

If all requirements of §5.1(b) are satisfied, the trustee is not otherwise responsible for the investment decisions or actions of the investment agent to which the investment functions were delegated. 760 ILCS 5/5.1(c).

3. [7.34] Duty of Impartiality

While the duties of loyalty and prudence apply equally to all beneficiaries, the duty of impartiality requires the trustee to distinguish individual beneficiaries based on their specific rights and needs under the trust. See RESTATEMENT (THIRD) OF TRUSTS §79 (2007) ("trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust"). Not all beneficiaries are created equal. The "trustee's treatment of beneficiaries, and the balancing of their competing interests [must] reasonably reflect any preferences and priorities that are discernible from the terms . . . purposes, and circumstances of the trust and from the nature and terms of the beneficial interests." RESTATEMENT §79, cmt. b. This means that a trustee, in his or her business judgment, may well (or may even be required to) treat different beneficiaries differently as long as there are reasons (practical or in the terms of the trust) for doing so: "different present-interest beneficiaries may have different needs, objectives, and tax positions, leading to differing preferences (e.g., to emphasize high yield, or capital appreciation, or tax-exempt income) in the trust's investment program." RESTATEMENT §79, cmt. c. For example, in *Carter v. Carter,* 2012 IL App (1st) 110855, 965 N.E.2d 1146, 358 Ill.Dec. 667, a marital trust's trustee, who was also the sole income beneficiary, did not breach her duty of impartiality when she invested solely in tax-free municipal bonds, despite the fact that inflation could (and did) diminish the value of the trust's principal at the expense of the sole remainder beneficiary, the decedent's daughter from a prior marriage. The remainder beneficiary

of the trust argued that such an investment was a breach of the trustee's duty of impartiality because the trustee favored her individual income beneficiary interests at the expense of the remainder beneficiary's interests in the principal. Because the trust specifically allowed for investment "regardless of diversification," the court held that the trustee's investment strategy was consistent with the settlor's intent in creating a marital trust, which was "to generate income during [the income beneficiary's lifetime], regardless of diversification," and therefore such actions did not favor the current income beneficiary's interest over that of the remainder beneficiary's interest. 2012 IL App (1st) 110855 at ¶26.

Although the duty of impartiality does not require a trustee to treat all beneficiaries alike, it does require him or her to keep personal bias, animosity, or favoritism from influencing his or her work in administering the trust; *i.e.,* the trustee must act in good faith. *Id.* For example, when one beneficiary litigates against another, the trustee has a duty to remain neutral rather than advocating for one side. *Id. See also Northern Trust Co. v. Heuer,* 202 Ill.App.3d 1066, 560 N.E.2d 961, 148 Ill.Dec. 364 (1st Dist. 1990). In some instances, it may even be advisable to divide one trust into several as a means of lessening impartiality issues.

Finally, the duty of impartiality also informs the trustee's duty to disclose his or her actions to beneficiaries. In cases in which the trustee needs beneficiaries' approval before acting, the trustee "need not include all available beneficiaries, provided the trustee's selection . . . of those to be informed . . . is fair, reasonable, and impartial in light of the context." RESTATEMENT §79, cmt. d. This means that the trustee should make a reasonable effort to inform beneficiaries with different preferences under the trust, different tax concerns, different risk tolerances, etc. *Id.* ("except as otherwise authorized or directed by the terms of the trust, the trustee should select beneficiaries who appear reasonably [likely] to reflect the diverse beneficial interests that are likely to be affected"). This extension of the duty of impartiality (*i.e.,* the communicative aspect of impartiality) is different from the general duty to disclose. While the general duty to disclose is meant to protect all the beneficiaries as a class against the trustee, the duty to disclose impartially is meant to protect some beneficiaries against others. Selective disclosure would give one class of beneficiaries a leg up at everyone else's expense.

C. [7.35] Duty To Collect Assets

The duty to collect the assets of the decedent's estate typically is placed on the executor of the estate. An "executor has a fiduciary duty to collect and preserve the assets of the estate and would be remiss in failing to do so." *Estate of MacLeish,* 35 Ill.App.3d 835, 342 N.E.2d 740, 746 (1st Dist. 1976). *See also Bullis v. DuPage Trust Co.,* 72 Ill.App.3d 927, 391 N.E.2d 227, 228, 29 Ill.Dec. 68 (2d Dist. 1979) (trustee can be negligent in failing to urge executor to close estate and transfer trust property to trustee before unreasonable period of time has gone by or in failing to require executor to account for entire trust res). However, when there is a risk that assets of the estate will be wasted if prompt control of them is not taken, or when there will be some delay in the appointment of an executor, the Probate Act gives a court the discretion to appoint (on petition) an administrator for the specific purpose of collecting assets. 755 ILCS 5/10-1. An administrator to collect has the power to take control of the decedent's property and even to sue for debts owed the decedent. 755 ILCS 5/10-4. The powers and duties of an administrator to

collect typically will cease once the letters of authority are issued to the executor. 755 ILCS 5/10-5. An administrator to collect also may be appointed when there is a missing person who is not necessarily deceased. 755 ILCS 5/10-3.

The RESTATEMENT (THIRD) OF TRUSTS §76, cmt. d (2007), describes the trustee's duty to collect trust assets:

> **The trustee's duty to administer the trust includes a duty, at the outset of administration, to take reasonable steps to ascertain the assets of the trust estate and to take and keep control of those assets.**
>
> **In the case of a testamentary trust, these initial steps should include obtaining and examining an accounting from (or the records of) the settlor's executor. Similarly, a successor trustee ordinarily . . . should obtain an accounting from or review the records of the predecessor trustee. Furthermore, in cases of these types, the trustee ordinarily has the associated responsibility of taking reasonable steps to uncover and redress any breach of duty committed by a predecessor fiduciary.**
>
> **The manner of acquiring and maintaining control of the trust property depends on the nature of the property, the terms of the trust, and what is appropriate to the prudent administration of the trust. Accordingly, except as it may be reasonable for the trustee to entrust possession to an attorney, broker, banker, or other agent . . . the trustee is responsible for taking and keeping possession of securities. Also, the trustee is ordinarily to take and keep possession or control of chattels, except as a beneficiary may be entitled to possession or control under or consistent with the terms of the trust. If land is held in the trust, it depends on the trust terms and on considerations of prudent management whether the trustee has a duty to retain possession, to lease the property to others, or to give possession of it to a beneficiary; if the land was subject to a lease at the time of the trust's creation, the lessee should be notified of the trust and directed to pay the rent to the trustee. If the trust property includes a chose in action, the trustee should take necessary steps to inform the obligor of the trust, to receive payments of income and principal, and to enforce the chose on maturity.**
>
> **The duty of protecting the trust estate includes taking reasonable steps to enforce or realize on other claims held by the trust and to defend actions that may result in a loss to the trust estate. Reasonable steps may include taking an appeal to a higher court, compromise or arbitration of claims by or against the trust, or even abandoning a valid claim or not resisting an unenforceable claim if the costs and risk of litigation make such a decision reasonable under all the circumstances.**

D. [7.36] Duty To Administer Trust

A trustee has a duty to administer the trust, diligently and in good faith, according to its terms. RESTATEMENT (THIRD) OF TRUSTS §76(1) (2007). When the trustee breaches that duty, even if the failure was not in bad faith and does not harm the trust estate, a trustee may be

held liable for the breach. *Jones v. Heritage Pullman Bank & Trust Co.,* 164 Ill.App.3d 596, 518 N.E.2d 178, 115 Ill.Dec. 653 (1st Dist. 1987). In *Jones,* a trustee did not sell a particular trust asset as directed by the trust. Despite finding that the trust estate was not harmed by the failure to sell the asset as directed, the trustee "breached its fiduciary duty to administer the trust according to its terms," and therefore the court found that the trustee was not "entitled to an award of attorney fees and litigation expenses from the trust estate for defending the lawsuit." 518 N.E.2d at 183.

E. Duty To Diversify

1. [7.37] Representatives of Decedents' Estates Have No Such Duty

Unlike the Trusts and Trustees Act (discussed in §7.38 below), the Probate Act does not impose a duty on an executor to diversify investments or to invest assets in a prudent manner. Rather, the executor's duty is one of collecting the decedent's assets and distributing them as directed under the decedent's will or by statute. *See In re Estate of Pirie,* 141 Ill.App.3d 750, 492 N.E.2d 884, 97 Ill.Dec. 225 (2d Dist. 1986).

2. [7.38] Trustees and Illinois' Prudent Investor Rule

"The trustee has a duty to diversify the investments of the trust unless, under the circumstances, the trustee reasonably believes it is in the interests of the beneficiaries and furthers the purposes of the trust not to diversify." 760 ILCS 5/5(a)(3). RESTATEMENT (THIRD) OF TRUSTS §92, cmt. a (2007), provides that

> **the trustee's decision to retain or dispose of certain assets may properly be influenced, even without trust terms expressly bearing on the decision, by the property's special relationship to some objective of the settlor that may be inferred from the circumstances, or by some special interest or value the property may have as a part of the trust estate or that it may have, consistent with [**the**] trust's purposes and the trustee's duty of impartiality, to some or all of the beneficiaries. Examples of such property might be land used in a family farming operation, the assets or shares of a family business, or stockholdings that represent or influence control of a closely or publicly held corporation.**

F. [7.39] Duty To Inform and Report

A fiduciary has a duty to provide information to beneficiaries. *Wylie v. Bushnell,* 277 Ill. 484, 115 N.E. 618, 622 (1917) (observing that leading "authorities hold that [trustees' records] should be open at all times to . . . inspection, on demand, [by] the beneficiary"). Furthermore, in Illinois, "it is well settled that a trustee owes the highest duty to his beneficiary to fully and completely disclose all material facts relating to dealings with the trust." *Regnery v. Meyers,* 287 Ill.App.3d 354, 679 N.E.2d 74, 79, 223 Ill.Dec. 130 (1st Dist. 1997), *as modified on denial of reh'g* (Apr. 22, 1997). See RESTATEMENT (THIRD) OF TRUSTS §82 (2007).

RESTATEMENT §82 provides:

> **(1) Except . . . as permissibly modified by the terms of the trust, a trustee has a duty:**
>
> > **(a) promptly to inform fairly representative beneficiaries of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship;**
> >
> > **(b) to inform beneficiaries of significant changes in their beneficiary status; and**
> >
> > **(c) to keep fairly representative beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, *particularly material information needed by beneficiaries for the protection of their interests.***
>
> **(2) [**A**] trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings. [**Emphasis added.**]**

Although RESTATEMENT §82 acknowledges that a duty to disclose may be modified by the trust instrument, there is no authority in Illinois or elsewhere that allows this duty to be completely eliminated. There are circumstances, however, that will justify less than full disclosure; *e.g.,* a trustee need not disclose opinions obtained from counsel that are obtained "for the trustee's personal protection in the course, or in anticipation, of litigation." RESTATEMENT §82, cmt. f (2007). Furthermore, a trustee must be mindful of the privacy interests of other beneficiaries who may be affected by the disclosure of information specific to their interests. *Id.*

The RESTATEMENT reflects a trend limiting the beneficiaries who are entitled to disclosure to a fairly representative group — recognizing the difficulties of providing information to all beneficiaries, including remote or remainder beneficiaries whose rights are adequately represented by current beneficiaries.

1. [7.40] Nature and Extent of Information Necessary To Disclose

Generally, a trustee must disclose all information requested by a beneficiary that is necessary for the beneficiary to protect his or her interests and to prevent a breach of trust or enforce his or her rights under the trust. RESTATEMENT (THIRD) OF TRUSTS §82, cmts. a(2), e (2007). In Illinois, the trustee has a duty to be transparent in the performance of his or her duties. *See Wallace v. Malooly,* 4 Ill.2d 86, 122 N.E.2d 275, 280 (1954) ("the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust"), quoting RESTATEMENT OF TRUSTS §173, cmt. c (1935). When a beneficiary requires information regarding the trust's receipts, disbursements, and holdings in order to determine his or her right to receive trust income, the beneficiary is entitled to a current account. *Sanders v. Stasi,* 2011 IL App (4th) 100750, ¶29, 951 N.E.2d 1274, 351

Ill.Dec. 610. Furthermore, a trustee's duty to disclose information in response to a specific beneficiary request extends to all beneficiaries, even when the trustee might otherwise have an affirmative duty to provide the information only to fairly representative beneficiaries. RESTATEMENT (THIRD) OF TRUSTS §82, cmts. a(2), e (2007).

The ability to contract around the duty to disclose is critical. Here, the authorities are split. The RESTATEMENT (THIRD) OF TRUSTS suggests that the trust instrument cannot completely contract around the duties to (a) respond to beneficiary requests for information, (b) inform beneficiaries of the existence of an irrevocable trust, (c) inform beneficiaries of a change in their status under the trust, and (d) inform beneficiaries of material information necessary to protect their interests. See RESTATEMENT (THIRD) OF TRUSTS §82 (2007). For these four duties, "[t]he terms of a trust may alter the amount of information a trustee must give," but they "may not be dispensed with entirely or to a degree or for a time that would unduly interfere with the underlying purposes . . . of the information requirements." RESTATEMENT (THIRD) OF TRUSTS §82, cmt. a(2) (2007). However, a contrary tradition emerges from several states that have adopted a modified version of the Uniform Trust Code, whereby many of these states have modified or eliminated the duty to inform as a mandatory rule, rendering "the duty a default rule that can be waived by the settlor if the settlor so provides in the trust instrument." T.P. Gallanis, *The Trustee's Duty To Inform,* 85 N.C.L.Rev. 1595, 1609 (2007). Although a trustee's duty to affirmatively disclose information may be modified by a trust instrument in certain circumstances, a trustee still has an obligation to respond to requests for information from beneficiaries. The fiduciary would be well advised to respond to these kinds of requests promptly and thoroughly, subject to potential attorney-client privilege or confidentiality issues. Fiduciaries should consult with their counsel if they have questions regarding their obligation to respond to a beneficiary's request for information, but they should be advised of the limitations of the attorney-client privilege in the fiduciary context. Confidentiality issues should be considered, and attempts should be made to enter into a confidentiality agreement or find another suitable option that addresses this issue while providing the beneficiary with the information he or she requires.

2. [7.41] Duty To Account

The Trusts and Trustees Act requires trustees to, at least annually, "furnish to the beneficiaries then entitled to receive or receiving the income from the trust estate, or if none, then those beneficiaries eligible to have the benefit of the income from the trust estate a current account showing the receipts, disbursements and inventory of the trust estate." 760 ILCS 5/11(a). Furthermore, upon termination of a trust, the trustee shall "furnish to the beneficiaries then entitled to distribution of the trust estate a final account for the period from the date of the last current account to the date of distribution." 760 ILCS 5/11(b). Attorneys representing fiduciaries should review the trust document carefully, as the duty to account is one that often will be altered or eliminated by the terms of the trust. Even when the duty to account is eliminated, however, an attorney may want to advise a trustee to provide annual accounts because furnishing an account to a beneficiary starts the running of a three-year limitations period for the beneficiary (and the beneficiary's heirs and assigns) to bring an action against the trustee for matters disclosed in the account. 760 ILCS 5/11(a).

Furthermore, when the trust instrument eliminates or modifies the duty to account, trustees should be aware that such modification may not necessarily be upheld when a beneficiary's interest might be compromised. In *Vena v. Vena,* 387 Ill.App.3d 389, 899 N.E.2d 522, 524, 326 Ill.Dec. 305 (2d Dist. 2008), the trust instrument contained language allowing a majority of the income beneficiaries to approve a trustee's accountings "with the same effect as if a court" approved the accountings. In *Vena,* ultimately 16 out of the 19 beneficiaries approved the trustee's accounting. 899 N.E.2d at 525. However, one of the non-approving beneficiaries contested the trustee accounting and claimed breaches of the trustee's duty. The court in *Vena* held that the majority approval provision was void as against public policy because responsibility was too diffused and the trustee had too much control of the process; thus, the provision was unenforceable. 899 N.E.2d at 529. Interestingly, the court specifically stated that it was not intending to invalidate a provision modeled after RESTATEMENT (THIRD) OF TRUSTS §83, cmt. d (2007), which would allow one designated person to exculpate the trustee. 899 N.E.2d at 531. However, the court did indicate that there were potential concerns with this type of provision as well but that it was not necessary to resolve them. *Id.*

Much like the duty of trustees to account to beneficiaries, the Probate Act imposes on executors the duty to prepare and present to the court a verified account "within 60 days after the expiration of 12 months after the issuance of letters or within such further time as the court allows and thereafter whenever required by the court until the administration is completed, and if the letters are revoked, within such time as the court directs." 755 ILCS 5/24-1(a). If all of the interested persons in the estate consent, the court may excuse the preparation of the account. 755 ILCS 5/24-1(b).

Regardless of the law or the terms of the governing instrument, a fiduciary is well advised to adopt a policy of prompt and open disclosure, within reason. If possible, information should be provided more frequently than required. When significant changes to the assets or administration occur, the beneficiaries should be advised. It is worthwhile speaking or meeting personally with the beneficiaries, again within reason.

V. [7.42] BREACHES, REMEDIES, AND DAMAGES

Trustees have the obligation to carry out the trust according to its terms, to use care and diligence in protecting and investing trust property, and to use perfect good faith. *Chicago Title & Trust Co. v. Chief Wash Co.,* 368 Ill. 146, 13 N.E.2d 153, 157 (1938). If a trustee exercises reasonable care, skill, and caution and honestly exercises his or her discretionary power, it is unlikely that the trustee will be held liable for breach of trust. *See Continental Illinois National Bank & Trust Company of Chicago v. Sax,* 199 Ill.App.3d 685, 557 N.E.2d 475, 145 Ill.Dec. 705 (1st Dist. 1990); 3A HORNER PROBATE PRACTICE AND ESTATES §68:51 (2006), citing *Clardy v. Smith,* 273 Ill.App. 339 (3d Dist. 1934). For example, in instances in which the trust estate has lost value, or has not grown in value as much as a beneficiary may have anticipated, the trustee will not be held liable for such losses as long as the trustee exercised reasonable care, skill, and caution and honestly exercised his or her discretionary powers. *See, e.g., McCormick v. McCormick,* 180 Ill.App.3d 184, 536 N.E.2d 419, 129 Ill.Dec. 579 (1st Dist. 1988). Because a

trustee is not an insurer of results, the mere fact that a trustee has made an error in judgment when ascertaining or carrying out trust duties does not automatically give rise to a breach of trust. *Id.*

However, a breach of trust does occur when the trustee violates a duty, whether such violation was in bad faith, in good faith, negligent, or because of a mistake as to the extent of trustee duties. This is true with respect to the express or implied duties set out in the trust, provided by statute, or grounded in common law. A trustee will likely be held liable for imprudence, negligence, or willful default if that misconduct is adequately proved. *See Herget National Bank of Pekin v. Lampitt,* 133 Ill.App.3d 418, 478 N.E.2d 904, 905, 88 Ill.Dec. 413 (3d Dist. 1985) (trustee may be held liable for substantial decrease in value of retained stocks while failing to attend stockholders meetings or to follow value of stock on stock market); *Smith v. First National Bank of Danville,* 254 Ill.App.3d 251, 624 N.E.2d 899, 191 Ill.Dec. 711 (4th Dist. 1993) (breach of fiduciary duty); *Kubin v. Chicago Title & Trust Co.,* 307 Ill.App.12, 29 N.E.2d 859 (1st Dist. 1940) (in action by beneficiaries of trust against trustee for losses allegedly resulting from failure to sell stock before it declined in value, evidence was held insufficient to establish cause of action). As described in *Chief Wash, supra,* 13 N.E.2d at 157, "The term 'breach of trust' is sufficiently comprehensive to include every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness. Included is every omission or commission which violates in any manner the three major obligations of carrying out a trust according to its terms, of care and diligence in protecting and investing the trust property, and of using perfect good faith. 3 Pomeroy's Eq.Jur., 4th Ed., §1079." This is true even if the fiduciary acts in good faith. But see 760 ILCS 5/4.09 ("If the trustee uses reasonable care, skill, and caution in the selection of the agent, the trustee may rely upon the advice or recommendation of the agent and . . . shall have no responsibility for actions taken or omitted upon the advice or recommendation of the agent.").

Given that fiduciary relationships are equitable relationships, courts can devise any equitable remedy for a breach-of-fiduciary-duty claim. *See Graham v. Graham,* 85 Ill.App. 460 (1st Dist. 1899). Generally, Illinois courts will fashion a monetary remedy in the form of a surcharge that aims to restore the plaintiff to his or her position before the breach. See RESTATEMENT (SECOND) OF TRUSTS §205, cmt. a. (1959). Other remedies, such as removing the fiduciary and punitive damages, are available in more egregious and extraordinary circumstances.

A. [7.43] Surcharge in Relation to Value of Property or Profit Gained or Lost

Courts often grant a monetary award called a surcharge against a fiduciary for any costs or damages to a trust, estate, fiduciary property, or fiduciary account caused by a breach of fiduciary duty. The fiduciary can be charged with (1) any loss or depreciation in the value of the fiduciary account or property as a result of the breach, (2) any profit made by the fiduciary as a result of the breach, or (3) any profit that would have accrued had there been no breach. *Grot v. First Bank of Schaumburg,* 292 Ill.App.3d 88, 684 N.E.2d 1016, 1019, 226 Ill.Dec. 20 (1st Dist. 1997).

Fiduciaries are personally liable for any damage to fiduciary property or loss in the value of the fiduciary account that is attributable to a breach. *See Piff v. Berresheim,* 405 Ill. 617, 92 N.E.2d 113, 116 (1950); *Progressive Land Developers, Inc. v. Exchange National Bank of Chicago,* 266 Ill.App.3d 934, 641 N.E.2d 608, 614, 204 Ill.Dec. 384 (1st Dist. 1994). Plaintiffs

also can recover any profit that the fiduciary made through a breach. *In re Estate of Swiecicki,* 121 Ill.App.3d 705, 460 N.E.2d 91, 92, 77 Ill.Dec. 232 (5th Dist. 1984), *aff'd,* 106 Ill.2d 111 (1985); *Fischer v. Slayton & Co.,* 10 Ill.App.2d 167, 134 N.E.2d 673, 676 (1st Dist. 1956). Further, plaintiffs can recover their own lost profits or lost opportunities resulting from a breach. *See In re Estate of Talty,* 376 Ill.App.3d 1082, 877 N.E.2d 1195, 1206 – 1207, 315 Ill.Dec. 866 (3d Dist. 2007) (awarding lost rents that could have been collected and other profits); *In re Guardianship of Connor,* 170 Ill.App.3d 759, 525 N.E.2d 214, 217, 121 Ill.Dec. 408 (5th Dist. 1988) (ward's estate entitled to reimbursement of maximum amount of assets ward could have had if not for breach).

B. [7.44] Surcharge of Costs or Fees

In addition to a surcharge in the form of losses or profits, courts can fashion a surcharge that requires the fiduciary to return some or all compensation and fees received from the plaintiff or withdrawn from the fiduciary account. *See In re Estate of Talty,* 376 Ill.App.3d 1082, 877 N.E.2d 1195, 1207 – 1208, 315 Ill.Dec. 866 (3d Dist. 2007); *In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 1284, 111 Ill.Dec. 639 (1st Dist. 1987). Absent aggravating factors or egregious behavior that warrants punitive damages (*i.e.,* willful, malicious, or actively tortious conduct), however, Illinois courts will limit the surcharge to those fees incurred as a result of the breach. For example, in *Halas* a law firm represented the beneficiaries of an estate and defended their interests successfully in probate. 512 N.E.2d at 1277 – 1278, 1284. During that time, however, the court found that the firm breached its fiduciary duty by inefficiently administering the estate and by continuing to act despite a conflict of interest. 512 N.E.2d at 1284 – 1285. As a remedy for the breach, the court surcharged the firm but limited the surcharge to the excessive costs and the costs associated with the conflict of interest rather than charging all costs related to the firm's work on the estate. 512 N.E.2d at 1285.

If the breach of duty results in unpaid costs or fees to the plaintiff, the court can surcharge those expenses to the fiduciary. *See In re Estate of Dyniewicz,* 271 Ill.App.3d 616, 648 N.E.2d 1076, 1084, 208 Ill.Dec. 154 (1st Dist. 1995). In *Dyniewicz,* the court appointed a guardian ad litem to protect the interests of two minor children after the original coguardians mismanaged their estates. As one remedy for the coguardians' breach, they were required to pay the guardian ad litem's fee.

C. [7.45] Removal

Illinois courts can remove a fiduciary from his or her position as a remedy for a breach of fiduciary duty. *See Brown v. Brown,* 62 Ill.App.3d 328, 379 N.E.2d 634, 640, 19 Ill.Dec. 762 (2d Dist. 1978) (" 'The inherent power of a court of equity over trusts includes the power to remove a trustee for breach of trust, misconduct or disregard of fiduciary duties.' . . . nevertheless, this power 'should be exercised sparingly and (only) upon a showing of clear necessity.' "), quoting *Altschuler v. Chicago City Bank & Trust Co.,* 380 Ill. 137, 43 N.E.2d 673, 676 (1942), and *Chicago Title & Trust Co. v. Rogers Park Apartments Bldg. Corp.,* 375 Ill. 599, 32 N.E.2d 137, 141 – 142 (1941). Courts prescribe removal only sparingly, however, and not every mistake or instance of neglect warrants it as a remedy. *Chicago Title & Trust, supra; Durdle v. Durdle,* 141 Ill.App.3d 12, 489 N.E.2d 1142, 1145, 95 Ill.Dec. 414 (4th Dist. 1986). The Probate Act defines

the reasons for which a court may remove an executor or administrator. See 755 ILCS 5/23-2 (listing ten reasons for removal, including catchall "other good cause" category). Removal is generally ordered only upon a showing of necessity (*see Chicago Title & Trust, supra,* 32 N.E.2d at 141 – 142), and courts will not remove a fiduciary for errors or omissions that the fiduciary satisfactorily explains or for errors of judgment that do not amount to "malfeasance." *See In re Estate of Breault,* 29 Ill.2d 165, 193 N.E.2d 824, 832 (1963); *In re Estate of Chapman,* 104 Ill.App.3d 794, 433 N.E.2d 313, 315, 60 Ill.Dec. 516 (3d Dist. 1982). They will order removal when the fiduciary intentionally breaches a duty or acts in bad faith. *See, e.g., In re Busby's Estate,* 288 Ill.App. 500, 6 N.E.2d 451, 468 (1st Dist. 1937) (executor's actions were illegal and grossly negligent and permitted total destruction of estate); *In re Estate of Talty,* 376 Ill.App.3d 1082, 877 N.E.2d 1195, 1205, 315 Ill.Dec. 866 (3d Dist. 2007) (executor intentionally failed to disclose information to beneficiary and placed personal interests and profit above estate's); *Estate of O'Brien,* 166 Ill.App.3d 285, 519 N.E.2d 969, 971, 116 Ill.Dec. 754 (1st Dist. 1988) (executor incurred $35,000 in tax penalties and claimed $75,000 of testator's pension benefits even though will did not bequeath benefits to her).

Although Illinois courts have stated that a fiduciary's actions must amount to malfeasance to warrant removal, it is unclear what level of bad faith or dishonesty must be shown. In fact, one Illinois court expressly allowed removal of an executor for mismanagement of an estate even though "there was no evidence that the executor was personally dishonest," and his actions amounted to "nonfeasance rather than misfeasance." *In re Estate of Abbott,* 38 Ill.App.3d 141, 347 N.E.2d 215, 217 (2d Dist. 1976). Another Illinois court granted removal when the fiduciary did not act in bad faith but only held a conflict of interest. *See Mucci v. Stobbs,* 281 Ill.App.3d 22, 666 N.E.2d 50, 216 Ill.Dec. 882 (5th Dist. 1996). Generally, it appears that Illinois courts require either egregious mismanagement of the fiduciary account or some degree of bad faith to order removal of the fiduciary.

The Probate Act defines the required procedures for removal of an executor or administrator. See 755 ILCS 5/23-3.

D. [7.46] Punitive Damages

Punitive damages also can be awarded for extremely egregious behavior, when the breach of fiduciary duty is accompanied by aggravating circumstances such as wantonness, willfulness, malice, fraud, or oppression, or when the defendant acts with such gross negligence as to indicate a wanton disregard for the rights of others. *In re Estate of Hoellen,* 367 Ill.App.3d 240, 854 N.E.2d 774, 786, 305 Ill.Dec. 182 (1st Dist. 2006); *In re Estate of Talty,* 376 Ill.App.3d 1082, 877 N.E.2d 1195, 1207, 315 Ill.Dec. 866 (3d Dist. 2007). In *Hoellen,* for example, a Chicago police officer befriended an 89-year-old physically and mentally impaired senior citizen after responding to a call at his home. 854 N.E.2d at 778. He then used his position as an officer to gain the senior citizen's trust and confidence. He eventually convinced the senior citizen, who suffered from progressive dementia, to transfer power of attorney and to designate the officer as beneficiary of his life insurance, savings, and trust estate. *Id.* The court found that the officer exerted undue influence over the senior citizen and that he "flagrantly and intentionally" breached his fiduciary duty and affirmed an award of $1 in compensatory damages and $50,000 in punitive damages against the officer. 854 N.E.2d at 787.

VI. [7.47] DEFENSES/LITIGATION ISSUES

In addition to defending the actual substance of a claim filed against a fiduciary, attorneys should be aware of a number of statutory and common-law defenses that could arise.

A. [7.48] Jurisdiction

The circuit courts in Illinois have jurisdiction over probate matters. ILL.CONST. art. VI, §9 (granting circuit courts original and general jurisdiction for matters over which Illinois Supreme Court does not have original and exclusive jurisdiction). The Circuit Courts Act, 705 ILCS 35/0.01, *et seq.,* grants the circuit courts the power to enter judgments, orders, and injunctions and issue any other process necessary to carry into effect the powers granted them. 705 ILCS 35/25.

B. [7.49] Standing

It is important for the attorney to consider whether the person bringing the action against the fiduciary is, in fact, a proper party to bring the action. For example, while a current trust beneficiary may bring an action against a trustee for breach of a duty owed by the trustee to that beneficiary, when a beneficiary tries to bring an action on behalf of the trust against a former trustee, such action may be dismissed because the beneficiary lacks standing. *See Godfrey v. Kamin,* 19 Fed.Appx. 435 (7th Cir. 2001). In an unpublished opinion, the Court of Appeals for the Seventh Circuit in *Godfrey* affirmed the district court's holding that a trust beneficiary had no standing to bring an action against a former trustee of the trust, but that right was vested in the current trustee. The court further stated

> **that a beneficiary may not bring suits in equity except where the "trustee improperly refuses or neglects to bring an action against the third person," or where "the trustee cannot be subjected to the jurisdiction of the court or . . . there is no trustee." . . . "[I]f the trustee does not commit a breach of trust in failing to bring an action against the third person . . . the beneficiary cannot maintain a suit against the trustee and the third person."** 19 Fed.Appx. at 438, quoting RESTATEMENT (SECOND) OF TRUSTS §282 (1959), and *Axelrod v. Giambalvo,* 129 Ill.App.3d 512, 472 N.E.2d 840, 846, 84 Ill.Dec. 703 (1st Dist. 1984).

Some documents provide that a successor trustee has no duty to inquire into the acts of a predecessor trustee. In fact, §14 of the Trusts and Trustees Act provides that a "successor trustee shall be under no duty to inquire into the acts or doings of a predecessor trustee, and is not liable for any act or failure to act of a predecessor trustee." 760 ILCS 5/14. If a successor trustee relies on such a provision in electing not to inquire into the acts of a predecessor trustee, the successor presumably cannot be said to be acting improperly or negligently, which under *Axelrod* would be the only grounds for permitting a beneficiary to sue the predecessor, but it would seem unfair to preclude a beneficiary in such circumstances from taking action against a predecessor for lack of standing. Maybe in such circumstances a court could liken it to there being no trustee, so that a beneficiary would have standing to sue, or a court might just take a commonsense approach and recognize that if the current trustee has no duty to inquire into the acts of the predecessor and elects not to, the standing rules should be expanded in that case to permit a beneficiary to proceed against the predecessor.

C. [7.50] Statute of Limitations

There are a few specific limitation periods set forth under Illinois law that a fiduciary may raise in responding to a claim brought against the fiduciary that is not filed in a timely manner. If a trustee provides annual accounts to the beneficiaries, any beneficiary receiving such an account is barred from bringing an action on a matter disclosed in the account after three years from the receipt of the account. 760 ILCS 5/11(a). Even when the trustee is guilty of fraudulent concealment, the claim is barred after five years. 760 ILCS 5/11(f); 735 ILCS 5/13-215. Other actions against a fiduciary may not be subject to a statute of limitations, such as certain breach-of-fiduciary-duty actions that are equitable claims; however, in those cases the doctrine of laches (described in §7.51 below) may be raised in defense of the claim.

In the estate context, the Probate Act sets forth time limits for the filing of a will contest and claims against an estate. Every claim against a decedent's estate is barred if proper notice is given to the claimant as provided in §18-3 of the Probate Act, 755 ILCS 5/18-3, and the claimant does not file the claim within the required time period (six-month minimum for unknown creditors). 755 ILCS 5/18-12(a). To the extent a claim is not barred because notice was not properly given to a creditor, all claims against a decedent's estate are barred two years after the decedent's death. 755 ILCS 5/18-12(b). With respect to will contests, any interested person may file a will contest within six months after the admission or denial of the will to probate. 755 ILCS 5/8-1(a), 5/8-2(a).

D. [7.51] Laches

The doctrine of laches is an affirmative defense that must be asserted by a fiduciary in an answer or reply to a petition or complaint asserting wrongdoing by the fiduciary. The burden of proving the laches defense falls on the party asserting the defense. *In re Estate of Comiskey,* 146 Ill.App.3d 804, 497 N.E.2d 342, 344, 100 Ill.Dec. 364 (1st Dist. 1986). A fiduciary asserting the defense of laches is claiming that the estate would be so injured or prejudiced by allowing a plaintiff or claimant to bring an action that the plaintiff or claimant could have brought at an earlier time that the plaintiff or claimant is now barred from bringing the action. Laches may apply even when the cause of action is still timely under the applicable statute of limitations; however, "[m]ere passage of time, standing alone, will not warrant the application of laches." 497 N.E.2d at 345. Whether laches is applicable is a matter of equity for the court to decide, and the doctrine may be invoked by the court in its discretion. *Id.*

E. [7.52] Equitable Estoppel

Equitable estoppel is another affirmative defense that is available to fiduciaries. Instead of looking at the damage that would be done to the trust or estate if a claimant were allowed to exercise his or her rights, equitable estoppel looks at whether a claimant, prior to asserting his or her rights, has acted in a way to cause the fiduciary (or another party) to rely on the claimant's conduct. "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded from asserting rights which might otherwise have existed as against another person who has, in good faith, relied upon such conduct and has been led thereby to change his

position for the worse and who on his part acquires some corresponding right." *Kyker v. Kyker,* 117 Ill.App.3d 547, 453 N.E.2d 108, 109, 72 Ill.Dec. 803 (2d Dist. 1983).

F. [7.53] Doctrine of Election

The doctrine of election is an old equitable principle that received renewed attention from the Illinois Supreme Court in *In re Estate of Boyar,* 2013 IL 113655, ¶4, 986 N.E.2d 1170, 369 Ill.Dec. 534. Prior to *Boyar,* the last time the Supreme Court had addressed the doctrine was in *Remillard v. Remillard,* 6 Ill.2d 567, 129 N.E.2d 744 (1955). A full discussion of every aspect of *Boyar* is beyond the scope of this chapter, but a number of important points emerge from the court's decision.

As background, until *Boyar,* this author believes that most practitioners and many Illinois courts, other than the Supreme Court, thought that the doctrine of election was as simple as follows: a party who accepted (or elected to take) a benefit under a will was barred from later contesting the will. Many of the decisions in this area of the law that came down after *Remillard* dealt with application of the doctrine so described. And use of the doctrine of election, so understood and applied, was common in this author's experience.

When *Boyar* came out, one might have been surprised to read the court's assessment that "[s]o little used is the doctrine today that our own court has had no occasion to consider it since our decision in *Remillard* . . . more than 50 years ago." 2013 IL 113655 at ¶28. As it turns out, it appears that what many thought was the doctrine of election was actually a kind of equitable estoppel, which the *Boyar* court discussed briefly near the conclusion of its decision. The doctrine of election, itself, as is evident from *Boyar,* is much more narrow in scope.

As defined by the *Boyar* court, the doctrine of election "is triggered in the context of wills only when there are two different benefits to which a person is entitled, the testator did not intend the beneficiary to take both benefits, and allowing the beneficiary to claim both would be inequitable to others having claims upon the same property or fund." *Id.* The court then offered a more practical explanation of the doctrine:

> **[**F**]or example . . . "if a testator intending to dispose of his property, includes in the disposition, property of another person, and at the same time gives to such other person an interest in the estate of the testator, such person will not be permitted to defeat the disposition made by the will and at the same time take under it. He is put to his election whether he will retain his own property or take the benefit conferred by the will. [Citations.]" *Carper v. Crowl,* [**149 Ill. 465, 476, 36 N.E. 1040 (1984)**]. Similarly, where a devisee or legatee takes something under the will to which he would not be otherwise entitled, the doctrine of election prohibits that person from also seeking to hold property disposed of by the will to which he would be entitled if there had been no will. *Schuknecht v. Schultz,* 212 Ill. 43, 48 – 49, 72 N.E. 37 (1904).** 2013 IL 113655 at ¶29.

Based on this definition, the court noted that every decision by the court involving the doctrine involved a choice by the legatee of either accepting benefits under the will and at the same time

surrendering some claim, right, or property that the decedent did not own but sought by his or her will to dispose of, or else retaining the claim, right, or property and rejecting the provisions made by the will. For example, suppose a legatee owns Blackacre in fee, and the decedent's will provides that the legatee shall receive $100,000 in cash and a life estate in Blackacre, with the remainder going to a charity. In this case, the decedent's will is attempting to dispose of property of another (the legatee's remainder interest in Blackacre, which is part of the fee) in exchange for $100,000. In this example, the legatee must elect to either take the cash and a reduced interest in Blackacre, or keep the fee in Blackacre and give up the $100,000 in cash. What the legatee cannot do under the doctrine of election is take the cash and keep the fee interest in Blackacre.

The doctrine does not apply to the more typical situation in which a legatee accepts a bequest under a will and thereafter decides to challenge the will. That situation invokes a different equitable principle, which the *Boyar* court explained as follows:

> **Finally, we note that, separate and apart from the doctrine of election, there is a general principle of equity which holds that once one accepts some benefit, one cannot then challenge the validity of the thing by which the benefit was conferred. This principle has been applied in a variety of contexts, including challenges to divorce decrees . . . and other judgments . . . , contract disputes . . . and statutory challenges . . . . It is based on the principles of logic, fairness and consistency which are self-evident: Unless you acknowledge that a decree, statute, contract, etc., is valid, then by what right can you claim the benefit you accepted under its terms? [**Citations omitted.**]** 2013 IL 113655 at ¶40.

This general equitable principle seems to be based in estoppel, although the court did not refer to it as equitable estoppel and it is distinguishable from the kind of equitable estoppel discussed in §7.52 above in which a fiduciary has an affirmative defense based on the fiduciary's reliance on the claimant's conduct. In the case of the general equitable principle discussed in *Boyar,* the fiduciary does not act in reliance on the claimant's conduct. Instead, the claimant takes an action based on the decree, statute, contract, will, trust, or the like that precludes the claimant from turning around and challenging the validity of the thing by which the benefit was conferred.

The *Boyar* court declined to address whether the doctrine of election applied to a trust, so that issue remains unresolved, but the scope of the doctrine, as defined in *Boyar,* is so narrow that it seems unlikely to be much of a real-world issue. The principle that is likely to be invoked much more in practice is the equitable principle discussed immediately above, which operates like a form of estoppel.

In fact, a review of *Boyar* reveals that what the appellee had attempted to rely on in the lower courts was actually this separate general equitable principle, not the doctrine of election. The dissent in *Boyar* took the majority to task for not addressing whether the doctrine of election applies to a trust, but in light of the court's characterization of the doctrine, arguably that was not the important question. As discussed immediately above, the doctrine of election, as defined by *Boyar,* is likely to apply in far fewer situations than the general principle of equity the court reaffirmed. This author has never seen a will or trust that contains the type of disposition that

would trigger the doctrine of election, but he has often seen factual situations that implicate the general equitable principle when a beneficiary accepts a benefit under a will or trust and then later decides to challenge its validity. As discussed above, the court's analysis in *Boyar* makes clear that the general equitable principle applies to a trust as well as a will.

G. [7.54] Exculpatory Clauses

"Although exculpatory provisions . . . are not given special favor in the law, they are generally held effective except as to reckless or intentional breaches or those committed in bad faith." *Jewish Hospital of St. Louis, Missouri v. Boatmen's National Bank of Belleville,* 261 Ill.App.3d 750, 633 N.E.2d 1267, 1280, 199 Ill.Dec. 276 (5th Dist. 1994). Thus, when a beneficiary brings an action against a fiduciary for negligence or something other than reckless or willful misconduct, the presence of an exculpatory provision in the will or trust may be effective to insulate the fiduciary from liability.

H. [7.55] In Terrorem or No-Contest Clauses

In terrorem, or no-contest, clauses, which often serve to eliminate or reduce a bequest to a beneficiary challenging a will, are valid in Illinois. "Generally, conditions in a clause against contesting the will or attempting to set it aside are valid. . . . Even where they are held valid, though, conditions against contests are so disfavored by the courts that they are construed very strictly." [Citation omitted.] *In re Estate of Wojtalewicz,* 93 Ill.App.3d 1061, 418 N.E.2d 418, 420, 49 Ill.Dec. 564 (1st Dist. 1981). While Illinois courts do not go as far as courts in other jurisdictions (some of which hold that these clauses are void as against public policy), Illinois courts are "guided by 'the well-established rule that equity does not favor forfeitures, and in construing conditions . . . a reasonable construction must be given in favor of the beneficiary.'" *In re Estate of Mank,* 298 Ill.App.3d 821, 699 N.E.2d 1103, 1107, 232 Ill.Dec. 918 (1st Dist. 1998), quoting *Clark v. Bentley,* 398 Ill. 535, 76 N.E.2d 438, 441 (1947). A fiduciary should be aware of whether the operative document contains an in terrorem clause and, if so, whether the fiduciary might be able to use that clause to obtain the dismissal of an action by a beneficiary.

PRACTICE POINTER

✓ If a fiduciary believes that a beneficiary has engaged in conduct that is prohibited by an in terrorem clause, the fiduciary should exercise care when seeking to apply the clause to the beneficiary's detriment. Although most in terrorem clauses are directives to the fiduciary to reduce or eliminate the rights of any beneficiary who engages in conduct that constitutes a contest or other attack on some aspect of the trust or will, the fiduciary's court action seeking to apply the in terrorem clause is quite uncomfortably an action against the interest of that beneficiary. Ordinarily, one might worry about breaching the fiduciary's duty of impartiality. *See Northern Trust Co. v. Heuer,* 202 Ill.App.3d 1066, 560 N.E.2d 961, 965, 148 Ill.Dec. 364 (1st Dist. 1990). It may be that the fact that the governing instrument condones this fiduciary action modifies the duty of impartiality. That seems like the right conclusion, particularly in cases in which violation of the in terrorem clause is obvious, such as when a beneficiary prosecutes an unsuccessful will or trust contest. There are certain fiduciary duties that can be modified in the governing

instrument, such as the duty to account and the duty to diversify. Other fiduciary duties exist as a matter of common law and attach to the fiduciary office, such as the duty of care and duty of loyalty, among others. To avoid any question that an action to enforce a no-contest clause is a violation of the duty of impartiality, a fiduciary might consider filing a petition for instructions or seeking a declaratory judgment that the fiduciary is authorized to enforce the clause.

I. [7.56] Other Affirmative Defenses

In addition to those described in §§7.48 – 7.55 above, affirmative defenses generally are defenses that limit or excuse liability, even if a complainant's allegations are admitted or eventually proven. They call for a plaintiff's claims to be barred in whole or in part for various reasons. Some of these defenses deal with the failings of the complaint, *e.g.,* that it did not state a claim on which relief may be granted or that the complainant did not allege or has not suffered any injuries or damages. Others deal with the fiduciary's conduct itself, *e.g.,* that the fiduciary did not breach any fiduciary or other duty owed to the complainant or that the fiduciary always acted in good faith. A third category of affirmative defenses deals with the conduct of the complainant. In addition to laches, estoppel, and the doctrine of election, the doctrine of unclean hands bars a complaint when the complainant has acted in bad faith with respect to the subject matter of the complaint. The related doctrines of consent, waiver, acquiescence, and ratification bar a complainant's claims against a fiduciary when such complainant has expressly or implicitly authorized, accepted, or ratified the appointment or conduct of the fiduciary that is being challenged. *See McCormick v. McCormick,* 180 Ill.App.3d 184, 536 N.E.2d 419, 129 Ill.Dec. 579 (1st Dist. 1988); *White v. Sherman,* 168 Ill. 589, 48 N.E. 128 (1897); *Merchants Nat. Bank of Aurora v. Frazier,* 329 Ill.App. 191, 67 N.E.2d 611 (2d Dist. 1946). *See also Metz v. Independent Trust Corp.,* 994 F.2d 395, 401 (7th Cir. 1993) (grantor brought action against trustee for breach of trust, after grantor's financial advisor absconded with individual retirement account trust funds that were loaned to him by trustee at direction of grantor; court held that trustee could not be held liable for making loan as directed by grantor).

J. [7.57] Reliance on Advice of Counsel

The degree to which a fiduciary may use as a defense the fact that the fiduciary sought advice of counsel prior to taking an action is not entirely clear. In *In re Estate of Halas,* 209 Ill.App.3d 333, 568 N.E.2d 170, 180 – 181, 154 Ill.Dec. 170 (1st Dist. 1991), the respondents argued that a trustee should not be charged with breach of fiduciary duty because "there was no evidence of bad faith, and he was following advice of counsel." The court quoted with approval THE LAW OF TRUSTS, stating:

> **Where the trustee makes a mistake of law as to the extent of his duties or powers as trustee, it is no defense that he relied upon the advice of an attorney, even though the attorney was competent or the trustee reasonably believed that he was competent.**
>
> *** * ***

> **The subjection of the trustee to liability where he is not at fault in making the mistake may seem harsh. He can, however, escape liability by submitting the matter to the court for its instructions. If he is in doubt as to his duties or powers, he can thus avoid the risk of acting on his own opinion or on that of his attorney.** 568 N.E.2d at 181, quoting 3 Austin Wakeman Scott and William Franklin Fratcher, THE LAW OF TRUSTS §201, p. 221 (4th ed. 1988).

The court concluded that, despite acting on advice of counsel, the trustee breached his fiduciary duty by failing to give notice to the beneficiaries.

Despite the self-proclaimed "harsh" result reached in *Halas, supra,* courts have looked favorably on the effect of a trustee seeking counsel's advice in analyzing whether a trustee breached a duty in exercising its discretion. In *Chicago Title & Trust Co. v. Chief Wash Co.,* 368 Ill. 146, 13 N.E.2d 153, 158 (1938), the court held that "[b]efore instituting the foreclosure suit, plaintiff, as trustee, sought and followed competent legal advice. In determining whether a trustee has employed common prudence, caution and good faith in the exercise of a discretionary power, the fact that it resorted to such advice merits consideration."

As discussed in §7.33 above, §4.09 of the Trusts and Trustees Act, 760 ILCS 5/4.09, provides that if a trustee uses "reasonable care, skill, and caution in the selection of [an] agent," including a lawyer, the trustee can rely on the lawyer's advice and "shall have no responsibility for actions taken or omitted upon the advice or recommendation of the" lawyer. This provision would seem to protect a trustee who relies on his or her lawyer's advice, at least with respect to nondiscretionary matters, provided the trustee properly selected the lawyer. The portion of §4.09 containing the exculpatory language was not added to the statute until after *Halas,* so the ruling in *Halas* should not be viewed as being in conflict with current §4.09 of the Act, but as discussed in §7.33 above, there are no Illinois cases that have specifically dealt with the application of §4.09, so some doubt may remain in this regard.

VII. [7.58] ALTERNATIVE DISPUTE RESOLUTION OPTIONS

There are a number of alternatives to litigation that a fiduciary and his or her counsel should consider carefully. These options can be very effective and in many cases less expensive. See the discussion in §§7.59 – 7.61 below.

A. [7.59] Arbitration

Arbitration is an alternative to litigation that requires the parties to submit their case to one or more neutral arbitrators. The American Arbitration Association has promulgated Wills and Trusts Arbitration Rules, available at www.adr.org. If the will or trust includes a provision requiring arbitration in the event of a dispute, the fiduciary is required to submit the dispute to arbitration. It is not clear if trust or estate beneficiaries would be required to participate in the arbitration rather than pursue their claims in court.

B. [7.60] Family Counseling and Family Business Counseling

Family counseling can be an option to control disgruntled, dissatisfied beneficiaries who seem driven to disagree in part by family issues. Although it can be a sensitive subject, counseling can be effective and should be considered in appropriate situations. A less sensitive, seemingly less personal form of counseling is family business counseling.

Dysfunctional families who are beneficiaries of trusts in which a family business is an asset of the trust can seriously interfere with the administration of the trust and the operation of the business. Often, there is a disparity between the experience levels of family members who are employed by the family business, and this disparity can lead to resentment and problems. The fiduciary is a common target, and litigation over these issues is not unusual.

Professional family business counseling services exist and should be considered. They can be very effective in helping families set realistic business goals and separate their emotional family issues from their business objectives. Many of these firms employ professionals with significant experience in business management and counseling or psychology. While expensive in the short term, many families find themselves eager to work with these professionals, and successful resolution of disputes is not uncommon. It is of course important to interview these firms carefully and involve the fiduciary and the beneficiaries in the process.

C. [7.61] Mediation

Mediation is perhaps the most common form of alternative dispute resolution in the trust and estate litigation context. Mediation is a process in which one or more neutrals are retained to facilitate a settlement among the parties. They do not make a decision on the merits of the case or the settlement; they assist with communication and negotiation of the disputed issues. Settlement is voluntary.

Mediation is becoming more common in this area nationwide. A number of states (such as Texas and California) have statutorily mandated mediation. In Illinois, the Cook County Circuit Court Rules provide for "court-annexed" mediation — permitting the judge to whom a matter is assigned to order any contested civil matter pending in the Chancery Division referred to mediation. See Cook County Circuit Court Rules 21.01 – 21.11. The parties may select the mediator by agreement or with the assistance of the court.

Mediation can be a solution well before litigation commences. It is also an effective way to bring the parties to settlement during litigation. One of the reasons mediation works particularly well in these cases is that the issues can be so emotional that the parties often have great difficulty settling disputes on their own. Attorneys representing the parties cannot take the place of a neutral facilitator and often lack the skills to handle the psychological issues that can escalate the litigation. Another reason that mediation can be effective is that it allows the parties to have the equivalent of their "day in court," giving each side the opportunity to tell its story to a neutral professional. Sometimes, the simple process of a neutral party listening impartially to the separate parties can be very powerful.

VIII. TERMINATION OF FIDUCIARY RELATIONSHIP

A. [7.62] Resignation

Sometimes, despite a fiduciary's best efforts to resolve a conflict or address an issue that could lead to fiduciary liability, a fiduciary may find himself or herself in a position in which it is in his or her best interests (and often in the best interests of the beneficiaries) to resign. In those instances, it is important for the attorney representing the fiduciary to understand what liability could potentially continue for the fiduciary even after resignation.

1. Reasons To Resign

a. [7.63] Conflicts of Interest

A fiduciary, particularly an individual serving as a fiduciary of a family member's trust or estate, might find himself or herself in a position in which the individual's personal interest is different from the trust or estate beneficiaries' interests. This could occur in a situation in which the fiduciary is also a beneficiary of the trust or estate (*e.g.,* a child serving as trustee or executor of a parent's trust or estate). Conflicts also could occur when the fiduciary holds a management or other position in a company whose stock is a major asset of the estate.

b. [7.64] Unreasonable Beneficiaries

In today's increasingly litigious society, fiduciaries are from time to time finding themselves faced with beneficiaries who simply will not take no for an answer and who view a trust estate as their own personal bank account. Often this occurs when a lifetime income beneficiary (a surviving spouse perhaps) refuses to accept the fact that the fiduciary owes a duty to the remainder beneficiaries and instead thinks that he or she should be able to direct how distributions are made. These litigious beneficiaries often will threaten to file (or actually file) petitions with the appropriate court when the trustee exercises his or her discretion in a manner inconsistent with the beneficiary's view of the world.

2. [7.65] Current Law on Resignation

The Probate Act provides that "[u]pon petition of a representative, the court may permit him to resign. The petition may be heard without notice or after giving notice to such persons and in such manner as the court directs. If the petitioner is permitted to resign the court shall revoke his letters." 755 ILCS 5/23-1. Illinois law defines "representative" as including "executor, administrator, administrator to collect, standby guardian, guardian and temporary guardian." 755 ILCS 5/1-2.15. The Trusts and Trustees Act provides that "[a] trustee may resign at any time by written notice of the resignation to the settlor, if living, to a co-trustee, if any, and to the beneficiaries then entitled to receive or eligible to have the benefit of the income from the trust estate." 760 ILCS 5/12.

The statutory rule for trustees is only a default provision. Should the trust agreement provide a "specific method for resignation by the trustees," and the trustee does not follow the specified method, such a resignation is "without legal effect." *Croslow v. Croslow,* 38 Ill.App.3d 373, 347

N.E.2d 800, 804 (5th Dist. 1976). See also ILLINOIS PRACTICE SERIES: ESTATE PLANNING AND ADMINISTRATION IN ILLINOIS §216:12 (4th ed. 2007) ("A trustee may resign only in accordance with the terms of the trust, or with permission of all the beneficiaries, they having the capacity to give consent, or by permission of the proper court."). In *Croslow,* the trust agreement prohibited the resignation of a sole trustee. As the only two trustees of the estate resigned at the same time by signing a written instrument together, they violated the trust agreement with this action. The Illinois appellate court looked to both the RESTATEMENT (SECOND) OF TRUSTS and Texas caselaw to support this decision. The RESTATEMENT states: "A trustee who has accepted the trust cannot resign except: . . . (b) in accordance with the terms of the trust." 347 N.E.2d at 804, quoting RESTATEMENT (SECOND) OF TRUSTS §106 (1959). The court also noted that Texas caselaw holds that "a resignation is not effective unless it is in accordance with the terms of the trust." 347 N.E.2d at 804.

3. [7.66] Continuing Liability

There is little Illinois caselaw outlining the liability that remains after a fiduciary resigns or is removed from office. While Illinois statutes and caselaw are clear in saying that a successor trustee does not assume the liabilities of the former trustee, the law in Illinois is more opaque in describing the liabilities the former trustee retains. 760 ILCS 5/14. *See also Dick v. Peoples Mid-Illinois Corp.,* 242 Ill.App.3d 297, 609 N.E.2d 997, 1002 – 1003, 182 Ill.Dec. 463 (4th Dist. 1993) (reiterating that successor trustee assumes liabilities of former trustee only if successor is also at fault for breaches of fiduciary duty).

Whether liability follows a fiduciary after he or she has either resigned or been removed from office depends on the circumstances of the case. The U.S. Supreme Court interpreted early 20th century Illinois caselaw as providing that a "discharge" of future liability occurred upon a full accounting of the assets for which the executor was responsible. *Hulburd v. Commissioner,* 296 U.S. 300, 80 L.Ed. 242, 56 S.Ct. 197, 203 (1935). The Court stated: "There is not only exoneration for the past, but absolution for the future." 56 S.Ct. at 203 – 204. However, it appears that more recent caselaw requires further action to terminate such liability; mere resignation or removal likely does not terminate all liabilities stemming from a position as a fiduciary.

In order for a resignation to be effective, the trustee must stop acting as trustee. In *Collins v. Nugent,* 110 Ill.App.3d 1026, 443 N.E.2d 277, 284, 66 Ill.Dec. 594 (1st Dist. 1982), an Illinois court determined that, although a trustee had resigned, the former trustee's relationship to the plaintiff continued to be fiduciary in nature. In *Collins,* the former trustee and the plaintiff were siblings, the former trustee managed the business that the plaintiff had inherited, and the "[p]laintiff constantly entrusted the handling of her business and financial affairs to" the former trustee. 443 N.E.2d at 285. Therefore, even though there was technically no legal relationship between the two, the court found that the former trustee had violated his fiduciary duties to the plaintiff. 443 N.E.2d at 285, 289. *See also Sauvage v. Gallaway,* 329 Ill.App. 38, 66 N.E.2d 740, 742 – 743 (4th Dist. 1946) (when "resignation was never acted upon by the Court" and trustee continued to act in his position as trustee, resignation was invalid).

Obtaining a release from a beneficiary is a way in which a former trustee or executor can obtain protection from liability. *See In re Estate of Rice,* 130 Ill.App.3d 416, 473 N.E.2d 1382,

1390, 85 Ill.Dec. 577 (2d Dist. 1985) (discussing how former executors can be protected from liability through indemnifying releases). In *Lopacich v. Falk,* 5 F.3d 210, 213 (7th Cir. 1993), the Seventh Circuit considered, under Illinois law, whether there was a fiduciary duty between a brother and sister. The court noted that the brother had resigned as the trustee of his sister's trust. Upon his resignation, the sister "executed a document releasing her brother from all liability for his actions as trustee." *Id.* Therefore, the brother had no responsibility to his sister at the time of the contested events, which occurred five years after the resignation and release. In order for a release, *i.e.,* an agreement between a fiduciary and a beneficiary, to be considered valid, it should include the following elements:

> **(1) that [**the fiduciary**] made a full and frank disclosure of all the relevant information which he had; (2) that the consideration was adequate; and (3) that the principal had independent advice before completing the transaction.** *Masterson v. Wall,* 365 Ill. 102, 6 N.E.2d 161, 165 (1936).

In the context of the Employment Retirement Income Security Act of 1974, Pub.L. No. 93-406, 88 Stat. 829, parties seeking to hold former trustees liable for actions that occurred after their resignation must produce "hard evidence" that the former trustees were still "exercis[ing] discretionary authority . . . over the Plan." *Anderson v. Mortell,* 722 F.Supp. 462, 470 (N.D.Ill. 1989). However, for actions that occurred before the resignation, the court still will consider the facts to determine whether there had been a breach of fiduciary duties. 722 F.Supp. at 470 – 471.

There are some fiduciary liabilities that cannot be contracted out of through a release, *e.g.,* an executor's duty to file tax returns. The IRS imposes the burden on the executor to file returns on behalf of the estate. 26 U.S.C. §6018. The Supreme Court confirmed this by holding that the executor, not an agent hired by the executor, is the sole person with the burden of promptly filing taxes. *United States v. Boyle,* 469 U.S. 241, 83 L.Ed.2d 622, 105 S.Ct. 687, 692 (1985). The Court elaborated: "That the attorney, as the executor's agent, was expected to attend to the matter does not relieve the principal of his duty to comply with the statute." *Id.* The Seventh Circuit has held the same way. In *United States v. Kroll,* 547 F.2d 393, 396 (7th Cir. 1977), the Seventh Circuit stated: "[W]e hold that, when there is no question that a return must be filed, the taxpayer has a personal, nondelegable duty to file the tax return when due." The court repeated itself several years later in *Fleming v. United States,* 648 F.2d 1122, 1127 (7th Cir. 1981), holding that it was bound to follow *Kroll* and finding that the executor was liable for failing to file a federal tax return. The executor may be exempt from liability only if, after using "reasonable care" and relying on expert advice that the return was not required, the executor failed to file a tax return. 648 F.2d at 1125.

However, while an executor has the duty to file tax returns, the Supreme Court has found that once the probate court had properly discharged an executor from duty, the former executor was no longer responsible for subsequent tax assessments against the estate. *Hulburd, supra,* 56 S.Ct. at 204.

B. [7.67] Receipt and Release/Indemnity

Receipts and releases from the beneficiaries can be helpful in limiting fiduciary liability. Typically, a fiduciary requests a receipt and release from a beneficiary to whom a distribution is

made. The purpose of a receipt and release is to obtain an acknowledgment of the distribution and a release of potential claims against the fiduciary. In some cases, receipts and releases are used in lieu of expensive accounting proceedings.

It is important that the beneficiary be well informed of the relevant facts and that the scope of the receipt and release be reasonable. While some protection can be afforded the fiduciary through these devices, an overreaching receipt and release can create suspicion and concern in a beneficiary, damaging the fiduciary relationship and potentially leading to a dispute or litigation.

A receipt and release could be incorporated into a virtual representation agreement under §16.1 of the Trusts and Trustees Act. Section 16.1(d)(4) specifically provides that approval of a trustee's accounting may be resolved by a virtual representation agreement. An agreement approving a trustee's accounts would typically include a receipt and release. The advantage of utilizing the Act in this manner is that it becomes final and binding on the trustee and all current and future beneficiaries, and any other interested party, "as if ordered by a court with competent jurisdiction." 760 ILCS 5/16.1(d)(6).

IX. [7.68] ATTORNEYS' FEES IN DEFENDING FIDUCIARY

It is well accepted in Illinois that the fiduciary of a trust or estate may use funds from such trust or estate as are reasonably necessary for its general administration. *See In re Estate of Zagaria,* 2013 IL App (1st) 122879, 997 N.E.2d 913, 375 Ill.Dec. 602; *In re Estate of Goffinet,* 318 Ill.App.3d 152, 742 N.E.2d 874, 879, 252 Ill.Dec. 336 (4th Dist. 2001). See also 760 ILCS 5/7. When the fiduciary properly brings or defends a proceeding for the benefit of the trust or estate, he or she is justified in using those funds to cover all necessary litigation expenses, including reasonable attorneys' fees. *See Spencer v. Di Cola,* 2014 IL App (1st) 121585, ¶37, 16 N.E.3d 1, 383 Ill.Dec. 819, *reh'g denied* (Aug. 18, 2014), *as modified on denial of reh'g* (Aug. 21, 2014); *Wool v. LaSalle National Bank,* 89 Ill.App.3d 560, 411 N.E.2d 1135, 44 Ill.Dec. 769 (1st Dist. 1980); *Brown v. Commercial National Bank of Peoria,* 94 Ill.App.2d 273, 237 N.E.2d 567 (3d Dist. 1968). *But see Northern Trust Co. v. Heuer,* 202 Ill.App.3d 1066, 560 N.E.2d 961, 148 Ill.Dec. 364 (1st Dist. 1990) (trustee exceeded its role as trustee and breached its duty of impartiality when it argued that trust should be interpreted in manner favorable to one beneficiary and detrimental to another, precluding award of trustee's attorneys' fees and costs from trust principal).

Under the Probate Act, "[i]t is the duty of the representative to defend a proceeding to contest the validity of the will." 755 ILCS 5/8-1(e). Further, Illinois courts have held that "[t]he employment of counsel is considered indispensable to the reasonable discharge of [a fiduciary's] duty." *In re Estate of Lipchik,* 27 Ill.App.3d 331, 326 N.E.2d 464, 468 (1st Dist. 1975). *See also Patterson v. Northern Trust Co.,* 286 Ill. 564, 122 N.E. 55, 56 (1919) (fees and expenses of trustee in defending trust against groundless lawsuits are to be paid out of trust); *Union Bank of Chicago v. Wormser,* 256 Ill.App. 291, 303 – 304 (1st Dist. 1930) (trustee is to be reimbursed for legal fees incurred in defense of trust). Therefore, a fiduciary is entitled to recover attorneys' fees incurred in the good-faith defense of the trust or estate. *In re Estate of Breault,* 63 Ill.App.2d 246, 211 N.E.2d 424, 430 – 431 (1st Dist. 1965).

A. Limitations on Fiduciary's Use of Trust or Estate Funds in Litigation

1. [7.69] Duty To Mitigate and Surcharge Fees

The fiduciary maintains a duty to initiate litigation only when it serves an interest of the trust or estate and to refrain from litigation when it does not. *Bullis v. DuPage Trust Co.,* 72 Ill.App.3d 927, 391 N.E.2d 227, 29 Ill.Dec. 68 (2d Dist. 1979).

When a fiduciary fails to take appropriate steps necessary to protect the trust, the fiduciary may be subject to a surcharge for any loss resulting from his or her failure to act. *Waterman v. Alden,* 144 Ill. 90, 32 N.E. 972 (1893). A trustee may recover from the trust or estate legal expenses incurred to successfully defend against an attempt by the trust beneficiaries to assess a surcharge on the trustee. However, the trustee will be personally responsible for the legal expense of an unsuccessful defense. *See Greenspan v. Mesirow,* 138 Ill.App.3d 294, 485 N.E.2d 1196, 1201, 92 Ill.Dec. 953 (1st Dist. 1985) (finding that "[there is] no support for defendants' contentions that they are authorized to advance their litigation costs and fees from the Trusts pursuant to the Trust Agreement and the applicable law, where they have been accused of serious misconduct in their dealings as trustees with respect to these very funds").

2. [7.70] Petition for Fees (Fees on Fees)

The litigation expenses incurred in the fiduciary's defense of a trust or estate are chargeable to the trust or estate because these fees are incurred on behalf of the beneficiaries. *Wool v. LaSalle National Bank,* 89 Ill.App.3d 560, 411 N.E.2d 1135, 44 Ill.Dec. 769 (1st Dist. 1980); *Brown v. Commercial National Bank of Peoria,* 94 Ill.App.2d 273, 237 N.E.2d 567 (3d Dist. 1968). However, the costs incurred by the fiduciary in petitioning the court for the reimbursement of attorneys' fees may not be charged to the trust or estate, as the fee petition itself does not benefit the trust or estate. *In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 111 Ill.Dec. 639 (1st Dist. 1987).

3. [7.71] Litigation Expenses of Third Parties

Generally, only the fiduciary's attorneys' fees may be charged against the trust or estate. Illinois typically follows the American rule, under which parties to litigation, beneficiaries and other third parties included, must pay their own legal expenses. *See Trustees of Wheaton College v. Peters,* 286 Ill.App.3d 882, 677 N.E.2d 25, 28, 222 Ill.Dec. 212 (2d Dist. 1997). Under the Probate Act, "[t]he attorney for a *representative* is entitled to reasonable compensation for his services." [Emphasis added.] 755 ILCS 5/27-2. The term "representative" includes an executor, administrator, administrator to collect, standby guardian, guardian, and temporary guardian. 755 ILCS 5/1-2.15. A trustee is authorized to pay reasonable compensation to attorneys pursuant to 760 ILCS 5/4.09. Beneficiaries of a trust or estate do not meet the definition of "representative," nor are they expressly authorized by statute to employ attorneys.

Despite the lack of statutory authority, beneficiaries may be able to charge their attorneys' fees to the estate or trust under certain limited circumstances. One such circumstance arises when a beneficiary initiates litigation that enables the estate to be closed. *See, e.g., In re Estate of Freund,* 63 Ill.App.3d 1, 379 N.E.2d 935, 936 – 937, 20 Ill.Dec. 102 (2d Dist. 1978) (holding that

when action by heirs against executors and trustees of estate enhanced value of estate, heirs were entitled to have their attorneys' fees paid from estate). A second exception to the American rule is the common-fund doctrine. Under the common-fund doctrine, a "party who creates, preserves, or increases the value of a fund in which others have an ownership interest [may] be reimbursed from that fund for litigation expenses incurred, including counsel fees." *In re Estate of Pfoertner,* 298 Ill.App.3d 1134, 700 N.E.2d 438, 440, 233 Ill.Dec. 133 (5th Dist. 1998). That notwithstanding, a beneficiary is never entitled to collect attorneys' fees from the trust or estate when he or she seeks only personal benefits. *Boldenweck v. City Nat. Bank & Trust Co. of Chicago,* 343 Ill.App. 569, 99 N.E.2d 692, 702 (1st Dist. 1951).

4. [7.72] Litigation Expenses Incurred Because of Ambiguous Provision

The construction of a will or trust sometimes may be disputed because its terms are ambiguous. In such cases, the Illinois Supreme Court has held that a fiduciary's reasonable attorneys' fees may be charged against the trust or estate when the fiduciary properly seeks judicial interpretation of an ambiguous provision, even if the construction adopted by the court is adverse to the fiduciary. However, legal fees may not be charged to the trust or estate by the fiduciary when the terms are not ambiguous and the proceedings are unnecessary. *Orme v. Northern Trust Co.,* 25 Ill.2d 151, 183 N.E.2d 505, 513 (1962).

5. [7.73] Superfluous Litigation Expenses

Under estate law, attorneys' fees are not recoverable from the estate funds when the litigation is not in the interest of or does not benefit the estate. *See In re Estate of Minsky,* 59 Ill.App.3d 974, 376 N.E.2d 647, 651, 17 Ill.Dec. 501 (1st Dist. 1978). Similarly, under the law of trusts, a trustee may not charge superfluous expenses to the trust for "employing agents to do acts which the trustee ought personally to perform." *Smith v. Stover,* 15 Ill.App.2d 78, 145 N.E.2d 515, 522 (2d Dist. 1957). See also SCOTT AND ASCHER ON TRUSTS §§22.1 – 22.2. Nevertheless, as long as the representative's actions benefit the trust or estate in some manner, success at litigation is not a requirement for attorneys' fees to be paid from funds of the trust or estate. *Estate of Roselli,* 70 Ill.App.3d 116, 388 N.E.2d 87, 92, 26 Ill.Dec. 463 (1st Dist. 1979).

6. [7.74] Attorneys' Fees Incurred by Multiple Fiduciaries

Although fiduciaries generally are permitted to charge their legal expenses against the funds of the trust or estate, Illinois courts often have held that when there are multiple representatives of a single trust or estate, fiduciaries cannot recover fees if they each retain separate counsel. "[C]o-executors and co-trustees must act as an entity in matters pertaining to the administration of the estate; any other rule would lead to confusion and chaos and create unnecessary charges against estate funds." *In re Estate of Greenberg,* 15 Ill.App.2d 414, 146 N.E.2d 404, 408 (1st Dist. 1957). The attorneys' fees incurred by multiple fiduciaries acting separately may be charged against the estate only if the employment of separate legal counsel is necessary to protect the estate's interests and ensure its proper administration. 146 N.E.2d at 409; *Northern Trust Co. v. Continental Illinois National Bank & Trust Company of Chicago,* 43 Ill.App.3d 169, 356 N.E.2d 1049, 1071 – 1072, 1 Ill.Dec. 767 (1st Dist. 1976) (holding "that the irreconcilable conflict

between the corporate and individual trustees necessitated a final judicial resolution" and that this honest difference of opinion justified retention of separate counsel at expense of trust), *rev'd in part on other grounds sub nom. Stuart v. Continental Illinois National Bank & Trust Company of Chicago,* 68 Ill.2d 502 (1977).

7. [7.75] Fees Incurred on Appeal

Under estate law, fiduciaries generally may not charge against the trust or estate legal fees incurred to appeal unsuccessful litigation. *See Rosenthal v. First National Bank of Chicago,* 127 Ill.App.2d 371, 262 N.E.2d 262, 264 – 265 (1st Dist. 1970). The Illinois Supreme Court has held that "[t]he construction placed upon a will by the lower court may not be satisfactory to some of the parties and they may be able to have it changed on appeal, but, should they feel disposed to litigate beyond the court of original jurisdiction, this they must do at their own risk and costs." *Glaser v. Chicago Title & Trust Co.,* 401 Ill. 387, 82 N.E.2d 446, 448 – 449 (1948). However, when a lower court decision construing a will is appealed and the appellees hire attorneys to defend the lower court's construction of the terms of the will, the appellees' attorneys' fees may be properly charged to the estate. *Dyslin v. Wolf,* 347 Ill.App. 80, 106 N.E.2d 193 (2d Dist. 1952). Furthermore, when an appellant challenges a lower court's construction of a will and is successful in overturning the lower court's construction, the appellant may recover reasonable attorneys' fees from the estate. *See Landmark Trust Co. v. Aitken,* 224 Ill.App.3d 843, 587 N.E.2d 1076, 1079, 167 Ill.Dec. 461 (5th Dist. 1992); *Bank of America, N.A. v. Judevine,* 2015 IL App (1st) 140532, ¶34, 26 N.E.3d 555, 389 Ill.Dec. 465.

Under the law of trusts, Illinois courts have held that when it would be unreasonable not to appeal, the fiduciary assumes a duty to appeal. As such, expenses resulting from the appeal are chargeable to the trust. SCOTT AND ASCHER ON TRUSTS §17.10, citing *Peoples Bank of Bloomington v. Trogdon,* 276 Ill.App. 373 (3d Dist. 1934).

8. [7.76] Attorneys' Fees Incurred for Fiduciary's Personal Benefit

When a fiduciary employs an attorney for his or her individual benefit and not for that of the trust or estate, the fiduciary is personally responsible for all legal fees. *In re Estate of Dyniewicz,* 271 Ill.App.3d 616, 648 N.E.2d 1076, 1083, 208 Ill.Dec. 154 (1st Dist. 1995); *Barth v. Reagan,* 146 Ill.App.3d 1058, 497 N.E.2d 519, 100 Ill.Dec. 541 (2d Dist. 1986). Nevertheless, when the beneficiaries of a trust bring a proceeding for the removal of the trustee, the trustee may properly charge the trust estate with the expense of defending the proceeding, but if the trustee is removed, the trustee should not expect to be able to charge the trust estate for the cost of an unsuccessful defense. See §7.77 below. See SCOTT AND ASCHER ON TRUSTS §11.10.

B. [7.77] Litigation Expenses Arising from Breach of Fiduciary Duty

Although it is undisputed that a fiduciary maintains the right to defend himself or herself from charges of alleged misconduct, it is unclear how these legal expenses are to be paid. *Heritage Pullman Bank & Trust Co. v. Carr,* 283 Ill.App.3d 472, 670 N.E.2d 814, 219 Ill.Dec. 136 (1st Dist. 1996); *First Midwest Bank/Joliet v. Dempsey,* 157 Ill.App.3d 307, 509 N.E.2d 791, 109 Ill.Dec. 130 (3d Dist. 1987); *Webbe v. First National Bank & Trust Company of Barrington,*

139 Ill.App.3d 806, 487 N.E.2d 711, 93 Ill.Dec. 886 (2d Dist. 1985). Generally, the fiduciary's attorneys' fees may be charged against the fiduciary account. *Webbe, supra.* However, Illinois courts have held that trust and estate funds may not be used for a fiduciary's legal fees when the legal services rendered were not in the interest of or did not benefit the estate beneficiaries or when the fiduciary breached his or her fiduciary duty of care. *In re Estate of Minsky,* 59 Ill.App.3d 974, 376 N.E.2d 647, 651, 17 Ill.Dec. 501 (1st Dist. 1978).

A fiduciary who is at fault in causing the litigation may not charge the trust or estate with the resulting legal expenses. *Bennett v. Weber,* 323 Ill. 283, 154 N.E. 105 (1926); *Ellis v. King,* 336 Ill.App. 298, 83 N.E.2d 367, 372 (2d Dist. 1949). Moreover, a fiduciary who performs poorly, by either negligently or fraudulently breaching his or her fiduciary duty, will be unlikely to recover from the trust or estate the cost of attorneys' fees incurred in his or her defense. *See In re Estate of Devoy,* 231 Ill.App.3d 883, 596 N.E.2d 1339, 1343, 173 Ill.Dec. 460 (5th Dist. 1992).

Although the Illinois Supreme Court held in *Orme v. Northern Trust Co.,* 25 Ill.2d 151, 183 N.E.2d 505, 513 (1962), that a fiduciary may charge legal expenses associated with the judicial interpretation of an ambiguous provision against the trust or estate, a fiduciary may not do so if the fiduciary supports an interpretation that favors one group of beneficiaries above another. *Northern Trust Co. v. Heuer,* 202 Ill.App.3d 1066, 560 N.E.2d 961, 965, 148 Ill.Dec. 364 (1st Dist. 1990). Such an act constitutes a breach of the fiduciary's duty of impartiality. *Id.*

8 Admission of Wills to Probate

JOHN T. BROOKS
JENA L. LEVIN
Foley & Lardner LLP
Chicago

I. INTRODUCTION

A. [8.1] Scope and Structure

This chapter addresses admission of wills to probate. The will contest issues discussed in this chapter are distinguished from those discussed in Chapter 1 of this handbook.

Admitting a will to probate and contesting a will can potentially be a three-step process:

1. The petitioner must prove up the will in what is usually an ex parte probate court proceeding governed primarily by §6-4 of the Probate Act of 1975, 755 ILCS 5/1-1, *et seq*. 755 ILCS 5/6-4.

2. An interested person has the opportunity to object to a will that has been admitted to probate under step one by demanding formal proof of the will, though at this stage the court will consider only grounds related to the circumstances of the execution of the will and governed primarily by §6-21 of the Probate Act, 755 ILCS 5/6-21.

3. An interested person has the opportunity to contest the validity of the will as that of the decedent in a classic will contest or to contest the denial of the admission of the will to probate. 755 ILCS 5/8-1, 5/8-2.

The first two steps in the process are addressed in this chapter.

B. [8.2] Policy

The admission of will process is limited in scope and time. The court is charged with determining whether a prima facie case has been made that the execution of the will complies with §6-4(a) of the Probate Act, 755 ILCS 5/6-4(a) (usually in an ex parte proceeding). That prima facie case can be overcome only by specific issues related to the circumstances of the execution of the will (usually at a hearing on formal proof of will). If the will is admitted to probate, the order is nonetheless not final as to whether the will is the valid, final will of the decedent if a timely (within six months) will contest is filed. *In re Estate of Alfaro,* 301 Ill.App.3d 500, 703 N.E.2d 620, 623, 234 Ill.Dec. 759 (2d Dist. 1998). The policy behind this three-step process is to facilitate administration of an estate by appointing an executor to timely marshal and protect the estate assets. *In re Estate of Gaglione,* 97 Ill.2d 408, 454 N.E.2d 664, 667, 73 Ill.Dec. 567 (1983). Rather than endure delays in estate administration during a prolonged will contest, the Illinois procedure allows for the ongoing administration of an estate during the more lengthy will contest period (the contest can be brought up to six months after the will has been admitted to probate and may not go to trial for several years). On the other hand, the statute balances the need for efficient administration against the desire to ensure that the proper will has been admitted by at least allowing for some form of contest on limited grounds and in a much shorter time period. (Essentially, challenges with respect to execution, discussed in §§8.13 – 8.18 below, must be brought within 42 days after the will has been admitted to probate and then with limited discovery and generally expedited trial schedules. See 755 ILCS 5/6-21.) Other states have adopted

alternative statutory schemes that address the same policy concerns, such as appointing a temporary administrator during a contest or providing for an extremely short statute of limitations for a will contest.

C. [8.3] Strategy

As Illinois is a double contest state, when representing the petitioner in a potential traditional will contest, one should also consider challenging the admission of the will to probate in the first instance. For example, if the likely grounds for contesting the will include lack of capacity and undue influence, then it is certainly possible that the signature of the decedent was obtained by forgery or compulsion, both of which are grounds for challenging the initial admission of the will through formal proof of will. If that is the case, it is probably advisable to object to the admission of the will and force a hearing; you never know what the supposed witnesses to a will might say. See §8.10 below concerning supposed witnesses to wills denying the substance of an attestation clause. Even if there is no evidence of fraud, forgery, or compulsion, the minimal discovery and testimony during formal proof of will are also at least minor considerations. Discovery and evidentiary issues are discussed in §8.19 below.

There are other possible tactical and strategic advantages to seeking or not seeking formal proof of will. The effect of invalidating a will prior to its admission should be compared to obtaining a finding in a will contest that the will is not the valid last will of the decedent. For example, a potential petitioner who has "accepted the benefits" of his or her legacy under a purported will is estopped from challenging the validity of a will through a will contest under §8-1 of the Probate Act, 755 ILCS 5/8-1. *Kyker v. Kyker,* 117 Ill.App.3d 547, 453 N.E.2d 108, 110 – 111, 72 Ill.Dec. 803 (2d Dist. 1983). However, a petitioner may demand formal proof of will even though he or she has elected to accept a bequest. *In re Estate of Levin,* 135 Ill.App.3d 866, 482 N.E.2d 409, 412, 90 Ill.Dec. 590 (1st Dist. 1985).

Another difference may arise in the area of revocation. A will that has been admitted to probate revokes all prior wills. If, however, that will is found in a Probate Act §8-1 will contest not to be the valid last will of the decedent, it still may in theory function as an effective revocation of the prior wills (as a Probate Act §4-7(a)(4) "instrument declaring the revocation and signed and attested in the manner prescribed by this Article for the signing and attestation of a will" (755 ILCS 5/4-7(a)(4))). If that same will was denied admission to probate in the first instance, it would not revoke prior wills because, necessarily, it was not legally effective.

Additionally, there is no right to a jury in a hearing on whether to admit a will to probate, while there is a right to a jury in a Probate Act §8-1 will contest. *See In re Estate of Millsap,* 75 Ill.2d 247, 388 N.E.2d 374, 378, 26 Ill.Dec. 659 (1979). Thus, to the extent the issues are similar, it is possible to have one opportunity to be heard with the judge as the trier of fact and one opportunity to be heard by a jury.

Generally, the petitioner will be paid from the estate in a proceeding to admit a will, *if that will is admitted.* What if the will is not admitted? Arguably, when the nominated executor petitions to admit the will, that person could be paid because he or she is attempting to fulfill a fiduciary duty. The issue is even more interesting in the context of a lost will. As is discussed in

§8.23 below, a petition to admit a lost will can result in a lengthy (and costly) evidentiary hearing. It is unclear whether a losing petitioner may be paid, and if the losing petitioner may be paid, it is unclear under what circumstances he or she should be paid. It would seem that if a prima facie case is made, then a standard similar to that of a will and trust construction case should be used; *i.e.,* there is a genuine issue over which the parties in good faith disagree. Due to the uncertainty, however, the petitioning party should consider petitioning the court in advance for authority to bring the petition and to be paid from the estate assets. The petitioner's argument is, of course, stronger if he or she is the nominated executor under the lost will.

PRACTICE POINTER

✓ When considering various strategies, however, be careful about the statute of limitations. Pursuant to §8-1(a) of the Probate Act, an interested person must file a petition to contest the validity of the will within six months from the date of the admission of the decedent's will to probate. *In re Estate of Mohr,* 357 Ill.App.3d 1011, 830 N.E.2d 810, 294 Ill.Dec. 398 (1st Dist. 2005), confirmed again the absolute jurisdictional nature of that six-month time period. The time to file a petition to contest a will and invoke the trial court's jurisdiction will not be stayed by a trial court order granting leave to file a petition to contest a will, by a petition for formal proof of will under §6-21 of the Probate Act, by fraudulent concealment, or even by a tolling agreement. *But see In re Estate of Ellis,* 236 Ill.2d 45, 923 N.E.2d 237, 337 Ill.Dec. 678 (2009) (distinguishing will contests from actions in tort for intentional interference with inheritance and finding that six-month statute of limitations applies only to former, at least in certain limited fact patterns); *Bjork v. O'Meara,* 2013 IL 114044, 986 N.E.2d 626, 369 Ill.Dec. 313 (tortious interference claim not subject to six-month jurisdictional statute of limitations if claimant does not seek to invalidate will).

II. ADMISSION OF WILLS TO PROBATE — PROCESS

A. [8.4] Statutory

The process for admitting wills to probate is purely statutory. *Glos v. Schildbach,* 344 Ill. 23, 176 N.E. 65 (1931); *In re Estate of Lum,* 298 Ill.App.3d 791, 699 N.E.2d 1049, 232 Ill.Dec. 864 (1st Dist. 1998). Section 6-21 of the Probate Act, 755 ILCS 5/6-21, provides that if an interested person timely files a petition for formal proof of will, the circuit court "must set the matter for [a] hearing." *In re Estate of Koziol,* 366 Ill.App.3d 171, 851 N.E.2d 198, 201, 303 Ill.Dec. 300 (1st Dist. 2006).

As is made clear in the notice cases discussed in §8.20 below, the statutory requirements must be followed strictly. For example, in *In re Estate of Weir,* 120 Ill.App.3d 18, 458 N.E.2d 134, 75 Ill.Dec. 966 (3d Dist. 1983), the administrator of an intestate estate opposed the admission of a lost will to probate. Over the administrator's vigorous objections, the will was admitted to probate. That administrator had a fiduciary duty to the decedent's heirs, including Naomi Hoffman. Notice of the hearing to admit the contents of the lost will was not provided to

Hoffman. The same person who acted as administrator of the estate then acted as executor for Hoffman's estate and demanded a hearing on formal proof of will. Despite her being involved in the prior proceeding (albeit in another capacity) and there having been a full evidentiary hearing on the lost will, the appellate court very reluctantly ordered a hearing, holding that the requirements of §6-21 of the Probate Act "are clear, direct and mandatory. We believe it best to enforce them to the letter." 458 N.E.2d at 139.

B. [8.5] Requirements of Valid Will

As noted in §8.4 above, the validity of a will in Illinois is governed strictly by the procedures outlined in the Probate Act. The Probate Act requires that a will be in the form of a writing signed by the testator, or some person in his or her presence and at his or her direction, and "attested" in the presence of the testator by at least two credible witnesses. 755 ILCS 5/4-3(a). These requirements are statutory and may not be deviated from by the courts in any material way. *Glos v. Schildbach,* 344 Ill. 23, 176 N.E. 65 (1931).

To admit the will to probate, the attesting witnesses must state that they were present and saw the testator, or some person in the testator's presence and at the testator's direction, sign the will in the presence of the witnesses or acknowledge his or her signature to the witnesses; that the will was attested to by the witnesses in the presence of the testator; and that the witnesses believed the testator to be of sound mind and memory at the time the will was signed. 755 ILCS 5/6-4(a). The proponent of the will may introduce other evidence to establish a will. If sufficient competent evidence is presented, the will is then admitted "unless there is proof of fraud, forgery, compulsion or other improper conduct which in the opinion of the court is deemed sufficient to invalidate or destroy the will." *Id*.

C. [8.6] Form of Will

A will does not require a special form. Any writing, however informal, made with the express intent of disposing of the testator's property upon death that meets the formalities of execution and attestation described in §§8.4 and 8.5 above is a will. *Austin v. First Trust & Savings Bank,* 343 Ill. 406, 175 N.E. 554 (1931); *In re Estate of Francoeur,* 8 Ill.App.3d 567, 290 N.E.2d 396 (3d Dist. 1972). The will may refer to and incorporate other writings into the will even though those writings do not separately meet the formal requirements of §4-3(a) of the Probate Act, 755 ILCS 5/4-3(a). *See, e.g., In re Estate of Meskimen,* 39 Ill.2d 415, 235 N.E.2d 619 (1968), listing the requirements for a valid incorporation by reference as (1) the will refers to the writing as being then in existence and in a way that makes it clear that the testator intends to incorporate it by reference, (2) the will clearly identifies the writing, and (3) the writing is in fact in existence at the time the will is executed.

An interesting variation on the incorporation by reference cases resulted from the Illinois version of the testamentary additions to trusts statute, 755 ILCS 5/4-4. The Probate Act makes it possible to revive a trust that was terminated. In *In re Estate of Stern,* 263 Ill.App.3d 1002, 636 N.E.2d 939, 201 Ill.Dec. 507 (1st Dist. 1994), the decedent executed a will and a separate trust on May 23, 1980. The will devised the estate to the trustee of the trust (the pourover) "as in effect at my death." 636 N.E.2d at 941 – 943. In 1989, the decedent executed a second will that revoked

the 1980 will. The probate court also entered a finding that the trust had terminated on May 12, 1988 (it is unclear from the record why the trust was terminated). The probate court then found that the successor trustee, who sought to challenge the 1989 will, was no longer an "interested party." 636 N.E.2d at 941. The successor trustee appealed, arguing that if it succeeded in challenging the 1989 will, the terminated trust would be revived due to the unusual language in Probate Act §4-4. After finding that Illinois was the only state to provide for the revival of a trust when it is terminated by revocation, the court held that the Probate Act was ambiguous with respect to whether a trust could be revived after it was terminated by means other than revocation. Because the legislative intent indicated that the goal of the Probate Act was to avoid intestacy whenever possible, the court held that the trust could be revived. 636 N.E.2d at 941 – 942.

D. [8.7] Initial Proceeding Ex Parte

If it is unlikely that there will be a contest and the petitioner knows the heirs and legatees, common practice is to obtain waivers of notice in advance as provided by Probate Act §6-10(b). In a likely contest, the petition to admit a will required under §6-2 of the Probate Act, 755 ILCS 5/6-2, is generally filed without notice to anyone. On the return date of the Probate Act §6-2 petition, as long as a prima facie case of due execution pursuant to Probate Act §6-4 has been made to the court, the will is admitted. Then the executor is required to send out notice of the action taken by the court within 14 days to all heirs and legatees. 755 ILCS 5/6-10. Included with this notice is a description (usually provided on a county court form) of the rights of an heir or legatee to require formal proof of will under Probate Act §6-21 or to file a will contest under Probate Act §8-1 or §8-2.

A 2004 case in the will contest area held that even if there are several intervening wills, an heir will always have standing to file a will contest. Similarly, an heir should always have standing to seek formal proof of will no matter how many intervening wills may exist. Under the statute of descent, the daughter was the one who would take from her father's estate if he died without leaving a will; had her father died intestate, she would have inherited a one-third share of his real and personal property, and the fact that her father might have executed other, earlier wills did not disqualify her from petitioning to contest later wills. *In re Estate of Schlenker,* 209 Ill.2d 456, 808 N.E.2d 995, 283 Ill.Dec. 707 (2004).

E. [8.8] Witnesses

At common law, a person who received a benefit from a will could not act as a witness to that will. In fact, if a beneficiary, even as to an insignificant amount, acted as a witness, the will could be invalidated. Illinois avoids this result by providing that rather than invalidating the will as a whole, the interest of a beneficiary who acts as a witness (or who is the spouse of a witness) is void. 755 ILCS 5/4-6(a). Of course, if the will was witnessed by two other credible witnesses (see 755 ILCS 5/4-3(a)), the Probate Act provides that the witness-beneficiary still may take under the will. Additionally, in all events the witness-beneficiary is entitled to take up to that amount that the beneficiary would have been entitled to take had the will not been admitted to probate. In other words, as long as the witness-beneficiary is not benefiting from his or her testimony, either because the witness would take the same or more under a prior will or under intestacy, he or she can take under the will. *Id.*

Another potentially common problem is avoided by statute. One could argue that a person or corporation nominated to act as a fiduciary (either as executor of the will or trustee of a trust under the will) has a financial interest that could disqualify the person (or corporation if one of its employees acts as a witness) from (1) acting as a credible witness, (2) acting as fiduciary, or (3) receiving compensation for acting as fiduciary. In fact, that is just what happened in *Lawndale Nat. Bank of Chicago v. Kaspar American State Bank,* 288 Ill.App. 555, 6 N.E.2d 670 (1st Dist. 1937), in which the only witnesses to a will were employees of the bank that was nominated and in fact later served as executor and trustee. The court did not invalidate the will, but instead voided the provisions appointing the bank as executor and trustee. The Probate Act now provides that a nominated fiduciary is not disqualified to act or receive compensation for acting as a fiduciary because a partner of the individual or any employee or shareholder of the corporation witnessed the execution of the will. 755 ILCS 5/4-6(b). However, it should be kept in mind that a provision in a will naming an actual attesting witness as an executor, such as an attorney, may be null and void. *In re Estate of Burd,* 354 Ill.App.3d 434, 820 N.E.2d 613, 289 Ill.Dec. 837 (2d Dist. 2004).

Similarly, in *In re Estate of George,* 11 Ill.App.2d 359, 137 N.E.2d 555, 557 – 558 (3d Dist. 1956), an attorney who testified as to the execution of the will, and who was hired by the executor pursuant to a direction in the will, was denied compensation for his services because of the "beneficial interest" received by the attorney under the will. Shortly thereafter, the statute was amended so that attorneys are neither disqualified from acting as attorney for the fiduciary nor barred from being compensated because the attorney (or a partner or employee) acted as a witness to the will. *In re Estate of Wolfner,* 27 Ill.2d 221, 188 N.E.2d 712 (1963).

F. [8.9] Methods of Proving Valid Execution

The court will indulge every reasonable presumption that the will has been executed and attested properly. *Estate of Ragen,* 96 Ill.App.3d 1035, 422 N.E.2d 179, 52 Ill.Dec. 498 (1st Dist. 1981). Absent any evidence of fraud, forgery, compulsion, or other similar conduct, a will is admitted to probate upon the showing of a prima facie case by one of the following three methods: attestation; affidavit; or testimony. See §§8.10 – 8.12 below.

1. [8.10] Attestation

Section 6-4 of the Probate Act provides the only three methods of proving that the requirements of a validly executed will have been met. The most common and simple method of proving the validity of a will is through an attestation clause. 755 ILCS 5/6-4(b)(2). If an adequate attestation clause is part of the will, then the requirements of Probate Act §6-4 are met without the need for testimony. *See In re Estate of Koester,* 2012 IL App (4th) 110879, 975 N.E.2d 1115, 363 Ill.Dec. 806; *In re Estate of Cornelius,* 125 Ill.App.3d 312, 465 N.E.2d 1033, 80 Ill.Dec. 687 (4th Dist. 1984). If formal proof of will is demanded (and therefore a hearing is required), an attestation clause remains invaluable because it can (a) prevent a witness to the will who is called to testify from changing stories, (b) discredit a witness who does change stories, or (c) overcome the difficulty that a witness with a faulty memory may have in recollecting the events surrounding the execution.

For example, in *In re Estate of Carroll,* 192 Ill.App.3d 202, 548 N.E.2d 650, 653, 139 Ill.Dec. 265 (1st Dist. 1989), citing *Conway v. Conway,* 14 Ill.2d 461, 153 N.E.2d 11, 15 (1958), three witnesses signed the will. At the time of hearing, one of the witnesses was deceased, and the other two were elderly residents of a nursing home. The surviving witnesses testified in evidence depositions that their respective signatures appeared on the will and that they would not have signed the attestation clause if the statements in it were not true. Neither witness remembered anything about the circumstances surrounding the execution. The only signature of the decedent on the will appeared in the first line of the will rather than at the end. The trial court denied admission to probate. The appellate court reversed, holding that when a will is executed in proper form with an attestation clause, and the parties admit that the signatures are genuine, every presumption will be indulged in favor of execution. Thus, the attestation clause will speak for any witnesses who have no recollection of the events surrounding the execution of the will.

Even when the only surviving witness testified that he did not see the decedent sign the will and did not think that the decedent saw him sign as a witness, it was not enough to overcome the presumption established by the proper attestation clause. *In re Estate of Smith,* 282 Ill.App.3d 389, 668 N.E.2d 102, 217 Ill.Dec. 917 (1st Dist. 1996). (*Smith* also describes how Probate Act §8-2 can work to challenge the denial of a will to probate, although in this case the trial court ultimately vacated the order denying probate and admitted the will.)

2. [8.11] Affidavit

Like an attestation clause, an affidavit recites the facts required under §6-4 of the Probate Act, 755 ILCS 5/6-4, but it can be signed by the witness after the will has been executed, and it can be attached to a copy of the will. But it only works to cure the lack of an attestation clause if the will was signed by the witness in the presence of the testator. In *In re Estate of Lum,* 298 Ill.App.3d 791, 699 N.E.2d 1049, 232 Ill.Dec. 864 (1st Dist. 1998), *appeal denied,* 181 Ill.2d 572 (1998), one year after the decedent allegedly had signed a will, his daughter signed an affidavit stating that she was present when the decedent signed the will, and she believed that he was then of sound mind and memory. But she did not herself sign the will. The issue before the court was whether the "attested" requirement of Probate Act §4-3 could be met when the witness did not sign the will. After noting that some jurisdictions, which distinguish between the meaning of "attest" and "subscribe," have held that "attest" only encompasses being present for the signing of a will, the court held that Illinois requires an attesting witness to have actually signed the will as such witness in the presence of the testator. 699 N.E.2d at 1050 – 1051.

3. [8.12] Testimony

A will also can be proved by the testimony of the witnesses to the will. The testimony can be in court or by deposition. Several issues arise when testimony from the supposed attesting witnesses is taken. First, it must be taken in those situations in which there is no affidavit or attestation clause. What happens if no witnesses or only one witness is competent to testify? Section 6-6 of the Probate Act governs proving up the handwriting of an unavailable witness. 755 ILCS 5/6-6. Section 6-5 permits the taking of the deposition of a witness to a will who resides outside the county of probate. 755 ILCS 5/6-5.

In one well-known case, a will appeared to be properly signed and witnessed but did not contain an attestation clause. One of the witnesses testified to all of the Probate Act §6-4 requirements. The other witness, while identifying her signature, could not recall any of the circumstances surrounding the execution of the will. The court found that the statutory requirements are met when one witness testifies that they were satisfied. *Knaphurst v. Lindauer,* 61 Ill.App.2d 269, 210 N.E.2d 23 (1st Dist. 1965).

If formal proof of will is demanded under Probate Act §6-21, then the proponent must offer as evidence at the hearing the testimony of the witnesses to the will or their depositions (§6-5) or other evidence, such as a videotape of the executor or the testimony of the attorney who supervised the execution of the will, but not merely the attestation clause or affidavit. 755 ILCS 5/6-21.

G. Methods of Invalidating Will

1. [8.13] Not Enough Proof

A will will not be admitted to probate if the proponent fails to make his or her prima facie case. The first challenge to the prima facie case may be the document itself or the witnesses whose testimony is not consistent with the formalities required by §6-4 of the Probate Act, 755 ILCS 5/6-4.

If a prima facie case has been made, it can be overcome by proof of fraud, forgery, compulsion, or other improper conduct. In effect, proof of one of these elements can nullify one of the elements of the prima facie case, *e.g.,* proof of forgery nullifies the signature requirement. Once circumstances exist that suggest forgery or fraud, the court is free to consider all facts that bear on the validity of the instrument at issue. *Estate of Ragen,* 96 Ill.App.3d 1035, 422 N.E.2d 179, 52 Ill.Dec. 498 (1st Dist. 1981).

2. [8.14] Fraud

Fraud in the context of invalidating a will should be distinguished from undue influence or the intentional tort of interference with an expectancy. In the case of undue influence or tort claims, there may be an element of fraud, such as when the defendant untruthfully tells the decedent that her son is "out to get her" and is stealing her money. The fraud referred to in §§6-4 and 6-21 of the Probate Act, 755 ILCS 5/6-4, 5/6-21, is in the nature of trickery, *e.g.,* by getting the person to sign the document by tricking the person into thinking that the document is something other than a will ("fraud in the execution"). *Stuke v. Glaser,* 223 Ill. 316, 79 N.E. 105, 107 (1906); *Ruffing v. Glissendorf,* 41 Ill.2d 412, 243 N.E.2d 236 (1968).

3. [8.15] Forgery

Generally, the testimony of a handwriting expert will not be enough to overcome the direct testimony of witnesses to a will. *Jones v. Jones,* 406 Ill. 448, 94 N.E.2d 314 (1950). However, in *Estate of Ragen,* 96 Ill.App.3d 1035, 422 N.E.2d 179, 52 Ill.Dec. 498 (1st Dist. 1981), an accumulation of suspect circumstances, including evidence that the decedent was in New York

the day the document was supposedly signed in Florida, combined with an expert's testimony, was enough to sustain the trial court's finding of forgery. The *Ragen* court distinguished the will at issue from that in *Jones* based on the accumulation of suspect circumstances. 422 N.E.2d at 185 – 186.

4. [8.16] Compulsion and Other Improper Conduct

The phrase "other improper conduct" in §6-4(a) of the Probate Act is somewhat ambiguous. 755 ILCS 5/6-4(a). It has been defined as being conduct similar to fraud or compulsion, as opposed to undue influence. *Shepherd v. Yokum,* 323 Ill. 328, 154 N.E. 156, 159 (1926). An example of compulsion would be if someone holds a gun to the testator's head and says, "Sign it!"

5. [8.17] Sound Mind and Memory

The witnesses to a will must believe at the time they attest to the will that the testator is of sound mind and memory. It is not necessary that the witnesses attest to or later testify that the testator was in fact of sound mind and memory, and the witnesses cannot be cross-examined on this point. The only issue is the belief at that time that the testator was of sound mind and memory. The ultimate question of the testator's capacity is left to the contest under §8-1 of the Probate Act, 755 ILCS 5/8-1. *In re Estate of Davison,* 119 Ill.App.2d 477, 256 N.E.2d 16 (1st Dist. 1970). If, however, the witnesses testify that they did not believe the decedent to be of sound mind and memory, the will may be denied probate. *In re Estate of Jacobson,* 75 Ill.App.3d 102, 393 N.E.2d 1069, 30 Ill.Dec. 722 (5th Dist. 1979).

6. [8.18] Revocation

One other way to invalidate a will at the admission of will stage of the probate process is by proving that the will was revoked by the testator. Of course, a contestant also may challenge the will based on its alleged revocation in a petition under §8-1 of the Probate Act, 755 ILCS 5/8-1. Probate courts may hear testimony and other evidence as to whether the testator revoked the will sought to be admitted in a proof of will hearing. *In re Estate of Millsap,* 75 Ill.2d 247, 388 N.E.2d 374, 376 – 377, 26 Ill.Dec. 659 (1979); *Estate of Koester v. First Mid-Illinois Bank & Trust, N.A.,* 2012 IL App (4th) 110879, 975 N.E.2d 1115, 363 Ill.Dec. 806.

H. [8.19] Discovery and Evidence

Section 6-4(a) of the Probate Act provides that when establishing a prima facie case for admission, in addition to the testimony of the witnesses to the will, the affidavit, or the attestation clause, the proponent may "introduce any other evidence competent to establish a will." 755 ILCS 5/6-4(a). The contestant does not have the right to introduce contrary evidence when the proponent is making his or her prima facie case and in fact is essentially limited to cross-examining the witnesses to the will. *In re Porter's Will,* 309 Ill. 220, 140 N.E. 856 (1923). The contestant may even be prevented from examining a nontestifying third witness to a will who is present in the courtroom but not called by the proponent. *In re Estate of Jackson,* 56 Ill.App.3d 915, 372 N.E.2d 711, 14 Ill.Dec. 515 (4th Dist. 1978). It is within the trial court's discretion to

limit or prohibit any discovery consistent with the evidentiary guidelines provided in the Probate Act. As a result, discovery is essentially nonexistent when the only issue is the proponent's prima facie case. For example, in *In re Estate of Kvasauskas,* 5 Ill.App.3d 202, 282 N.E.2d 465 (2d Dist. 1972), the trial court was affirmed when it denied the contestant's motion for leave to take the deposition of a witness to the will.

The contestant does have the right to call witnesses or introduce evidence to prove fraud, forgery, or compulsion. *In re Estate of Parker,* 42 Ill.App.3d 860, 356 N.E.2d 967, 1 Ill.Dec. 685 (1st Dist. 1976). If a prima facie case of fraud, forgery, or compulsion is made, then a contestant will be allowed to put on evidence of such conduct. *Estate of Ragen,* 96 Ill.App.3d 1035, 422 N.E.2d 179, 52 Ill.Dec. 498 (1st Dist. 1981).

In the case of an attempt to probate a lost will, evidence giving rise to a presumption of revocation may be presented at the admission of will stage, and additional proof may be taken by the court as to the testator's intent and the issues revolving around the loss or the destruction of the will and its contents. *In re Estate of Millsap,* 75 Ill.2d 247, 388 N.E.2d 374, 376, 26 Ill.Dec. 659 (1979).

I. [8.20] Notice

Heirs and legatees entitled to receive notice of the initial hearing on the petition to admit will under §6-2 of the Probate Act, 755 ILCS 5/6-2, are entitled to demand formal proof of the will. The newly appointed executor is required within 14 days to give them notice that the will has been admitted to probate. The notice must include an explanation of their rights, including the right to demand within 42 days a formal proof of will hearing. 755 ILCS 5/6-10. Then, within 42 days of the order admitting the will, any heir or legatee has the right to demand formal proof of will. 755 ILCS 5/6-21.

If any heir or legatee was omitted from a petition to admit a will to probate or, if included in the petition, the person was not provided with proper notice, and an order has been entered admitting or denying admission of the will to probate, then an amended Probate Act §6-2 petition must be filed. 755 ILCS 5/6-11(a). Those heirs and legatees who did not receive notice then have 42 days from the date the amended petition is filed to demand formal proof of will (while all heirs and legatees and creditors who received proper notice are bound by that notice). 755 ILCS 5/6-11(b). The failure to properly provide notice can thus have harsh consequences for the estate, the executor, and the attorney for the executor.

The importance of notice in a probate proceeding is similar to the importance of service of summons in chancery or law proceedings. Without such notice, the court does not have in personam jurisdiction over the heirs and legatees in a probate case. *In re Estate of Stanford,* 221 Ill.App.3d 154, 581 N.E.2d 842, 846, 163 Ill.Dec. 688 (5th Dist. 1991). Any form of notice that is made that does not conform with the statutory requirements of the Probate Act is ineffective, and all orders and judgments are voidable as to the parties not receiving notice.

III. SPECIAL ISSUES

A. [8.21] Admitting Will Discovered After Probate

Occasionally, a will may be found years after probate has been closed, either under intestacy or an earlier will. A question arises as to whether it is permissible to then reopen the estate and, if so, how to reopen it. The appellate court addressed these issues in *In re Estate of Cornelius,* 125 Ill.App.3d 312, 465 N.E.2d 1033, 80 Ill.Dec. 687 (4th Dist. 1984). Peter Cornelius died September 15, 1980. An intestate estate was opened shortly thereafter and closed upon completion of administration in November 1981. In March 1983, a document that turned out to be the will of Cornelius was discovered. The petitioner filed to admit the will to probate, and the will was admitted. On appeal, one of the decedent's intestate heirs argued that the only circumstances under which an estate may be reopened are those found in what is now §24-9 of the Probate Act, 755 ILCS 5/24-9. That statute allows for the reopening of an estate only when there exists later-discovered assets or an unsettled portion of an estate. Since neither condition existed in *Cornelius,* the heir argued that the estate could not be reopened. The court rejected this novel argument and held that Probate Act §24-9 is not the only grounds under which a closed estate may be reopened, noting that other courts have held that a later-discovered will provides grounds for vacating orders of distribution. 465 N.E.2d at 1034 – 1035. For further discussion, *see In re Estate of Nicola,* 275 Ill.App.3d 497, 656 N.E.2d 431, 433 – 434, 212 Ill.Dec. 108 (3d Dist. 1995) (supporting absence of legal time limits on probating found wills); *In re Estate of Schafroth,* 233 Ill.App.3d 185, 598 N.E.2d 479, 174 Ill.Dec. 282 (5th Dist. 1992) (allowing admission of will to probate in open intestate estate years after decedent's death).

B. [8.22] Joint and Mutual Wills

The case of alleged joint and mutual wills presents interesting procedural questions. In the classic case, husband and wife execute either the same will or identical wills in which they expressly or impliedly promise not to change the will after the first one dies. Then, the survivor writes a new will anyway. The proponent of the new will petitions for probate, and the would-be proponent of the joint and mutual will attempts to petition to have that will admitted, sometimes in the form of a cross-petition, other times by moving to strike the petition to admit the later will.

Presented with these facts, the courts have consistently held that the only issue that will be considered is which will is the most recent, valid, unrevoked will of the decedent. The policy behind these decisions is consistent with the statutory framework of the admission process to expedite probate and appoint an executor to marshal and protect the estate assets. *In re Estate of Gaglione,* 97 Ill.2d 408, 454 N.E.2d 664, 73 Ill.Dec. 567 (1983). Further, the "attempt to prove the existence of a contract not to revoke at such proceedings is irrelevant since it is tantamount to an attempt to prove a . . . claim against the estate before the appointment of an indispensable party, the executor." *Perino v. Eldert,* 217 Ill.App.3d 582, 577 N.E.2d 807, 808, 160 Ill.Dec. 482 (3d Dist. 1991), quoting *In re Estate of Marcucci,* 54 Ill.2d 266, 296 N.E.2d 849, 851 (1973). Thus, the later-signed will is admitted, and any interested person can make a claim against the estate for breach of contract.

C. [8.23] Lost Wills

The procedure for admitting an alleged lost will to probate is similar to that of any other will; it is the required proofs that are different. *In re Estate of Millsap,* 75 Ill.2d 247, 388 N.E.2d 374, 26 Ill.Dec. 659 (1979); *In re Estate of Weir,* 120 Ill.App.3d 18, 458 N.E.2d 134, 136, 75 Ill.Dec. 966 (3d Dist. 1983). If a will was kept by the testator after its execution and it cannot be found after the testator's death, it is presumed revoked. *In re Estate of Phillips,* 359 Ill.App.3d 114, 833 N.E.2d 895, 901, 295 Ill.Dec. 689 (1st Dist. 2005), quoting *In re Estate of Strong,* 194 Ill.App.3d 219, 550 N.E.2d 1201, 1206 – 1207, 141 Ill.Dec. 155 (1st Dist. 1990). That presumption may be rebutted by such factors as statements of the testator that he or she did not intend to revoke the will, evidence of a continued kind and loving attitude toward the beneficiaries of the missing will, and evidence of access of others to the will or some other explanation for its disappearance (such as it being thrown away accidentally after death or being destroyed in a fire). 833 N.E.2d at 901. Quite often, the effort to rebut that presumption leads to a lengthy trial filled with hearsay and Dead-Man's Act, 735 ILCS 5/8-201, evidentiary issues.

A related issue is whether an original codicil can have the effect of republishing *a copy* of a prior will, especially when the codicil contains only minor or ministerial amendments to the prior will. There are at least two possible ways courts analyze this situation. First, in some jurisdictions, a codicil that expressly ratifies a will is itself a valid will, and the common-law presumption that applies to the missing original will does not apply to the codicil. In Illinois, however, the rule is that if the codicil is not sufficiently complete to stand alone (*e.g.,* because all that the codicil did was to add a no-contest clause), then a revocation of the will also serves as a revocation of the codicil. *In re Estate of Koziol,* 366 Ill.App.3d 171, 851 N.E.2d 198, 202 – 203, 303 Ill.Dec. 300 (1st Dist. 2006). In *Koziol,* the court remanded with directions to the trial court to hold an evidentiary hearing on whether the presumption of revocation to the missing original will could be overcome. 851 N.E.2d at 205.

D. [8.24] Appeals

A number of cases have addressed the extent to which an order admitting a will to probate may be appealed. The cases are in accord that an order admitting a will to probate is not a final judgment or final order. *See, e.g., In re Estate of Lynch,* 103 Ill.App.3d 506, 431 N.E.2d 734, 736, 59 Ill.Dec. 233 (3d Dist. 1982) ("the probate process represents a continuum of proceedings"); *In re Estate of Chlebos,* 194 Ill.App.3d 46, 550 N.E.2d 1069, 141 Ill.Dec. 23 (1st Dist. 1990). Thus, no immediate appeal is available under Supreme Court Rules 301 and 303.

However, S.Ct. Rule 304(b)(1) provides for the immediate appeal of any judgment or order entered in an estate "which finally determines a right or status of a party." Thus, generally, an order admitting a will does finally determine the status of certain litigants (*e.g.,* an interested person under a prior will or an heir) and is therefore immediately appealable. *Lynch, supra*. But appeals of an order admitting the will have nonetheless been held moot if the objecting party has also filed a will contest under §8-1 of the Probate Act, 755 ILCS 5/8-1. *In re Estate of Lewis,* 213 Ill.App.3d 113, 571 N.E.2d 526, 156 Ill.Dec. 742 (3d Dist. 1991).

9 Heirship, Adoption, and Paternity

JOHN T. BROOKS
JENA L. LEVIN
Foley & Lardner LLP
Chicago
HEATHER ROSS
NORA ZUCKERMAN
Ross and Zuckerman, LLP
Northbrook

Heather Ross and Nora Zuckerman authored those portions of the chapter dealing with artificial reproduction and surrogacy.

The contribution of Samantha E. Weissbluth to prior editions of this chapter is gratefully acknowledged.

I. [9.1] IMPORTANCE OF HEIRSHIP IN PROBATE PROCEEDINGS

Establishing a decedent's heirship is generally the first proceeding following the filing of a petition for admission of a will to probate and appointment of the executor or for appointment of an administrator in the case of an intestate estate. It is often the first order of business because the object of the heirship proceeding is not only to determine those individuals who will receive the assets from an intestate estate but also to determine all individuals entitled to notice of probate proceedings, regardless of whether there is a will, so as to bind them to the results. Although heirship determinations usually occur early in the probate proceedings, under the Probate Act of 1975, 755 ILCS 5/1-1, *et seq.,* the court may ascertain heirship, or an interested person may challenge an order declaring heirship, at any time during estate administration. 755 ILCS 5/5-3(a). Moreover, the Probate Act allows heirship proceedings even when no estate administration is pending. *Id.*

The complexity of heirship matters results from the fact that numerous statutory sources can apply, some of which have undergone significant amendments (such as the Probate Act, the Illinois Parentage Act of 2015, 750 ILCS 46/101, *et seq.,* and the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/101, *et seq.*). While progress has been slow and often uneven, the clear legislative and judicial trend has been toward a more equal, uniform treatment of legitimates, illegitimates, and adopted individuals. Nevertheless, heirship generates extensive litigation over issues surrounding illegitimate and adopted individuals and the use and application of scientific evidence.

II. RULES OF DESCENT AND DISTRIBUTION

A. [9.2] General Rules

Legislative assumptions regarding the likely intended beneficiaries of an intestate decedent's estate underlie the laws of descent and distribution. Section 2-1 of the Probate Act of 1975 provides the general rules for the descent and distribution of property in intestate estates. 755 ILCS 5/2-1. Depending on the decedent's marital status and family situation at his or her death, these rules are as follows:

1. If there are a surviving spouse and one or more descendants, one half of the entire estate goes to the surviving spouse and one half to the descendants per stirpes. 755 ILCS 5/2-1(a).

2. If there is no surviving spouse but a descendant of the decedent, all of the estate goes to the descendant per stirpes. 755 ILCS 5/2-1(b).

3. If there is a surviving spouse but no descendant of the decedent, all of the estate goes to the surviving spouse. 755 ILCS 5/2-1(c). See §§9.21 – 9.24 below for a discussion of the issues surrounding proof of a valid marriage.

4. If there is no surviving spouse or descendant, but a parent, sibling of the decedent, or descendant of the decedent's siblings, the entire estate is distributed to the parents and decedent's siblings in equal shares. 755 ILCS 5/2-1(d). If one of the decedent's parents is also deceased, the living parent takes a double share. If one of the decedent's siblings is also deceased but has living descendants, those descendants will take the deceased sibling's share per stirpes.

5. If there is no surviving spouse, descendant, parent, brother, sister, or descendant of a brother or sister but there is a grandparent or descendant of a grandparent, one half goes to the maternal grandparents in equal shares or all to the survivor of them, and one half goes to the paternal grandparents in equal shares or all to the survivor of them, and if no grandparent is living on a given side, then that half passes to those grandparents' descendants per stirpes. 755 ILCS 5/2-1(e). For an interesting case demonstrating the complexities of §2-1(e) of the Probate Act, see *In re Estate of O'Handlen,* 213 Ill.App.3d 160, 571 N.E.2d 482, 156 Ill.Dec. 698 (3d Dist. 1991).

6. If there is no surviving spouse, descendant, parent, brother, sister, descendant of a brother or sister, grandparent, or descendant of a grandparent but there is a great-grandparent or descendant of a great-grandparent, one half goes to the maternal great-grandparents in equal shares or all to the survivor of them or, if none, to their descendants per stirpes, and one half goes to the paternal great-grandparents or their descendants in the same manner. 755 ILCS 5/2-1(f).

7. If none of the aforementioned individuals is living, the decedent's estate passes to the "nearest kindred" in equal degree without representation as determined by the rules of civil law. 755 ILCS 5/2-1(g). "Without representation" means that the children of a deceased relative do not acquire the same standing as their parent. Thus, only those individuals who are in the same class (*i.e.,* the decedent's closest relations) will share in the decedent's estate. *See Chambers v. Chambers,* 249 Ill. 126, 94 N.E. 108 (1911); *Barger v. Hobbs,* 67 Ill. 592 (1873); *Arehart v. United States,* 54 F.2d 301 (7th Cir. 1931). Under the civil law rules, the degree of kinship is calculated by counting up from the decedent to the nearest ancestor that the decedent and the claimant share in common, then counting down by degrees to the claimant with each generation counting as one degree. Of course, before the decedent's "nearest kindred" can inherit anything, the administrator must establish that none of the decedent's eight great-grandparents have a descendant who survived the decedent (pursuant to §2-1(f) of the Probate Act), a daunting task to say the least.

8. If no heirs of kindred as described above can be located, the decedent's probate assets "escheat" to either the county or the state. 755 ILCS 5/2-1(h). In feudal law, the concept of escheat meant the lord of the manor was automatically vested with a fee interest in the lands of an intestate decedent dying without lawful heirs. *See People ex rel. Kuntsman v. Shinsaku Nagano,* 389 Ill. 231, 59 N.E.2d 96 (1945). The Probate Act provides that the real estate of such a decedent escheats to the county in which it is located. 755 ILCS 5/2-1(h). If the personal estate is physically located in Illinois, and if probate proceedings are initiated in Illinois, any personal estate assets physically located in another jurisdiction and subject to ancillary administration escheat to the Illinois county in which the decedent was a resident. If the decedent was not a resident of Illinois, this property escheats to the county in which it is located. All other personal property of the decedent, regardless of class or character and wherever situated, escheats to the

State of Illinois and must be delivered to the Illinois State Treasurer subject to the Uniform Disposition of Unclaimed Property Act, 765 ILCS 1025/0.05, *et seq. Id.* For a case describing the due-process and notification rights of the county in these situations, *see Boghosian v. Mid-City National Bank of Chicago,* 25 Ill.App.2d 455, 167 N.E.2d 442 (1st Dist. 1960).

B. Illegitimates

1. Inheritance from Illegitimates

a. [9.3] Estate of Hicks

Prior to 1996, §2-2(d) of the Probate Act of 1975 provided: "If there is no surviving spouse or descendant but the mother or a descendant of the mother of the decedent: the entire estate to the mother and her descendants." 755 ILCS 5/2-2(d) (1994). That rule was challenged on constitutional grounds in *Estate of Hicks,* 174 Ill.2d 433, 675 N.E.2d 89, 221 Ill.Dec. 182 (1996), a case involving an heirship proceeding resulting from the death of an eight year old child. The initial heirship determination omitted the child's biological father based on §2-2(d), as it then existed. The father argued that §2-2(d) violated the Equal Protection Clause by unconstitutionally discriminating against fathers based on gender.

The Illinois Supreme Court agreed. The court held that no legitimate state interest justified the total statutory disinheritance of the fathers of intestate illegitimate children. 675 N.E.2d at 96 – 97. However, the court allowed for the possibility of a legitimate state interest in allowing only those parents who have supported or taken an interest in their illegitimate children to inherit from them. 675 N.E.2d at 94 – 95.

b. [9.4] Statutory Changes

Following the Illinois Supreme Court's ruling in *Estate of Hicks,* 174 Ill.2d 433, 675 N.E.2d 89, 221 Ill.Dec. 182 (1996), the Illinois legislature enacted P.A. 90-803 (eff. Dec. 15, 1998), which amended §2-2 of the Probate Act of 1975, governing inheritance from illegitimates. The amendments apply, for inheritance purposes, to decedents dying on or after December 15, 1998, and for purposes of determining property rights of any individual, to all instruments executed on or after December 15, 1998. 755 ILCS 5/2-2.

As amended, the Probate Act now refers to "eligible parents" rather than making distinctions between an illegitimate's mother and father. 755 ILCS 5/2-2(d). Section 2-2 of the Probate Act defines an "eligible parent" as a parent of the decedent who, during the decedent's lifetime, acknowledged the decedent as the parent's child, established a parental relationship with the decedent, and supported the decedent as the parent's child. However, an eligible parent who owes more than one year of child support obligations will not inherit from the decedent until the court makes a determination as to the effect of the arrearage on the deceased and the appropriate reduction in the delinquent parent's share pursuant to §2-6.5 of the Probate Act. *Id.* For further discussion of the parent neglecting child provision, see §9.9 below.

In its current form, §2-2 provides that, if both parents are eligible, the estate passes according to the provisions of §2-1 of the Probate Act as if the decedent were legitimate. If neither parent is eligible, the illegitimate decedent's estate passes according to §2-1, treating both parents as having predeceased the decedent. *Id.*

In *In re Estate of Poole,* 207 Ill.2d 393, 799 N.E.2d 250, 278 Ill.Dec. 532 (2003), the alleged biological father of a fetus who was stillborn after the mother's death wished to act as administrator of the fetus' estate. The father had lived with the mother during the pregnancy, he acknowledged during the pregnancy that he was the father, his name was listed on the birth certificate of the stillborn fetus, and he was present for the christening and funeral of the child. The Illinois Supreme Court held that the father had priority over the maternal grandmother of the stillborn fetus to act as administrator of the estate provided that he could establish his parentage under the former Illinois Parentage Act of 1984. However, the court cautioned that its ruling did not mean that the father established himself an "eligible parent" for purposes of §2-2 of the Probate Act. *Poole* provides a nice review of the relationship between the former Illinois Parentage Act of 1984, the Wrongful Death Act, 740 ILCS 180/0.01, *et seq.,* and the Probate Act.

In dicta, the *Poole* court went to great lengths to give lower courts guidance as to the definition of "eligible parent" under §2-2 of the Probate Act. The court noted that §2-2 "evinces our General Assembly's intent to allow only the parents of illegitimate children *who have demonstrated an interest in their illegitimate children* to inherit by intestate succession, which is a legitimate state interest." [Emphasis in original.] 799 N.E.2d at 259. The court went on to state that it did not accept the argument that illegitimate fathers of stillborn fetuses cannot establish themselves as "eligible parents" under §2-2 and that it did not believe that the legislature intended that all illegitimate fathers be barred from recovering for the wrongful deaths of their stillborn children. Rather, the court offered its opinion that the legislature intended §2-2 as a means of ensuring that such fathers prove that they are parents in more than the "genetic" sense (*i.e.,* "eligible") before they can take under Illinois' intestacy rules.

If only one parent is eligible, the illegitimate decedent's estate passes according to §§2-1(a) through 2-1(c) of the Probate Act, as described in §9.2 above. 755 ILCS 5/2-2(a) through 5/2-2(c). If none of the individuals described in those sections is living (*i.e.,* no surviving spouse or descendants), the estate passes as follows depending on the extended family members then living:

1. If there is no surviving spouse or descendant but an eligible parent or a descendant of an eligible parent, the entire estate goes to the eligible parent, or if the eligible parent also has descendants, one half goes to the eligible parent, and one half goes to the eligible parent's descendants, per stirpes. 755 ILCS 5/2-2(d).

2. If there is no surviving spouse, descendant, eligible parent, or descendant of an eligible parent but there is a grandparent on the eligible parent's side or a descendant of a grandparent, the entire estate goes to the decedent's grandparents, or all to the survivors of them, or if no grandparent is living on the eligible parent's side, the entire estate goes to the descendants of the grandparents per stirpes. 755 ILCS 5/2-2(e).

3. If there is no surviving spouse, descendant, eligible parent or descendant of an eligible parent, grandparent on the eligible parent's side, or a descendant of such an eligible grandparent but there is a great-grandparent on the eligible parent's side or a descendant of a great-grandparent, the entire estate goes to the great-grandparents, or all to the survivor of them, or if neither great-grandparent is living, to the descendants of the great-grandparents per stirpes. 755 ILCS 5/2-2(f).

4. If none of the aforementioned individuals is living, the estate passes to the nearest kindred of the decedent's eligible parent in equal degree without representation. 755 ILCS 5/2-2(g).

5. As with the estates of legitimate decedents, if no kindred exist, the estate escheats to the county or state. 755 ILCS 5/2-2(h).

2. Inheritance by Illegitimates

a. [9.5] Former Law

Previously, the Probate Act of 1975 had stated that an illegitimate child was the heir of his or her mother and maternal ancestors. Thus, the old statute did not allow for inheritance from an illegitimate child's father or paternal ancestors. However, in 1977, the United States Supreme Court held in *Trimble v. Gordon,* 430 U.S. 762, 52 L.Ed.2d 31, 97 S.Ct. 1459 (1977), that not allowing illegitimates to inherit from their fathers violated the Equal Protection Clause of the Fourteenth Amendment.

b. [9.6] Present Law

Effective September 12, 1978, the legislature amended the Probate Act of 1975 to allow an illegitimate to inherit from both parents. For a discussion of the meaning of "illegitimate," see §9.37 below. Thus, an illegitimate child may inherit from his or her father and paternal ancestors if either of the following conditions is demonstrated:

1. The deceased father acknowledged paternity during his lifetime. 755 ILCS 5/2-2.

2. Either during his lifetime or after his death, a court adjudged the deceased father to be the illegitimate child's father. *Id.; Baez v. Rosenberg,* 409 Ill.App.3d 525, 949 N.E.2d 250, 350 Ill.Dec. 762 (1st Dist. 2011). An authenticated copy of a judgment rendered during the father's lifetime is sufficient proof of paternity. For all other adjudications, however, the petitioner must prove paternity by clear and convincing evidence. 755 ILCS 5/2-2; *In re Estate of Willis,* 214 Ill.App.3d 683, 574 N.E.2d 172, 158 Ill.Dec. 378 (1st Dist.), *appeal denied,* 141 Ill.2d 539 (1991); *Morelli v. Battelli,* 68 Ill.App.3d 410, 386 N.E.2d 328, 25 Ill.Dec. 57 (1st Dist. 1979).

The statute of limitations under the Illinois Parentage Act of 2015 requiring that paternity suits be brought within two years of the child's reaching age 18 does not apply when §2-2 of the Probate Act applies; therefore, the paternity of an illegitimate person may be established during probate proceedings regardless of the person's age. *Willis, supra.* Along these lines, the Illinois

Supreme Court has held that when a testator acknowledged paternity of his illegitimate child during his lifetime, §2-2 of the Probate Act applied, and the Illinois Parentage Act's two-year limitations period did not bar the adult daughter from bringing her trust construction suit seeking to be included under the definition of "children" in a trust created by her deceased father. *Tersavich v. First National Bank & Trust Company of Rockford,* 143 Ill.2d 74, 571 N.E.2d 733, 156 Ill.Dec. 753 (1991). Moreover, the fact that §2-2 permits paternity adjudications after the death of an illegitimate person's alleged father does not deny the constitutional rights of equal protection or due process to the decedent's collateral heirs. *Cody v. Johnson,* 92 Ill.App.3d 208, 415 N.E.2d 1131, 47 Ill.Dec. 818 (1st Dist. 1980). Also, the doctrines of collateral estoppel or res judicata cannot bar a child from filing a paternity suit when paternity was established in an uncontested judgment of dissolution of marriage to which the child was not a party. *Simcox v. Simcox,* 131 Ill.2d 491, 546 N.E.2d 609, 611 – 612, 137 Ill.Dec. 664 (1989). Furthermore, children are not privies of their parents in dissolution proceedings because their interests are not properly represented unless they are parties to the action. *Id.*

For a discussion of special issues of proof regarding illegitimates, see §§9.38 – 9.47 below.

C. Adopted Persons

1. [9.7] Inheritance from Adopted Persons

An adopting parent and the lineal and collateral relatives of that parent inherit property from an adopted child to the exclusion of the biological parent and the biological parent's lineal and collateral relatives. 755 ILCS 5/2-4(b). The one exception to this rule is that the natural parent and such parent's lineal or collateral kindred may inherit property that the child has taken from or through the natural parent or the kindred of the natural parent by gift, will, or intestacy. *Id.*

2. [9.8] Inheritance by Adopted Persons

The general rule is that an adopted child is a descendant of the adopting parent for purposes of inheritance from the adopting parent and from the lineal and collateral kindred of that parent. 755 ILCS 5/2-4(a). Previously, Illinois law did not distinguish between adult and child adoptees, and an adult adoptee could take full advantage of §2-4(a). *In re Estate of Brittin,* 279 Ill.App.3d 512, 664 N.E.2d 687, 216 Ill.Dec. 50 (5th Dist. 1996). However, there have since been several changes to the Probate Act of 1975 with respect to inheritance by adopted persons. Effective for decedents dying on or after January 1, 1998, and for instruments executed on or after such date, the courts will deem a person who is adopted after attaining age 18 and who never resided with the adopting parent before attaining age 18 to be a child of the adopting parent but not a descendant of this parent for purposes of inheriting from the parent's lineal or collateral kindred. 755 ILCS 5/2-4(a). This statutory change reflects the sentiment of a 1988 case in which the court stated that adopting an adult solely for the purpose of making him or her a beneficiary under the terms of a testamentary instrument created by the adopting parent's ancestor and existing at the time of the adoption constituted "subterfuge" and did great violence to the intent and purpose of the adoption laws. *Cross v. Cross,* 177 Ill.App.3d 588, 532 N.E.2d 486, 488 – 489, 126 Ill.Dec. 801 (1st Dist. 1988), *appeal denied,* 126 Ill.2d 558 (1989).

Additionally, Illinois courts used to consider an adopted child to be the child of both its natural and adoptive parents for inheritance purposes. *See In re Tilliski's Estate,* 323 Ill.App. 490, 56 N.E.2d 481 (4th Dist. 1944), *aff'd,* 390 Ill. 273 (1945); *In re Estate of Cregar,* 30 Ill.App.3d 798, 333 N.E.2d 540 (1st Dist. 1975). In yet a further change to the rules regulating inheritance by adopted persons (also effective for decedents dying and instruments executed on or after January 1, 1998), §2-4(d) of the Probate Act now provides specific conditions that must be satisfied in order for an adopted child to inherit from or through a natural parent:

> **(d) For purposes of inheritance from or through a natural parent and for determining the property rights of any person under any instrument, an adopted child is not a child of a natural parent, nor is the child a descendant of a natural parent or of any lineal or collateral kindred of a natural parent, unless one or more of the following conditions apply:**
>
> > **(1) The child is adopted by a descendant or a spouse of a descendant of a great-grandparent of the child, in which case the adopted child is a child of both natural parents.**
> >
> > **(2) A natural parent of the adopted child died before the child was adopted, in which case the adopted child is a child of that deceased parent and an heir of the lineal and collateral kindred of that deceased parent.**
> >
> > **(3) The contrary intent is demonstrated by the terms of the instrument by clear and convincing evidence.** 755 ILCS 5/2-4(d).

For a case under the amended statute, *see In re Estate of Snodgrass,* 336 Ill.App.3d 619, 784 N.E.2d 431, 271 Ill.Dec. 213 (4th Dist. 2003).

Finally, an adopted child may not inherit from successive sets of adoptive parents. Thus, a child may not inherit from his or her first set of adopting parents when the child is readopted prior to the deaths of the first set of adopting parents. *In re Leichtenberg's Estate,* 5 Ill.App.2d 336, 125 N.E.2d 277 (1st Dist. 1955), *aff'd,* 7 Ill.2d 545 (1956).

D. [9.9] Parent Neglecting Child

The Probate Act of 1975 provides that a court shall bar or reduce the inheritance of a parent who, for a period of one year or more immediately before the death of the parent's minor or dependent child, has willfully neglected or failed to perform any duty of support owed to the child or who has willfully deserted the child. The amount by which the court will reduce the inheritance depends on the effect of the parent's behavior on the child. 755 ILCS 5/2-6.5.

Inheritance rights affected by §2-6.5 of the Probate Act include any property, benefit, or other interest arising by reason of the child's death, regardless of whether the parent takes as an heir, legatee, beneficiary, survivor, appointee, or in any other capacity, other than joint tenant, and whether the property, benefit, or other interest passes pursuant to any form of title registration (other than joint tenancy), testamentary or nontestamentary instrument, intestacy, renunciation, or

any other circumstances. A petitioner seeking to reduce or block the inheritance of a neglectful parent under §2-6.5 must file within six months after the child's death.

The types of inheritance reduced or precluded by §2-6.5 are nearly as broad as the "slayer statute" (*i.e.,* §2-6 of the Probate Act, discussed in §9.12 below), in that it covers nonprobate assets as well as probate assets. The one difference is that a person causing the death of another cannot receive the victim's interest in joint tenancy property, whereas under §2-6.5, the child's joint tenancy interest inexplicably passes to the neglectful parent notwithstanding that parent's conduct.

The court's considerations in determining the amount to be deducted from the parent's inheritance include, but are not limited to, the deceased child's loss of opportunity as a result of the parent's conduct, the effect of the parent's conduct on the deceased child's quality of life, and the parent's ability to avoid the conduct. *Id.*

Holders of any property subject to the above provisions will not be liable for distributing, releasing, or transferring the property to the parent if the distribution or release occurs before a court makes a determination under §2-6.5 or if the holder of the property has not received written notification of the determination before the distribution or release. *Id.* If the property in question is an interest in real property, this interest may be distributed, released, or transferred at any time, by any person or entity, including the neglectful parent, at any time before a court makes a determination and before a certified copy of that determination is recorded in the county where the real property is located.

Section 2-6.5's vagueness raises three issues of interpretation. First, it does not include definitions of "willful neglect," "desertion," or "failure to perform any duty of support." Second, it is not clear whether the burden of proof is by a preponderance of the evidence or by clear and convincing evidence. And finally, the statute does not delineate how the court should apportion the share of the disinherited parent to the decedent's heirs (*i.e.,* siblings and the other parent).

E. [9.10] Abuse of the Elderly or Disabled

In a vein similar to the parent neglecting child provision of the Probate Act of 1975 discussed in §9.9 above, the Illinois legislature enacted two provisions designed to protect the elderly and/or disabled population. Section 2-6.2 provides that persons convicted of financial exploitation, abuse, or neglect (as defined in the Criminal Code of 2012, 720 ILCS 5/1-1, *et seq*.) of an elderly or disabled person may not receive any property, benefit, or other interest by reason of the death of that person; rather, the property, interest, or benefit shall pass as if the person convicted had predeceased the decedent. 755 ILCS 5/2-6.2(b). The exception to this provision is that the person convicted may inherit if he or she can demonstrate by clear and convincing evidence that the victim knew of the offense and, after the conviction, expressed or ratified his or her intent to benefit the person convicted as defined in 2-6.2(b).

Section 2-6.2(c) goes on to provide that a holder of property (such as a financial institution or trustee) shall not be liable for releasing the property postconviction unless the holder does so after

receiving written notice of the conviction. Moreover, if a holder knows that a potential beneficiary has been convicted, the holder must cooperate fully with law enforcement officials. 755 ILCS 5/2-6.2(d).

Section 2-6.6 contains similar (and, at times, redundant) provisions regarding any individual convicted of abuse and criminal neglect of a long-term care facility resident, criminal abuse or neglect of an elderly person or person with a disability, or financial exploitation of an elderly person or person with a disability.

F. [9.11] Posthumous and Pretermitted Children

A decedent's child who was not born at the time of the decedent's death is called a "posthumous" or after-born child or, in Latin, en ventre sa mere. A posthumous child receives the same share of the decedent's intestate estate as if that child had been born during the decedent's lifetime, provided that the child must have been in utero at the decedent's death. 755 ILCS 5/2-3.

A situation similar to that of a posthumous child involves a child born after a testator has executed his or her will. Illinois courts often refer to such a child as "pretermitted," although the Probate Act of 1975 itself does not use this term. Illinois law protects such a child's rights of inheritance. Unless the will specifically contains a provision disinheriting after-born children or unless other evidence indicates the testator's intention to disinherit such a child, the child is entitled to his or her share of the estate (*i.e.,* the same share that the child would receive if the decedent had died intestate). 755 ILCS 5/4-10. The existence of a pretermitted child will not invalidate a decedent's will. *Hedlund v. Miner,* 395 Ill. 217, 69 N.E.2d 862 (1946). Rather, devises and legacies abate to create the intestate share or shares. For a case in which the widow's fee interest in lands devised to her by her husband abated to mere rights of homestead and dower in favor of two pretermitted children, *see Hawkins v. McKee,* 321 Ill. 198, 151 N.E. 577 (1926).

The courts do not require a testator to explicitly state his or her intention to disinherit a pretermitted child. Rather, a court may infer this intent from the will's general language in light of all the relevant facts and circumstances surrounding the testator when he or she executed the will. For example, when a testator disinherited two living children by his will and then did not revoke that will after another child was born, the court inferred the intent to disinherit the later-born child as well. *In re Estate of Powers,* 117 Ill.App.3d 1087, 454 N.E.2d 384, 73 Ill.Dec. 524 (4th Dist. 1983). Evidence of the surrounding circumstances is admissible not to change the will's provisions, but rather to resolve the will's ambiguity created by the existence of pretermitted children. 755 ILCS 5/4-10.

A child adopted after the execution of the adoptive parent's will is treated as a pretermitted child within the meaning of §4-10 of the Probate Act. *Hopkins v. Gifford,* 309 Ill. 363, 141 N.E. 178, 181 – 182 (1923).

G. [9.12] Person Causing Death

It is against Illinois public policy to permit a murderer to inherit from his or her victim. *Illinois Bankers' Life Ass'n v. Collins,* 341 Ill. 548, 173 N.E. 465, 466 (1930). Earlier

permutations of the Probate Act embodied this policy but required an actual criminal conviction before precluding inheritance. *See In re Estate of Buehnemann,* 25 Ill.App.3d 1003, 324 N.E.2d 97, 98 (5th Dist. 1975). These prior statutes also did not bar inheritance by a person convicted of voluntary manslaughter. *See In re Estate of Seipel,* 29 Ill.App.3d 71, 329 N.E.2d 419 (4th Dist. 1975).

Today, the Probate Act of 1975 requires only that a person "intentionally and unjustifiably" cause the death of another in order for a court to bar inheritance. 755 ILCS 5/2-6 (generally referred to as the "slayer statute"). A person convicted of either first-degree murder or second-degree murder (formerly called voluntary manslaughter) is conclusively presumed to have caused the death intentionally and unjustifiably for purposes of the slayer statute, but such a conviction is not required. *In re Estate of Hook,* 207 Ill.App.3d 1015, 566 N.E.2d 759, 767, 152 Ill.Dec. 882 (5th Dist.), *appeal denied,* 137 Ill.2d 665 (1991); *State Farm Life Insurance Co. v. Smith,* 66 Ill.2d 591, 363 N.E.2d 785, 6 Ill.Dec. 838 (1977) (primary beneficiary may be precluded from recovering proceeds of life insurance policy for intentionally killing insured, despite not being convicted of homicide, but secondary beneficiaries must prove that primary beneficiary's actions were intentional and that killing was unjustified). Moreover, an acquittal of such criminal charges cannot be introduced as evidence that a person did not cause a decedent's death. *Hook, supra.* Proof must be by a preponderance of the evidence, but that evidence, at least according to the *Hook* court, must be clear and convincing. For a case criticizing the *Hook* court's clear and convincing evidence standard in favor of a pure preponderance requirement (probably correctly so), *see Eskridge v. Farmers New World Life Insurance Co.,* 250 Ill.App.3d 603, 621 N.E.2d 164, 190 Ill.Dec. 295 (1st Dist. 1993). An action under §2-6 of the Probate Act cannot proceed until such time as any criminal proceeding has been finally determined by the trial court or, if no criminal charges are pending, for at least one year after the date of death.

The specific types of inheritance barred by the slayer statute include any property benefit or other interest resulting from the victim's death, regardless of whether the slayer would inherit as heir, legatee, beneficiary, joint tenant, survivor, appointee, or in any other capacity, and regardless of whether the property or interest passes pursuant to any form of title registration, testamentary or nontestamentary instrument, intestacy, renunciation, or other circumstance. 755 ILCS 5/2-6. When the slayer statute applies, the property, benefit, or other interest passes as if the person causing the death died before the decedent, except that the statute does not cause a forfeiture of a joint tenancy interest possessed by the slayer prior to the victim's death. *Id.*

It is fundamental that the creation and continuance of a joint tenancy require four coexisting unities of time, title, interest, and possession. *Bradley v. Fox,* 7 Ill.2d 106, 129 N.E.2d 699, 705 – 706 (1955). Any act of a joint tenant that destroys any of these unities operates as a severance of the joint tenancy and extinguishes the right of survivorship. Thus, the murdering joint tenant lawfully retains only his or her undivided one-half interest in the property as a tenant in common with the heirs of the deceased tenant. *Id.* In *Bradley,* the Illinois Supreme Court upheld the constitutionality of an earlier version of the slayer statute, holding that this rule does not violate the constitutional prohibition against forfeiture of estates.

In certain circumstances, §2-6 of the Probate Act also appears to prevent an indirect inheritance by the slayer as well as his or her heirs or legatees. In *In re Estate of Vallerius,* 259

Ill.App.3d 350, 629 N.E.2d 1185, 196 Ill.Dec. 341 (5th Dist. 1994), a grandson who participated in his grandmother's murder was precluded from indirectly inheriting her property that passed to his mother, who subsequently died intestate shortly after the murder. The court stated that allowing the grandson to inherit would contravene the statute's clear intent that a murderer not receive a victim's property in any capacity or under any circumstances. Furthermore, in *In re Estate of Mueller,* 275 Ill.App.3d 128, 655 N.E.2d 1040, 211 Ill.Dec. 657 (1st Dist.), *appeal denied,* 164 Ill.2d 564 (1995), the court precluded the slayer's children from taking their mother's (the slayer's) share as contingent beneficiaries under the victim's will when they were not heirs of the victim.

H. [9.13] Time of Death

Article III of the Probate Act of 1975, 755 ILCS 5/3-1, *et seq.,* incorporates the Uniform Simultaneous Death Act. Article III provides that when more than one person has died and there is insufficient evidence of survivorship, the property of each person is distributed as if he or she had survived the other. *See generally In re Estate of Moran,* 77 Ill.2d 147, 395 N.E.2d 579, 32 Ill.Dec. 349 (1979); *In re Estate of Parisi,* 328 Ill.App.3d 75, 765 N.E.2d 123, 262 Ill.Dec. 297 (1st Dist.), *appeal denied,* 201 Ill.2d 569 (2002).

If two or more individuals dying simultaneously were designated to inherit property successively by reason of surviving another individual, the property is divided into as many equal shares as there are successive beneficiaries, and these shares are distributed respectively to those who would have taken if each designated beneficiary had survived. 755 ILCS 5/3-1(b).

In the case of joint tenancy property, the joint tenancy is severed, and each joint tenant's equal share is distributed to his or her heirs or legatees. 755 ILCS 5/3-1(c). Lastly, if the insured and the named beneficiary of a life or accident insurance policy die simultaneously, the policy proceeds are distributed as if the insured survived the beneficiary. 755 ILCS 5/3-1(d).

In *Moran,* the Illinois Supreme Court helped illustrate the high drama of evidence in survivorship cases as it surveyed other jurisdictions. The court's survey included the following cases in which the courts held that direct evidence satisfactorily established survivorship: *In re Estate of Schmidt,* 261 Cal.App.2d 262, 67 Cal.Rptr. 847 (1968) (survivor was breathing, gasping, and moaning and had extensive bleeding from ears); *In re Estate of Davenport,* 79 Idaho 548, 323 P.2d 611 (1958) (survivor was breathing and bleeding from nose). The *Moran* court also reviewed cases in which circumstantial evidence sufficiently established survivorship, including *In re Bucci's Will,* 57 Misc.2d 1001, 293 N.Y.S.2d 994 (1968) (following airplane crash, survivor's brain was intact and her blood contained carbon monoxide, which could only have entered by inhaling gas generated by gasoline fire that occurred after crash, while other deceased sustained massive head injuries and had no carbon monoxide in his blood); *United Trust Co. v. Pyke,* 199 Kan. 1, 427 P.2d 67 (1967) (survivor shot another in head five times, with any one of five shots capable of causing death almost instantaneously, before shooting himself once), *overruled on other grounds by Harper v. Prudential Insurance Company of America,* 233 Kan. 358, 662 P.2d 1264 (1983).

Illinois cases in which the courts discuss the evidence necessary to prove survivorship include *Estate of Sewart,* 236 Ill.App.3d 1, 602 N.E.2d 1277, 1287, 177 Ill.Dec. 105 (1st Dist. 1991) (quoting *In re Haymer,* 115 Ill.App.3d 349, 450 N.E.2d 940, 945, 71 Ill.Dec. 252 (1st Dist. 1983), and *Janus v. Tarasewicz,* 135 Ill.App.3d 936, 482 N.E.2d 418, 422, 90 Ill.Dec. 599 (1st Dist. 1985), to find that expert testimony was required to diagnose legal death according to "usual and customary standards of medical practice," but that lay testimony could sufficiently meet party's burden of proving survivorship if "evidence of a positive sign of life in one body and the absence of any such sign in the other" could be shown), *appeal after remand,* 274 Ill.App.3d 298 (1st Dist.), *appeal denied,* 164 Ill.2d 564 (1995), and *Prudential Ins. Co. of America v. Spain,* 339 Ill.App. 476, 90 N.E.2d 256 (4th Dist. 1950) (survivor groaned, moved her head, and had slight pulse).

III. ESTABLISHING HEIRSHIP INITIALLY

A. [9.14] Methods of Proof

In the vast majority of cases, the court ascertains heirship in a routine ex parte proceeding from an affidavit submitted by any person stating the facts from which the court can determine the decedent's heirship. 755 ILCS 5/5-3(b). The court may also determine heirship from evidence either by testimony in narrative form or by questions and answers that are reduced to writing and certified by the court. The clerk of the court declaring the heirship files the affidavit or transcript, and it remains part of the court file. *Id.*

B. [9.15] Effect of Order Declaring Heirship

An order of the court declaring heirship is prima facie evidence of heirship and thus effectively shifts the burden to the party challenging the heirship. 755 ILCS 5/5-3(c); *In re Estate of Arcicov,* 94 Ill.App.2d 122, 236 N.E.2d 365, 367 (1st Dist. 1968). The heirship order is by no means conclusive, however, and will not preclude any other legal evidence of heirship. *Prescott v. Ayers,* 276 Ill. 242, 114 N.E. 557, 559 (1916). Moreover, an interested party may resort to any legal method of proving heirship in any proceeding in which the heirship question arises. 755 ILCS 5/5-3(c). Therefore, rather than conclusively resolving the issue of heirship, the order may merely signal the beginning of contested heirship proceedings.

IV. CONTESTING THE ORDER OF HEIRSHIP

A. [9.16] Time Limitations

A contestant may petition to vacate or amend an order declaring heirship under §5-3 of the Probate Act of 1975 at any stage of a probate proceeding. After an estate is closed (and after 30 days have elapsed), a contestant may petition under §2-1401 of the Code of Civil Procedure, 735 ILCS 5/2-1401, to set aside or amend the order of heirship, provided that the petitioner meets the statutory requirements of due diligence and lack of fault. 755 ILCS 5/5-3. The contestant must file the petition within two years of the entry of the order closing the estate. *In re Estate of*

Arcicov, 94 Ill.App.2d 122, 236 N.E.2d 365 (1st Dist. 1968). If the contestant establishes fraudulent concealment and reliance thereon, then a court may exclude the period of fraudulent concealment in computing the two years. *See id. See also Estate of Knoes,* 114 Ill.App.3d 257, 448 N.E.2d 935, 70 Ill.Dec. 57 (1st Dist. 1983).

A respondent may challenge a §2-1401 petition under the doctrine of laches when the petitioner's unreasonable delay in bringing suit prejudiced the respondent or caused the respondent to take a different course of action from that which he or she might have taken. *People ex rel. Nelson v. Village of Long Grove,* 169 Ill.App.3d 866, 523 N.E.2d 656, 662, 119 Ill.Dec. 900 (2d Dist.) (citing *Hippert v. O'Grady,* 97 Ill.App.3d 310, 423 N.E.2d 228, 229, 53 Ill.Dec. 36 (1st Dist. 1981)), *appeal denied,* 122 Ill.2d 593 (1988). The granting of §2-1401 relief lies within the court's sound discretion. *Demos v. National Bank of Greece,* 209 Ill.App.3d 655, 567 N.E.2d 1083, 153 Ill.Dec. 856 (1st Dist. 1991); *Tatosian v. Graudins,* 86 Ill.App.3d 661, 408 N.E.2d 231, 41 Ill.Dec. 809 (1st Dist. 1980); *Clay v. Huntley,* 338 Ill.App.3d 68, 787 N.E.2d 317, 272 Ill.Dec. 502 (1st Dist. 2003).

B. [9.17] No Jury Trial

The right to a trial by jury does not apply to an heirship determination because the court is essentially exercising chancery powers. *See Lewandowski v. Zuzak,* 305 Ill. 612, 137 N.E. 500 (1922); *Welch v. Worsley,* 330 Ill. 172, 161 N.E. 493 (1928). In *Prescott v. Ayers,* 276 Ill. 242, 114 N.E. 557 (1916), the court held that it was not improper to submit an heirship question to a jury, but the jury's verdict was advisory only and not binding on the court. See 735 ILCS 5/2-1111.

C. [9.18] Proving Heirship

The rules of evidence govern contested heirship proceedings, although they are somewhat relaxed. Unless one of several presumptions applies, the party claiming heirship bears the burden of proof. *See generally In re Estate of Severson,* 107 Ill.App.3d 634, 437 N.E.2d 430, 62 Ill.Dec. 903 (2d Dist. 1982); *Morelli v. Battelli,* 68 Ill.App.3d 410, 386 N.E.2d 328, 25 Ill.Dec. 57 (1st Dist. 1979); *In re Estate of Larimore,* 64 Ill.App.3d 470, 381 N.E.2d 76, 21 Ill.Dec. 141 (3d Dist. 1978); *In re Estate of Parisi,* 328 Ill.App.3d 75, 765 N.E.2d 123, 262 Ill.Dec. 297 (1st Dist.), *appeal denied,* 201 Ill.2d 569 (2002).

1. [9.19] Documentary Evidence

The courts give greater weight to documentary evidence than to witness recollections of events occurring after many years have elapsed. *In re Estate of Conrad,* 117 Ill.App.2d 29, 254 N.E.2d 123 (1st Dist. 1969); *Welch v. Worsley,* 330 Ill. 172, 161 N.E. 493 (1928). For a survey of documents admitted as relevant to proving heirship, see §9.39 below.

2. [9.20] Oral Testimony

Most evidence in contested heirship proceedings constitutes hearsay, but generally proponents can introduce this evidence under various exceptions to the hearsay rule. *See, e.g.,*

Cuddy v. Brown, 78 Ill. 415 (1875) (hearsay testimony admissible in questions of pedigree); *Jarchow v. Grosse,* 257 Ill. 36, 100 N.E. 290, 291 – 292 (1912) (hearsay declarations admissible to prove pedigree if proponent establishes that declarant was related by blood or marriage to family to which declarations refer). Moreover, the Dead-Man's Act, 735 ILCS 5/8-201, which generally bars an interested person from testifying as to conversations with a decedent, does not apply to testimony as to any fact relating to the heirship of a decedent. 735 ILCS 5/8-201(d); *In re Estate of Hutchins,* 120 Ill.App.3d 1084, 458 N.E.2d 1356, 76 Ill.Dec. 556 (4th Dist. 1984); *In re Estate of Bailey,* 97 Ill.App.3d 781, 423 N.E.2d 488, 53 Ill.Dec. 104 (5th Dist. 1981). However, the court will carefully scrutinize oral testimony and consider it in connection with all other evidence. *Kennedy v. Kennedy,* 93 Ill.App.3d 88, 416 N.E.2d 1188, 48 Ill.Dec. 666 (1st Dist. 1981); *Brice v. Estate of White,* 344 Ill.App.3d 995, 801 N.E.2d 1013, 280 Ill.Dec. 68 (1st Dist. 2003).

In order to admit evidence of out-of-court declarations made by persons other than the decedent, the proponent must first establish that the declarant is dead, that the declarations were made before the controversy arose, and that the declarant is a blood relative of the family at issue. Further, a court will not exclude this evidence on the grounds that living members of the same family can be examined on the same point or because the declarations are based on recently transpired events. However, courts may admit declarations as to heirship only when the circumstances show that they are the natural statements of a party who is in a position to know the truth and who speaks on an occasion when his or her mind is free from bias and without temptation to exceed or fall short of the truth. *See Welch v. Worsley,* 330 Ill. 172, 161 N.E. 493 (1928); *Sugrue v. Crilley,* 329 Ill. 458, 160 N.E. 847, *cert. denied,* 49 S.Ct. 20 (1928); *Foulkes v. Chicago Title & Trust Co.,* 283 Ill.App. 142 (1st Dist. 1935).

D. [9.21] Issues of Proof with Surviving Spouse: Validity of Marriage

In order for a surviving spouse to inherit under §2-1 of the Probate Act of 1975, 755 ILCS 5/2-1, or to be entitled to other benefits such as a spousal award, he or she must have been validly married to the decedent. The Illinois Marriage and Dissolution of Marriage Act defines valid and prohibited marriages. See 750 ILCS 5/201, *et seq.* Prohibited marriages include marriages entered into when one spouse is already married to someone else (750 ILCS 5/212(a)(1)), marriages between certain relatives (*id.*) and common-law marriages (750 ILCS 5/214; *Farrell v. Peters,* 951 F.2d 862 (7th Cir. 1992)). The burden of proof rests on the party challenging the validity of the marriage. *Greathouse v. Vosburgh,* 19 Ill.2d 555, 169 N.E.2d 97 (1960); *Crysler v. Crysler,* 330 Ill. 74, 161 N.E. 97 (1928). Same-sex marriages are fully valid and recognized in Illinois. *See Lee v. Orr,* No. 13-cv-8719, 2014 WL 683680 (N.D.Ill. Feb. 21, 2014).

For an interesting probate court challenge to the validity of a decedent's marriage that discusses the statutory requirements of solemnization, proxy marriages, the distinction between void and voidable marriages, and standing to challenge marriage, *see In re Estate of Crockett,* 312 Ill.App.3d 1167, 728 N.E.2d 765, 245 Ill.Dec. 683 (5th Dist. 2000).

A prohibited or invalid marriage (such as a bigamous marriage) can become valid when the impediment to the marriage's validity is removed such as when, in the case of a bigamous

marriage, the first marriage is dissolved or the first spouse dies. 750 ILCS 5/212(b); *In re Estate of Banks,* 258 Ill.App.3d 529, 629 N.E.2d 1223, 196 Ill.Dec. 379 (5th Dist. 1994); *Robinson v. Ruprecht,* 191 Ill. 424, 61 N.E. 631 (1901); *Estate of Whyte v. Whyte,* 244 Ill.App.3d 746, 614 N.E.2d 372, 185 Ill.Dec. 238 (1st Dist. 1993).

1. [9.22] Documentary Evidence of Marriage

A marriage certificate raises the presumption of a valid marriage. However, proof of prior contradictory statements and conduct by an alleged widow, including the failure of the widow to present herself as the decedent's wife, can overcome the presumption raised by a marriage certificate. *In re Sandusky's Estate,* 321 Ill.App. 1, 52 N.E.2d 285 (3d Dist. 1943).

2. [9.23] Other Evidence of Valid Marriage

The proponent of an allegedly valid marriage does not have to introduce record evidence of the marriage's validity. Rather, the proponent may rely on reputation evidence, and this evidence may be based on general opinions. *Gorden v. Gorden,* 283 Ill. 182, 119 N.E. 312 (1918). A proponent may also introduce declarations or conduct of the couple at issue. The fact that a couple's behavior is "consistent with . . . ceremonial marriage" is compelling evidence that they were in fact married. *In re Estate of Nowak,* 130 Ill.App.2d 573, 264 N.E.2d 307, 310 (2d Dist. 1970). Note, however, that a court will not presume a valid marriage because of reputation evidence alone. Thus, a statement made by a decedent's relative to the coroner who transferred the statement to the decedent's death certificate does not constitute a "fact" admissible as prima facie evidence of the decedent's marital status. *Id.* Moreover, a person who continues to live with his or her former spouse following a divorce does not qualify as a "surviving spouse" for inheritance purposes even though the couple holds themselves out to the public as husband and wife. *In re Estate of Biewald,* 127 Ill.App.3d 269, 468 N.E.2d 1321, 82 Ill.Dec. 541 (1st Dist. 1984).

The Dead-Man's Act does not bar any person from testifying as to any fact regarding a decedent's heirship. 735 ILCS 5/8-201(d). Hence, in a proceeding challenging the validity of a decedent's marriage, the court committed reversible error by barring a person purporting to be a decedent's widow from testifying as to her marriage to the decedent. *In re Estate of Bailey,* 97 Ill.App.3d 781, 423 N.E.2d 488, 53 Ill.Dec. 104 (5th Dist. 1981). Evidence of declarations may also be in the form of admissions by the decedent (*In re Estate of Clark,* 264 Ill.App. 544 (4th Dist. 1932)), or in the form of declarations by the decedent's relatives, provided that the relatives do not have a financial interest in the litigation's outcome (*Gorden, supra*).

3. [9.24] Presumption That Latest Marriage Is Valid

When a decedent has had several alleged marriages, the courts presume that the latest marriage is valid and that the earlier spouse either died or was legally divorced from the decedent. Therefore, the burden rests on the party challenging the validity of the latest marriage to prove that the earlier spouse did not die or divorce the decedent. *Sparling v. Industrial Commission,* 48 Ill.2d 332, 270 N.E.2d 411 (1971); *Baer v. De Berry,* 31 Ill.App.2d 86, 175 N.E.2d 673 (1st Dist. 1961). The person challenging the second marriage may introduce evidence that the court files in

the jurisdiction in which the (first marriage) couple resided contain no indication of divorce proceedings, and this evidence can be used to overcome the presumption of the second marriage's validity. *In re Estate of Dedmore,* 257 Ill.App. 519 (2d Dist. 1930). *See also Schmisseur v. Beatrie,* 147 Ill. 210, 35 N.E. 525 (1893).

E. [9.25] Illinois Religious Freedom Protection and Civil Union Act, Religious Freedom and Marriage Fairness Act, and *Obergefell v. Hodges*

On June 1, 2011, the Illinois Religious Freedom Protection and Civil Union Act (Civil Union Act), 750 ILCS 75/1, *et seq.,* went into effect. The Civil Union Act allows the establishment of a legal relationship between two persons of either the same or opposite sex. 750 ILCS 75/10. Pursuant to §20, a party to a civil union is "entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law." 750 ILCS 75/20. Further, the Civil Union Act has a reciprocity provision whereby a marriage of persons of the same sex, a civil union, or a substantially similar legal relationship legally entered into in another jurisdiction, shall be recognized in Illinois as a civil union.

On June 1, 2014, the Religious Freedom and Marriage Fairness Act (Marriage Fairness Act), 750 ILCS 80/1, *et seq.,* went into effect in Illinois. The purpose of the Marriage Fairness Act is to "provide same-sex and different-sex couples and their children equal access to the status, benefits, protections, rights, and responsibilities of civil marriage." 750 ILCS 80/5. As with the Civil Union Act, "[p]arties to a marriage and their children, regardless of whether the marriage consists of a same-sex or different-sex couple, shall have all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law, or any other source of civil or criminal law." 750 ILCS 80/10(b). The Illinois law further provides that "to the extent the law of this State adopts, refers to, or relies upon provisions of federal law as applicable to this State, parties to a marriage of the same sex and their children shall be treated under the law of this State as if federal law recognizes marriages of same-sex couples in the same manner as the law of this State." 750 ILCS 80/10(d). Following the passage of the Marriage Fairness Act, all civil unions remain in effect in Illinois for all couples, however, couples who want to convert their civil union into a marriage are able to do so.

On June 26, 2015, the U.S. Supreme court, in *Obergefell v. Hodges,* ___ U.S. ___, 192 L.Ed.2d 609, 135 S.Ct. 2584 (2015), held that the U.S. Constitution guarantees the right for same-sex couples to marry in all 50 states, stating specifically that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

While there is a legal presumption in Illinois that both parties who are legally married or have entered into a civil union are the legal parents of any child born after their civil union or marriage (and both of their names will be placed on the child's birth certificate), it is still recommended that the non-birth and/or nongenetic parent adopt the child or obtain a parentage order as the marriage or civil union parental status may not be recognized in other countries and the birth certificate of a same-sex couple may not be recognized in other states, despite the Marriage

Fairness Act in Illinois and *Obergefell.* Unlike a court order, a birth certificate may not be entitled to full faith and credit. For this same reason, same-sex couples who have children, even if they are married or have entered into a civil union, should have estate planning documents prepared. Any party to a third-party reproductive arrangement should always meet with an attorney knowledgeable in this area.

F. Issues of Proof with Legitimates

1. Artificial Insemination, Egg Donation, and Embryo Donation

a. Artificial Insemination

(1) [9.26] Treatment as naturally conceived legitimate child

The Illinois Parentage Act, 750 ILCS 40/1, *et seq.,* referred to herein for clarity as the Sperm Donation Act, is a separate statutory entity from the Illinois Parentage Act of 2015, which became effective January 1, 2016, and repealed the Illinois Parentage Act of 1984. The Sperm Donation Act provides that a child born to a married couple as the result of artificial insemination from the wife's egg and a donor's sperm is considered the legitimate child of the married couple. 750 ILCS 40/2. Historically, the Sperm Donation Act has been interpreted to apply only to "husbands" and "wives" as those terms are ordinarily and popularly understood. *See In re Marriage of Simmons,* 355 Ill.App.3d 942, 825 N.E.2d 303, 311, 292 Ill.Dec. 47 (1st Dist. 2005) (court invalidated insemination agreement because it was not entered into between husband and wife because husband was transsexual and born female). The Illinois Parentage Act of 2015, however, is gender neutral and recognizes same-sex parents. Given the passage of the Illinois Religious Freedom Protection and Civil Union Act and the Religious Freedom and Marriage Fairness Act, even if the couple is not married but are parties to a civil union or a same-sex couple that has entered a civil union or is married, the section on artificial insemination of the Sperm Donation Act should apply. It is important to note that although the Sperm Donation Act should theoretically be applicable to same-sex married or civil union male couples using donated sperm, because the couple would need to work with a gestational surrogate and would not fit the requirements of the Gestational Surrogacy Act, 750 ILCS 47/1, *et seq.,* which requires that at least one of the intended parents be genetically related to the child, it is unclear whether an Illinois court would apply 750 ILCS 40/3 to a same-sex male couple.

NOTE: The Illinois Parentage Act of 2015 references the repeal of the Sperm Donation Act, but it does not specifically repeal the Act or address sperm donation. An amendment to the Illinois Parentage Act of 2015, H.B. 6273, 99th Gen.Assem. (2016), which would repeal the Sperm Donation Act and add provisions addressing sperm donation to the Illinois Parentage Act of 2015, was referred to the House Rules Committee on February 11, 2016.

(2) [9.27] Treatment as natural parent

If a married woman is artificially inseminated under the supervision of a licensed physician with sperm donated by a man who is not her husband, the husband will be treated in law as if he were the natural father, provided that he consents in accordance with the Sperm Donation Act's

statutory requirements. 750 ILCS 40/3(a). Pursuant to the Illinois Religious Freedom Protection and Civil Union Act, the Religious Freedom and Marriage Fairness Act, and the Illinois Parentage Act of 2015, the noncarrying partner to a civil union or marriage who has consented to artificial insemination of his or her partner should also be considered the legal parent of the child. Specifically, in the Sperm Donation Act, the "husband's" (or noncarrying partner's) consent must (a) be in writing, (b) be signed by the "husband" (or noncarrying partner) and "wife" (or both partners), (c) include the date of insemination, (d) be certified by the treating physician, and (e) be held and kept confidential by the treating physician. Although the statute provides that the physician's failure to do any of the statutorily mandated directives will not affect the legal relationship between the father and child, in *In re Marriage of Simmons,* 355 Ill.App.3d 942, 825 N.E.2d 303, 311, 292 Ill.Dec. 47 (1st Dist. 2005) the court invalidated a sperm donation agreement because the physician failed to certify the date of the insemination. ("We find that the artificial insemination agreement did not comport with the statute and was, therefore, invalid on those grounds as well." *Id.*) The documents pertaining to the artificial insemination are subject to inspection only upon an order of the court for good cause. In *In re Parentage of M.J.,* 203 Ill.2d 526, 787 N.E.2d 144, 149, 272 Ill.Dec. 329 (2003), the Illinois Supreme Court found that the former Illinois Parentage Act's written consent provision is mandatory.

If a different-sex or same-sex couple is not married, has not entered into a civil union, is not in a "substantially similar legal relationship" as defined in the Illinois Parentage Act of 2015, or does not otherwise fit the definition of a presumed parent in 750 ILCS 46/204 and uses donor sperm, the nongenetic and noncarrying spouse can neither utilize the Illinois Parentage Act of 2015 nor acknowledge paternity voluntarily through the voluntary acknowledgment of paternity forms promulgated under §12 of the Vital Records Act, 410 ILCS 535/12. A "substantially similar legal relationship" is defined as "a relationship recognized in this State under Section 60 of the Illinois Religious Freedom Protection and Civil Union Act." 750 ILCS 46/103(u). Section 60 of the Civil Union Act recognizes civil unions, marriages, and other substantially similar legal relationships legally entered into in another jurisdiction other than common-law marriages or marriages otherwise prohibited in Illinois. See 750 ILCS 75/60. In this situation, the only way to legally become the natural father or parent of the child is through an adoption proceeding, which cannot be initiated until after the birth of the child. One exception is if the couple uses a gestational surrogate and the intended mother's genetic material. In this situation, if the parties are in compliance with the Gestational Surrogacy Act, the intended parents will both be deemed the legal parents of the child at the time of birth and both of their names will be placed on the birth certificate. If it is a same-sex male couple and neither intended parent's sperm is used to create the embryos, the Gestational Surrogacy Act will not apply.

While not addressed in the Adoption Act, 750 ILCS 50/0.01, *et seq.,* in *In re Petition of K.M.,* 274 Ill.App.3d 189, 653 N.E.2d 888, 210 Ill.Dec. 693 (1st Dist. 1995), the court held that unmarried couples have standing to adopt a child even if that couple is of the same sex. For example, a same-sex female couple who is using a sperm donor to conceive a child should consider an adoption. In addition, pursuant to the Illinois Parentage Act of 2015, a same-sex couple may also petition the court for an adjudication of parentage. (A presumed parent has standing to bring a parentage adjudication. See 750 ILCS 46/204, 46/602.) Although in Illinois both parents (who are married, parties to a civil union, or in a substantially similar legal relationship) will be considered legal parents at the time of birth and both names will be placed

on the birth certificate, a birth certificate does not carry the same legal weight as a court order. Unlike a birth certificate, an adoption order and/or an adjudication of parentage should be entitled to full faith and credit in other states and therefore provides additional protection to the child's parents. If the intended parents are not married, have not entered into a civil union, and are not in a substantially similar legal relationship, an adoption (or adjudication of parentage) is necessary even if the noncarrying intended parent is genetically related to the child, as only the party who gives birth to the child will be placed on the birth certificate at the time of birth (unless the parties have entered into a gestational surrogacy arrangement).

The inability to establish parentage prior to the birth of the child can lead to unintended results in a probate proceeding. Should the noncarrying intended parent or nongenetic intended father die prior to the birth of the child or the completion of an adoption proceeding or adjudication of parentage, the child will not be considered the natural or legal child of that individual and absent a will cannot inherit from his or her estate. For this reason, unmarried couples and couples who have not entered into a civil union using donor sperm are advised to enter into an estate plan naming the child (who may not yet be born) as a beneficiary of the noncarrying intended parent or nongenetic intended father. Because an intended parent's legal status may not be recognized in other states and countries, even if they are married or have entered into a civil union, they should also execute estate planning documents.

(3) [9.28] Sperm donor

An individual who donates sperm to a licensed physician for use in artificial insemination of a woman other than the individual's wife will not be treated in law as the natural father of any child conceived thereby. 750 ILCS 40/3(b). Although the Sperm Donation Act uses the term "wife," pursuant to the Illinois Religious Freedom Protection and Civil Union Act and the Religious Freedom and Marriage Fairness Act, this term should also encompass a "partner" or "spouse." Accordingly, a child born from donated sperm should not be able to claim inheritance rights from the estate of the sperm donor. However, the Illinois statute refers only to artificial insemination and not in vitro fertilization, a commonly used infertility treatment in sperm donation arrangements. The statute also only applies to sperm donated to "married" couples. Accordingly, a sperm donor may also want to secure a will disavowing any intent to be the legal or natural father of any child born through the use of his donated sperm.

b. [9.29] Egg Donation

A common technique used in assisted reproductive technology is egg donation. This is a procedure whereby a donor provides an egg that is then fertilized with sperm from either the intended father or a sperm donor. Resulting embryos may then be implanted in the intended mother or another woman who acts as a surrogate. Note that the Gestational Surrogacy Act does not apply when neither of the intended parents contributes a gamete (sperm or egg) to the embryo being carried by the surrogate. The Gestational Surrogacy Act also does not apply if the surrogate is also the egg donor. Although it is important for parties to enter into contracts governing their legal rights with respect to their donated eggs, it is also advisable for intended parents and egg donors to secure a will. Intended parents should specify their intent that the child born as a result of the egg donation should inherit from their estate as their legal and natural child, while the

donor should disavow any intent to be the legal or natural mother of any children born through the use of her donated eggs. Because these arrangements are often anonymous, *i.e.,* the intended parents and egg donor do not know each other's identities, the risk of an inheritance dispute may be minimal. However, should a dispute occur it may result in a decision not contemplated by any of the parties to the reproductive arrangement.

If the intended mother carries and gives birth to the child conceived via egg donation, her name will be placed on the birth certificate of the child, as there is a legal presumption that a woman who gives birth to a child is the child's legal mother. If the intended mother is married or a party to a civil union, her spouse's or partner's name will also be placed on the birth certificate. Because a birth certificate is not afforded the same protection of full faith and credit as that of a parentage order or adoption order, the noncarrying or nongenetic parent may wish to obtain a court order to further protect her parentage rights to the child.

If the parties are not married, but the intended father is the biological father of the child, he can complete an Illinois Voluntary Acknowledgement of Paternity form, www.childsupportillinois.com/assets/hfs3416b.pdf. See 410 ILCS 535/12. If a heterosexual couple is not married and has not entered into a civil union, and the intended father did not contribute the sperm, or a same-sex female couple is not married and have not entered into a civil union (if it is a same-sex male couple, a gestational surrogate would be involved and surrogacy law would be applicable), the noncarrying party or the nongenetic intended father will not be considered the natural or legal parent under Illinois law and the parties should pursue an adoption proceeding after the birth of the child. The parties should also secure a will at the time the embryos are created stating that the child will be the beneficiary of the nongenetic intended father's or noncarrying intended mother's estate.

c. [9.30] Embryo Donation

Embryo donation is a fertility procedure in which an embryo is donated to intended parent or parents by a couple who no longer intends on using it. The embryo is transferred to the uterus of the intended mother or a gestational surrogate to attempt to conceive a child. There is no genetic relationship between the embryo and the intended parent or parents. Although there is no law in Illinois addressing embryo donation, it is advisable for an embryo recipient or recipients to enter into a contract with the embryo donor or donors. Medical ethical guidelines as well as some state laws prohibit payment of any compensation to embryo donors, aside from reimbursement for medical or embryo storage fees. The intended mother's name (and the intended father's or spouse's name if the couple is legally married, or the intended co-parent's name if the parties have entered into a civil union) will be placed on the birth certificate of the child at the time of birth if the intended mother carries the donated embryo as there is a legal presumption that a woman who gives birth to a child is the child's legal mother. The intended parent or parents should also consider an adoption proceeding to be legally recognized as the natural parent or parents of a child born from embryo donation, as the possibility does exist that parentage could be challenged by the embryo donor via DNA testing. If the intended parents are not married and have not entered a civil union, the intended father or noncarrying partner can only be placed on the birth certificate and legally recognized as the natural father or legal parent through an

adoption proceeding. Like egg donors, embryo donors should also secure a will disavowing any intent to be the legal or natural mother or father of any children born through the use of donated embryos. Embryo recipients should likewise secure a will naming any children born as a result of the embryo donation as their heirs.

2. [9.31] Gestational Surrogacy

The Gestational Surrogacy Act became effective January 1, 2005. The Gestational Surrogacy Act defines "gestational surrogacy" as "the process by which a woman attempts to carry and give birth to a child created through in vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the *gestational surrogate has made no genetic contribution.*" [Emphasis added.] 750 ILCS 47/10. An "intended parent" is a person who enters into a gestational surrogacy contract with a gestational surrogate pursuant to which he or she will be the legal parent of the resulting child. *Id.* Because there is no marriage requirement imposed by the Gestational Surrogacy Act, the intended parents to a gestational surrogacy need not be married or parties to a civil union.

a. [9.32] Rights of Parentage

A child born to a gestational surrogate will be considered the legitimate child of the intended parent or parents for purposes of state law immediately upon the birth of the child if the eligibility requirements set forth in the Gestational Surrogacy Act are met by the gestational surrogate and the intended parent or parents at the time the gestational surrogacy contract is executed, and the gestational surrogacy contract meets the requirements of the Act. 750 ILCS 47/15.

In the case of a lab error in which the resulting child is not genetically related to either of the intended parents, the intended parents will be the parents of the child for purposes of state law unless otherwise determined by a court of competent jurisdiction. 750 ILCS 47/15(c).

b. [9.33] Eligibility

The gestational surrogate must meet several eligibility requirements. She must be 21 years of age and must have given birth to at least one child. She must have completed both a medical and mental health evaluation. The surrogate must also have undergone legal consultation with independent legal counsel regarding the terms of the gestational surrogacy contract and potential legal consequences. Finally, she must have or obtain a health insurance policy satisfying coverage criteria as set forth in the Gestational Surrogacy Act. 750 ILCS 47/20(a). The policy may be procured by the intended parent or parents on behalf of the gestational surrogate.

The intended parent or parents must also satisfy several requirements. They must contribute at least one of the gametes resulting in a pre-embryo (fertilized egg) that the gestational surrogate will attempt to carry to term. They also must have a medical need (not defined by the Gestational Surrogacy Act) for the gestational surrogacy as evidenced by a qualified physician's affidavit attached to the gestational surrogacy contract. They also must have completed a mental health evaluation and undergone legal consultation with independent legal counsel regarding the terms of the gestational surrogacy contract and the potential legal consequences. 750 ILCS 47/20(b)(3), 47/20(b)(4).

c. [9.34] Gestational Surrogacy Contract

Section 25 of the Gestational Surrogacy Act sets forth several specific requirements for the gestational surrogacy contract. 750 ILCS 47/25. It must be signed by the gestational surrogate and, if married, her spouse, or partner in a civil union, as well as by the intended parent or parents prior to the commencement of any medical procedures (other than medical or mental health evaluations necessary to determine the eligibility of the parties). If the intended parents are married or parties to a civil union, both intended parents must sign the contract. The contract's execution must be witnessed by two competent adults. In addition, the gestational surrogate and the intended parent or parents must be represented by separate counsel in all matters concerning gestational surrogacy and the gestational surrogacy contract. The gestational surrogate and the intended parent or parents must sign a written acknowledgment that they received information about the legal, financial, and contractual rights, expectations, penalties, and obligations of the surrogacy agreement. If the gestational surrogacy contract provides for the payment of compensation to the gestational surrogate, the compensation must be placed in escrow with an independent escrow agent prior to the gestational surrogate's commencement of any medical procedure (other than medical or mental health evaluations necessary to determine the gestational surrogate's eligibility). 750 ILCS 47/25(b).

The Gestational Surrogacy Act also requires that the contract contain certain terms. It must provide for the express written agreement of the gestational surrogate to (1) undergo pre-embryo transfer and attempt to carry and give birth to the child and (2) surrender custody of the child to the intended parent or parents immediately upon the birth of the child. If the gestational surrogate is married or a partner in a civil union, the express agreement of her spouse or partner in civil union to (1) undertake the obligations imposed on the gestational surrogate pursuant to the terms of the gestational surrogacy contract and (2) surrender custody of the child to the intended parent or parents immediately upon the birth of the child is required. The contract must also state that the gestational surrogate has the right to utilize the services of a physician of her choosing, after consultation with the intended parent or parents, to provide for her care during the pregnancy. Finally, it must include the express written agreement of the intended parent or parents to (1) accept custody of the child immediately upon his or her birth and (2) assume sole responsibility for the support of the child immediately upon his or her birth. 750 ILCS 47/25(c).

A gestational surrogacy contract may also, but is not required to, contain additional provisions concerning compensation, medical exams, abstaining from drinking alcohol, etc. The inclusion of one or more of these provisions will not affect its enforceability for purposes of state law. The list of additional provisions can be found in §25(d) of the Gestational Surrogacy Act. 750 ILCS 47/25(d).

Finally, in the event that any of the requirements are not met, a court of competent jurisdiction will determine parentage based on the evidence of the parties' intent. 750 ILCS 47/25(e).

d. [9.35] Establishment of the Parent-Child Relationship

For purposes of the Illinois Parentage Act of 2015, a parent-child relationship is established between a child born through gestational surrogacy and the intended parent(s) at the time of birth

if there is a valid gestational surrogacy contract under the Gestational Surrogacy Act or other law. 750 ILCS 46/201. In addition to satisfying the requirements of the Gestational Surrogacy Act, the gestational surrogate (and her spouse or partner in a civil union), intended parent or parents (whether or not they are married or in a civil union), attorneys, and physician file forms prescribed by the Illinois Department of Public Health, Vital Records. 750 ILCS 46/201, 47/35. Prior to the birth of the child, the original forms are filed with the delivering hospital in Illinois and copies are sent to the Illinois Department of Public Health. These forms were revised in August 2011 to be consistent with the Illinois Religious Freedom Protection and Civil Union Act. Such forms are also consistent with the Religious Freedom and Marriage Fairness Act and now make reference to a "co-parent" rather than just an intended mother and an intended father, recognizing the possibility that the intended parents and/or the gestational surrogate may be a party to a civil union (or are a same-sex couple). Because civil unions and same-sex marriage may not be recognized in other states or countries, and a birth certificate may not be given full faith and credit outside the state of Illinois as it is not a parentage or adoption order, the nongenetic parent may be advised to proceed with a parentage proceeding or adoption to further protect his or her parentage in the event of travel to another state.

In these forms, the attorneys representing both the gestational surrogate and the intended parent or parents certify that the parties entered into a gestational surrogacy contract intended to satisfy the requirements set forth in §25 of the Gestational Surrogacy Act, 750 ILCS 47/25. In addition, a physician licensed to practice in Illinois must certify that the child being carried by the gestational surrogate is the biological child of one of the co-parents, and not the biological child of the gestational surrogate. The gestational surrogate, her spouse or partner in a civil union, and each intended parent must also sign forms confirming their participation in the gestational surrogacy. All the certifications must be filed on forms prescribed by the Illinois Department of Public Health. For further information regarding surrogacy in Illinois see, Heather E. Ross, *Gestational Surrogacy in Illinois: Contracting the Unknown,* 26 DCBA Brief, No. 3, 16 (Dec. 2013), and Nancy Ford, *The New Illinois Gestational Surrogacy Act,* 93 Ill.B.J. 240 (2005).

3. [9.36] Valid Marriage Not Required for Legitimate Status

Modern Illinois statutes (sometimes referred to as "legitimation statutes") and caselaw do not require a valid marriage for legitimacy. The Illinois Marriage and Dissolution of Marriage Act states: "Children born or adopted of a prohibited or common law marriage are the lawful children of the parties." 750 ILCS 5/212(c). See also 750 ILCS 5/303. For examples of cases, *see In re Estate of Stewart,* 131 Ill.App.2d 183, 268 N.E.2d 187 (1st Dist. 1971); *Cardenas v. Cardenas,* 12 Ill.App.2d 497, 140 N.E.2d 377 (1st Dist. 1956); *Dotson v. Sears, Roebuck & Co.,* 157 Ill.App.3d 1036, 510 N.E.2d 1208, 110 Ill.Dec. 177 (1st Dist.), *appeal denied,* 116 Ill.2d 552 (1987).

4. [9.37] Legitimation

According to §2-2 of the Probate Act of 1975, a "person who was a child born out of wedlock whose parents intermarry and who is acknowledged by the father as the father's child is a lawful child of the father." 755 ILCS 5/2-2. See also 750 ILCS 46/201(b)(2). The Probate Act's rules of descent and distribution applicable to legitimate children (755 ILCS 5/2-1) would thus govern

such a child's inheritance rights. Moreover, in accordance with the legitimation statutes, a child born out of wedlock to two parents who subsequently enter into an invalid marriage is also legitimate. *In re Estate of Bartolini,* 285 Ill.App.3d 613, 674 N.E.2d 74, 220 Ill.Dec. 803 (1st Dist. 1996). Practitioners should note, however, the split of authority in other states on this point, as discussed by the *Bartolini* court. 674 N.E.2d at 78.

The required acknowledgment of paternity that, when coupled with a marriage, will operate to legitimate a formerly illegitimate child does not need to be general or public. *Miller v. Pennington,* 218 Ill. 220, 75 N.E. 919 (1905); *Robinson v. Ruprecht,* 191 Ill. 424, 61 N.E. 631 (1901); *Hall v. Gabbert,* 213 Ill. 208, 72 N.E. 806 (1904). The courts will assess witness credibility to determine the weight to be given their testimony and to draw all reasonable inferences therefrom regarding the decedent's acknowledgment of paternity. *In re Estate of Lukas,* 155 Ill.App.3d 512, 508 N.E.2d 368, 374, 108 Ill.Dec. 207 (1st Dist.), *appeal denied,* 116 Ill.2d 555 (1987). *See, e.g., Cooper v. Harris,* 499 F.Supp. 266, 268 (N.D.Ill. 1980) (allowing testimony of relatives of decedent and relatives of child); *In re Estate of Olenick,* 204 Ill.App.3d 291, 562 N.E.2d 293, 295, 149 Ill.Dec. 829 (1st Dist. 1990) (allowing testimony of friend and cohabitant of decedent), *appeal denied,* 136 Ill.2d 544 (1991); *Brice v. Estate of White,* 344 Ill.App.3d 995, 801 N.E.2d 1013, 280 Ill.Dec. 68 (1st Dist. 2003) (allowing testimony of unrelated and uninterested friend). However, courts give questionable weight to testimony by interested witnesses as to a decedent's alleged oral acknowledgments of paternity. *Kennedy v. Kennedy,* 93 Ill.App.3d 88, 416 N.E.2d 1188, 48 Ill.Dec. 666 (1st Dist. 1981).

G. Issues of Proof with Illegitimates: Proving Paternity

1. [9.38] Acknowledgments as Proof of Paternity

An illegitimate person can inherit from his or her alleged father if the alleged father acknowledged paternity of the illegitimate person. 755 ILCS 5/2-2. Acknowledgment alone, however, though establishing paternity, will not convert a child's status from illegitimate to legitimate. *See Dotson v. Sears, Roebuck & Co.,* 157 Ill.App.3d 1036, 510 N.E.2d 1208, 110 Ill.Dec. 177 (1st Dist.), *appeal denied,* 116 Ill.2d 552 (1987). Regardless of a decedent's motives to acknowledge paternity, an illegitimate child cannot become legitimate without the decedent being married to the child's mother. In other words, a decedent's good-faith efforts to acknowledge his child cannot act as a " 'backdoor' adoption." *In re Estate of Olenick,* 204 Ill.App.3d 291, 562 N.E.2d 293, 299, 149 Ill.Dec. 829 (1st Dist. 1990), *appeal denied,* 136 Ill.2d 544 (1991).

The Illinois Parentage Act of 2015 provides several methods of establishing paternity. Acknowledgments of paternity can be established informally through evidence of the alleged father's oral or written statements or through a more formal process by which the child's father and mother sign an acknowledgment of parentage. 750 ILCS 46/201. Paternity can also be adjudicated by the courts, or the parties can consent to establish a parent and child relationship through adoption or a valid gestational surrogacy contract. *Id.* Additionally, the Illinois Department of Health and Family Services may make administrative determinations of paternity in child support cases. See 305 ILCS 5/10-17.7. Finally, a person is presumed to be the parent of a child if (a) the child is born while the person and the child's mother are married, in a civil

union, or substantially similar legal relationship; (b) the child is born within 300 days after the termination of such marriage or other legal relationship; (c) the child is born during or within 300 days after the termination of an invalid marriage when the parties were in apparent compliance with the law; or (d) after the child is born, the person enters into a marriage, civil union, or other legal relationship with the child's mother and the person consented to be named on the child's birth certificate. 750 ILCS 46/204. Note, however, that a valid gestational surrogacy contract will negate the presumption in items (a) through (c). *Id.*

While an acknowledgment of paternity can constitute clear and convincing evidence of parentage, it is not conclusive evidence. *Olenick, supra; Estate of Ragen,* 79 Ill.App.3d 8, 398 N.E.2d 198, 34 Ill.Dec. 523 (1st Dist. 1979). Thus, when an opponent introduces material evidence contradicting the acknowledgment, the court must weigh all the evidence to determine whether the acknowledgment qualifies as proof that leaves no reasonable doubt. *Olenick, supra.*

A written acknowledgment is not required. *Miller v. Pennington,* 218 Ill. 220, 75 N.E. 919 (1905); *Cooper v. Harris,* 499 F.Supp. 266 (N.D.Ill. 1980). The decedent's motive in making the acknowledgment is immaterial. *Miller, supra.* The courts do, however, accord particular reliability and credibility to written evidence. *Kennedy v. Kennedy,* 93 Ill.App.3d 88, 416 N.E.2d 1188, 48 Ill.Dec. 666 (1st Dist. 1981); *Brice v. Estate of White,* 344 Ill.App.3d 995, 801 N.E.2d 1013, 280 Ill.Dec. 68 (1st Dist. 2003). A written acknowledgment combined with a mother's unimpeached testimony that she did not have sexual relations with anyone other than the decedent during the relevant time period of conception sufficiently establishes the decedent's paternity. *Kennedy, supra.* Of course, an acknowledgment of paternity is insufficient when contradictory evidence proves that the individual could not have fathered the child (*e.g.,* because he was in prison at the time). *See In re Estate of Willis,* 214 Ill.App.3d 683, 574 N.E.2d 172, 158 Ill.Dec. 378 (1st Dist.), *appeal denied,* 141 Ill.2d 539 (1991). *But see In re Parentage of G.E.M.,* 382 Ill.App.3d 1102, 890 N.E.2d 944, 322 Ill.Dec. 25 (3d Dist.), *appeal denied,* 229 Ill.2d 623 (2008), for a questionable case finding that once an acknowledgment of paternity is deemed to be final, paternity will not be set aside even if DNA evidence later proves that the acknowledging father cannot be the biological father.

2. [9.39] Documentary Evidence of Paternity

Courts accord documentary evidence particular reliability and credibility. *Kennedy v. Kennedy,* 93 Ill.App.3d 88, 416 N.E.2d 1188, 48 Ill.Dec. 666 (1st Dist. 1981). Provided that the proponent lays the proper evidentiary foundation, admissible documentary evidence in contested heirship proceedings may include

a. birth certificates and marriage certificates (*Hunt v. Morris,* 266 Ill.App. 18 (1st Dist. 1932));

b. baptismal records (*Foulkes v. Chicago Title & Trust Co.,* 283 Ill.App. 142, 163 – 164 (1st Dist. 1935));

c. family Bibles and genealogies, including those with handwritten notations as to familial relationships (*Bogart v. Brazee,* 331 Ill. 160, 162 N.E. 877 (1928); *Stone v. Salisbury,* 209 Ill. 56, 70 N.E. 605 (1904); *Crumley v. Worden,* 201 Ill. 105, 66 N.E. 318 (1903));

d. checks written by the decedent to show that the decedent could not have been in a particular place at a particular time (*Bogart, supra*) or to show relationships with the claimant (*In re Estate of Healea,* 254 Ill.App. 334, 347 (3d Dist. 1929));

e. inscriptions on a tombstone (*Bogart, supra*);

f. photographs allegedly showing familial resemblance (although they are accorded little weight by courts) (*Foulkes, supra,* 283 Ill.App. at 146; *Healea, supra; Brice v. Estate of White,* 344 Ill.App.3d 995, 801 N.E.2d 1013, 280 Ill.Dec. 68 (1st Dist. 2003) (pictures used to show that decedent attended various family functions with plaintiffs));

g. beneficiary designations such as those contained in a will, insurance policy, or retirement account (*In re Estate of Willis,* 214 Ill.App.3d 683, 574 N.E.2d 172, 158 Ill.Dec. 378 (1st Dist.), *appeal denied,* 141 Ill.2d 539 (1991));

h. public records that persons in public office are required to maintain in connection with the performance of their official duties (*In re Estate of Ersch,* 29 Ill.2d 572, 195 N.E.2d 149 (1963));

i. petitions for probate in prior proceedings (*In re Curby's Estate,* 334 Ill.App. 212, 78 N.E.2d 835 (2d Dist. 1948); *Stone, supra*);

j. cards or letters indicating familial relationships (*Willis, supra; Brice, supra*); and

k. census records, although these records are not conclusive on the issue of whether a child was born to a decedent and do not have the same standing as birth certificates (*In re Estate of Conrad,* 117 Ill.App.2d 29, 254 N.E.2d 123 (1st Dist. 1969)).

3. [9.40] Scientific Evidence of Paternity

Besides proving heirship by affidavit or narrative testimony as described in §§9.38 and 9.39 above, §5-3(c) of the Probate Act of 1975 provides that "any other legal method of proving heirship may be resorted to by any party interested therein in any place or court where the question may arise." 755 ILCS 5/5-3(c).

Advancements in scientific testing techniques have altered the landscape of heirship and paternity proceedings. Scientific evidence plays an important role in heirship determinations because this evidence is "independent evidence," *i.e.,* verifiable evidence that amounts to more than a party's mere assertion. Moreover, Illinois statutes and caselaw governing heirship contain numerous presumptions, and scientific evidence is one way to overcome these presumptions. For example, a party can rebut the presumption of paternity resulting from marriage or from a signed voluntary acknowledgment of paternity by introducing evidence of blood type or DNA. *See, e.g., In re A.A.,* 2014 IL App (5th) 140252, 20 N.E.3d 526, 386 Ill.Dec. 364 (DNA evidence that another man was child's biological father constituted clear and convincing evidence capable of rebutting presumption of paternity created by signed voluntary acknowledgement), *aff'd,* 2015 IL 118605. Note, however, that only certain individuals have standing to challenge presumptions of

paternity. 750 ILCS 46/602. *See also In re N.C.,* 2014 IL 116532, 12 N.E.2d 23, 382 Ill.Dec. 23 (only signatories to voluntary acknowledgment of paternity under former Illinois Parentage Act of 1984 may challenge acknowledgment on basis of fraud, duress, or material mistake of fact, but state does not have standing to bring such challenge).

Although the Probate Act does not specifically cover blood testing, the Illinois Parentage Act of 2015 provides for both DNA and blood-typing tests. 750 ILCS 46/404. Per the Illinois Parentage Act of 2015, test results may be used to exclude a man as a child's genetic father. Conversely, if tests result in a 99-percent probability that a man is the child's genetic father, the man is presumed to be the father, and this evidence shall be admitted for the purpose of this presumption. Regardless of whether blood test results exclude an individual as the father of a child or include him in the class of potential fathers, all parties are entitled to introduce other evidence attacking or bolstering the accuracy of the blood test. *In re Estate of Lukas,* 155 Ill.App.3d 512, 508 N.E.2d 368, 377, 108 Ill.Dec. 207 (1st Dist.), *appeal denied,* 116 Ill.2d 555 (1987).

In a proceeding to adjudicate the parentage of a child having a presumed, acknowledged, or adjudicated parent, the Illinois Parentage Act of 2015 allows a court to deny a motion seeking an order for genetic testing based on a variety of equitable considerations. See 750 ILCS 46/610. In such cases, if the court denies the motion seeking genetic testing, then it must issue an order adjudicating the presumed parent to be a parent of the child. *Id.*

In deciding whether to admit the results of any scientific testing, Illinois courts follow the rule enunciated in *Frye v. United States,* 293 F. 1013 (D.C.Cir. 1923), which has now been codified by the Illinois Rules of Evidence. *See In re Detention of New,* 2014 IL 116306, 21 N.E.3d 406, 386 Ill.Dec. 643. "Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs." Ill.R.Evid. 702.

Consequently, although blood typing and DNA testing are generally well established, the specific testing involved in a paternity dispute and the statistical methods used are nevertheless subject to a *Frye* analysis. *See Franson v. Micelli,* 269 Ill.App.3d 20, 645 N.E.2d 404, 410 – 411, 206 Ill.Dec. 399 (1st Dist. 1994), *vacated on other grounds, appeal dismissed,* 172 Ill.2d 352 (1996). *Cf. People v. Mehlberg,* 249 Ill.App.3d 499, 618 N.E.2d 1168, 1194, 188 Ill.Dec. 598 (5th Dist.) (finding that pretrial *Frye* hearing is not necessarily prerequisite to admission of expert testimony concerning new scientific technique and that failure to hold pretrial *Frye* hearing was not abuse of discretion when state presented extensive expert testimony in support of proposition that DNA identification procedures were reliable and accepted in scientific community), *appeal denied,* 153 Ill.2d 566 (1993).

a. [9.41] Traditional Blood Testing

The Illinois Parentage Act of 2015 sets forth specific circumstances under which a person is presumed to be the parent of a child if the person and the mother of the child entered into a

marriage, civil union, or substantially similar legal relationship. See 750 ILCS 46/204(a). A party seeking to rebut that presumption must introduce evidence that clearly and conclusively proves that the child's parent is someone else. *See Jones v. Industrial Commission,* 64 Ill.2d 221, 356 N.E.2d 1, 3, 1 Ill.Dec. 1 (1976).

Scientists design traditional blood tests to exclude certain individuals from the class of potential fathers. *Santiago v. Silva,* 90 Ill.App.3d 554, 413 N.E.2d 139, 143, 45 Ill.Dec. 806 (1st Dist. 1980). A traditional blood test that does not exclude a defendant's paternity is inadmissible to establish paternity. *Id.; People ex rel. Bucaro v. Johnson,* 8 Ill.App.3d 618, 291 N.E.2d 9, 12 (1st Dist. 1972). Thus, certain genetic traits must appear in the biological father's blood, and scientists discern these traits by subtracting the variations in genetic markers that occur in the mother's blood from those occurring in the child's blood. If certain markers in an alleged father's blood do not fall within a required range, he is excluded from paternity. If the markers do match, the alleged father is not excluded from paternity, but he also is not conclusively established to be the father.

The first available type of scientific evidence on paternity was the ABO blood-grouping system developed in the 1930s. The ABO system classifies blood into one of four inherited types: A, B, AB, or O. For example, in the ABO blood-grouping system, the frequency distribution in the population is approximately 40 percent type A, 14 percent type B, 3 percent type AB, and 43 percent type O. Paul C. Giannelli and Edward J. Imwinkelried, SCIENTIFIC EVIDENCE, p. 605 (1986). The ABO blood-grouping system eventually evolved into the human leukocyte antigen (HLA) tissue testing. HLA tests compare antigens found in white blood cells.

Neither blood grouping nor HLA testing is as reliable as DNA testing, and they vary greatly in the percentage of the population that can be excluded from the possibility of paternity. Blood-grouping tests, for example, depending on the type of test used, can exclude anywhere from 60 percent to 99 percent of the population. Moreover, HLA tests may fail to exclude up to 10 percent of falsely accused men, depending on the rarity of the particular antigens. Charles Nelson LeRay, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion,* 35 B.C.L.Rev. 747, 760 – 761 n.89 (1994), citing Scientific Testing for Paternity Establishment, in BRINGING AND DEFENDING CONTESTED PATERNITY CASES: PRACTICING UNDER G.L. CHAPTER 209C 91 (Mass.Cont. Legal Educ. ed., 1989). Even combining HLA with blood-grouping tests may fail to exclude more than one percent of falsely accused men. *Id.*

b. [9.42] DNA Testing

Often called the greatest boon to forensic medicine and law since the advent of fingerprinting, DNA analysis is based on well-established principles of genetic variability among humans and the uniqueness of each individual's genetic makeup (excluding identical twins). In addition to its well-published application in the criminal area, DNA testing has revolutionized heirship determinations, particularly with respect to paternity testing. DNA paternity testing is based on the fact that each child's unique genetic blueprint is stored in material known as DNA (or deoxyribonucleic acid). This DNA, which determines characteristics such as eye color and blood type, exists in two sets. The child inherits one set of DNA from the mother and one set from the father.

(1) [9.43] Admissibility and types of tests

In light of scientific advances, the Illinois Parentage Act of 2015 allows the courts to order DNA testing to determine parentage "[a]s soon as practicable" (750 ILCS 46/401) and even allowing the courts to presume the putative father's paternity if the statistical indications of the test are high enough. 750 ILCS 46/401 – 46/404. *See Villareal v. Peebles,* 299 Ill.App.3d 556, 701 N.E.2d 145, 233 Ill.Dec. 502 (1st Dist.), *appeal denied,* 181 Ill.2d 590 (1998). A court also can presume paternity if the putative father refuses to submit to DNA testing and the presumption is in the best interests of the child and of justice. *In re Devon M.,* 344 Ill.App.3d 503, 801 N.E.2d 128, 279 Ill.Dec. 836 (1st Dist. 2003). In a proceeding to adjudicate the parentage of a child having a presumed, acknowledged, or adjudicated parent, the Illinois Parentage Act of 2015 allows a court to deny a motion seeking an order for genetic testing based on a variety of equitable considerations. See 750 ILCS 46/610. In such cases, if the court denies the motion seeking genetic testing, then it must issue an order adjudicating the presumed parent to be a parent of the child. *Id.*

In a number of cases arising since the 1995 amendment of the former Illinois Parentage Act of 1984, parties have challenged the constitutionality of the presumption of paternity to no avail. *See, e.g., Illinois Department of Public Aid ex rel. Masinelli v. Whitworth,* 273 Ill.App.3d 156, 652 N.E.2d 458, 209 Ill.Dec. 918 (4th Dist. 1995) (concluding that either putative father or his identical twin was father of child, based on genetic testing, and using nongenetic evidence to determine putative father was most likely candidate); *Illinois Department of Public Aid ex rel. Galbraith v. Jones,* 281 Ill.App.3d 115, 666 N.E.2d 12, 216 Ill.Dec. 844 (4th Dist. 1996) (holding that presumption of paternity was valid and that general denials of paternity did not constitute clear and convincing evidence required to rebut presumption). The Illinois Parentage Act of 2015 also allows paternity to be established after the death of the father via genetic testing of his relatives. See 750 ILCS 46/408. *See also In re Estate of Medlen,* 286 Ill.App.3d 860, 677 N.E.2d 33, 222 Ill.Dec. 220 (2d Dist. 1997).

DNA testing requires a biological material sample such as blood or tissue (testing labs prefer to work with blood samples). Currently, five types of DNA testing techniques are available: "1) 'multi locus probe testing,' better known as DNA fingerprinting; 2) 'single locus restriction fragment length polymorphism,' better known as RFLP testing; 3) 'polymerase chain reaction,' or PCR, testing, using 'amplified length polymorphism' (AMPFLP); 4) PCR testing, using dot blot technology; and 5) mitochondrial DNA sequencing." Charles M. Strom, *Genetic Justice: A Lawyer's Guide to the Science of DNA Testing,* 87 Ill.B.J. 18, 19 (1999). Of these, RFLP testing and, in some cases, PCR testing are the techniques of choice in the paternity area.

Labs obtain the best results when they test the mother, child, and putative father. However, a lab can obtain statistically significant results by testing only the child and the putative father. In cases in which no genetic material is available from the putative father, such as when he has been cremated, certain relatives of the decedent, such as a brother or parents, may provide samples, but practitioners should be aware of the privacy and due-process issues with respect to forced testing, discussed in detail below in §9.46.

All living things are made up of long genetic chains of four basic chemicals: adenine, thymine, guanine, and cytosine. The manner in which these elements are linked together and arranged determines which traits offspring will possess. RFLP testing involves cutting DNA samples with an enzyme, separating the fragments by size, and radioactively labeling them. The forensic DNA tester then exposes these radioactive segments known as "probes" to X-ray film to produce RFLP's end result: the autoradiogram or "autorad." The tester then reads the dark bands at specific genetic locations, comparing the bands of the child and putative father. The tester wants to compare those DNA fragment lengths that normally display a significant degree of size variation in the relevant population. At a given genetic location, each of the variations is called an "allele."

PCR testing amplifies specific DNA sequences, making them easier to see and analyze. This method offers less complicated analysis than RFLP testing and is much faster; however, contamination of evidentiary samples used in PCR testing is of great concern due to the amplification. 87 Ill.B.J. at 23. Because the PCR process is so sensitive, even the smallest contact may cause contamination that could alter test results.

Using the RFLP or PCR test, if the child and alleged father do not match on two or more DNA probes or PCR systems, the probability of paternity is 0.0 percent, and the tester can conclusively exclude the alleged father. If the alleged father's DNA fragment matches what must be the paternal allele of the child, the tester compares the matching allele to a database derived from individuals of the same race. The tester then utilizes the frequency of the matching allele in the relevant population to calculate a paternity index.

(2) [9.44] Experts and approved labs

Regarding certification of laboratories doing DNA testing, Charles M. Strom, *Genetic Justice: A Lawyer's Guide to the Science of DNA Testing,* 87 Ill.B.J. 18, 25 (1999), states:

> **Two organizations license and certify DNA laboratories. The American Association of Blood Banks (AABB) licenses laboratories performing paternity testing, and the College of American Pathology (CAP) accredits DNA laboratories and has a proficiency-testing program for paternity and forensic testing. However, no certificate or license can assure that the DNA testing performed in any case has been done properly and interpreted correctly.**

Because of this lack of assurance, DNA results will always be susceptible to attack.

(3) [9.45] Attacking the results

Despite the increased reliability of scientific testing, the results of DNA testing are not beyond attack. Lawyers and their experts may question the integrity of the sample collection, the laboratory procedures employed, the interpretation of results, the particular test used, and, most relevant in the heirship area, the underlying assumptions in frequency or probability used to calculate the paternity index. See Allan Sincox and Marijane Hemza-Placek, *Challenging the Admissibility of DNA Testing,* 83 Ill.B.J. 170 (1995).

c. [9.46] Illinois Supreme Court Rule 215 and Forced Testing Issues

A blood test is a physical intrusion and invokes an individual's rights of privacy and due process protected under the federal and Illinois Constitutions. *See Schmerber v. California,* 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966); *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 103 L.Ed.2d 639, 109 S.Ct. 1402 (1989); *Henry v. Ryan,* 775 F.Supp. 247 (N.D.Ill. 1991).

Illinois Supreme Court Rule 215(a) governs requests for physical examinations, including blood tests:

> **In any action in which the physical or mental condition of a party or of a person in the party's custody or legal control *is in controversy,* the court, upon notice and on motion made within a reasonable time before the trial, may order such party to submit to a physical or mental examination. [**Emphasis added.**]**

S.Ct. Rule 215 "does not permit unlimited and indiscriminate mental and physical examinations of persons but by its terms gives a trial court discretion to order such examinations only when certain requirements are met." *In re Conservatorship of Estate of Stevenson,* 44 Ill.2d 525, 256 N.E.2d 766, 768, *cert. denied,* 91 S.Ct. 50 (1970). S.Ct. Rule 215 is unlike any other discovery provision in that it mandates a particularized showing of relevance as well as containing an "in controversy" requirement. Moreover, S.Ct. Rule 215 is the only discovery device that a party may not invoke without judicial authorization after notice and motion. See Richard A. Michael, CIVIL PROCEDURE BEFORE TRIAL §33.9 (2d ed. 2011) (Volume 4 of the ILLINOIS PRACTICE SERIES). Heirship cases may involve the blood testing of the child or alleged parent at issue, and this testing falls within S.Ct. Rule 215's ambit. *See Estate of Ragen,* 79 Ill.App.3d 8, 398 N.E.2d 198, 34 Ill.Dec. 523 (1st Dist. 1979).

Some heirship cases involve relatives who voluntarily submit to blood testing in the interest of resolving the controversy. *See Happel v. Mecklenburger,* 101 Ill.App.3d 107, 427 N.E.2d 974, 56 Ill.Dec. 569 (1st Dist. 1981); *People ex rel. DeVos v. Laurin,* 73 Ill.App.3d 219, 391 N.E.2d 164, 168, 29 Ill.Dec. 5 (1st Dist. 1979). An heirship hearing could also involve an S.Ct. Rule 215 motion to compel the blood testing of relatives of an alleged parent (*i.e.,* after the alleged parent has died) in order to establish paternity. *See Happel, supra; DeVos, supra; People ex rel. Coleman v. Ely,* 71 Ill.App.3d 701, 390 N.E.2d 140, 28 Ill.Dec. 158 (1st Dist. 1979); *Zavaleta v. Zavaleta,* 43 Ill.App.3d 1017, 358 N.E.2d 13, 3 Ill.Dec. 13 (1st Dist. 1976). Absent voluntary cooperation, a movant would have to show the court that the blood of a collateral relative of an alleged parent qualified as "in controversy" under S.Ct. Rule 215. *Stevenson, supra.*

4. [9.47] Burden

The "clear and convincing evidence" standard required for proof of paternity under the Probate Act of 1975 (see 755 ILCS 5/2-2) is the quantum of proof that leaves no reasonable doubt in the trier of fact's mind. *In re Estate of Lukas,* 155 Ill.App.3d 512, 508 N.E.2d 368, 374, 108 Ill.Dec. 207 (1st Dist.), *appeal denied,* 116 Ill.2d 555 (1987). An appellate court will reverse an order issued in an heirship proceeding finding paternity based on a preponderance of the evidence

because it employs an erroneous and lesser standard. *Estate of Ragen,* 79 Ill.App.3d 8, 398 N.E.2d 198, 34 Ill.Dec. 523 (1st Dist. 1979). In meeting or failing to meet this burden, witness credibility is crucial. *Lukas, supra.* As is true in other litigation contexts, the trier of fact must assess the credibility of both expert and nonexpert opinion witnesses in order to determine the weight to be accorded in their testimony. The trier of fact is not required to believe a complaining witness' testimony in a paternity adjudication merely because this testimony is unrebutted. *Id.*

H. Special Issues of Proof with Adopted Persons

1. [9.48] Validity of Adoption

Previously, Illinois courts required strict compliance with adoption statutes. *See Keal v. Rhydderck,* 317 Ill. 231, 148 N.E. 53 (1925). However, in support of the strong public policy favoring the finality and stability of adoptions, Illinois now requires only substantial compliance with the statutory provisions. *Dahl v. Grenier,* 126 Ill.App.3d 891, 467 N.E.2d 992, 81 Ill.Dec. 870 (1st Dist. 1984); *In re Custody of Mitchell,* 115 Ill.App.3d 169, 450 N.E.2d 368, 370, 70 Ill.Dec. 895 (5th Dist. 1983). Moreover, a contestant can collaterally attack an adoption decree only on the grounds that the adoption court lacked jurisdiction. *Gebhardt v. Warren,* 399 Ill. 196, 77 N.E.2d 187 (1948); *Dahl, supra. But see Christine A.T. v. H.T.,* 326 Ill.App.3d 569, 761 N.E.2d 299, 260 Ill.Dec. 455 (3d Dist. 2001) (contestant can also request evidentiary hearing within one year to raise issues that, if known to trial court at time of adoption decree, would have prevented that judgment).

Habeas corpus is an appropriate means to collaterally attack an adoption order when the order is void on jurisdictional grounds. *In re J.D.,* 317 Ill.App.3d 419, 739 N.E.2d 1036, 1039, 251 Ill.Dec. 103 (4th Dist. 2000), citing *Greco v. Chicago Foundlings Home,* 38 Ill.2d 289, 230 N.E.2d 865, 867 (1967). However, prior to invoking habeas corpus relief, a plaintiff or petitioner must show a "[p]rima facie legal right to custody" of the child. *Id.*

Collateral attacks on adoptions also may be time-barred. The Adoption Act provides: "No action to void or revoke a consent to or surrender for adoption, including an action based on fraud or duress, may be commenced after 12 months from the date the consent or surrender was executed." 750 ILCS 50/11(a). *See also J.D., supra.*

The law of the domicile jurisdiction governs an adoption's validity. However, if a child is adopted in a state other than Illinois and the adopting parents later move to Illinois, Illinois law governs the effect of the out-of-state adoption on the child's inheritance rights. *Keegan v. Geraghty,* 101 Ill. 26 (1881). For a case deciding the rights of an individual adopted in Illinois to inherit Kansas real estate, *see In re Riemann's Estate,* 124 Kan. 539, 262 P. 16, 17 (1927).

2. [9.49] Contracts To Adopt

The courts usually uphold contracts to adopt as valid and enforceable, and such a contract confers on the adopted child the right to obtain the share of the property to which he or she would be entitled had the adoption been judicially completed. *Dixon National Bank of Dixon, Illinois v. Neal,* 5 Ill.2d 328, 125 N.E.2d 463 (1955).

The courts will enforce oral contracts to adopt only if the proof relating to the contract's terms is clear and conclusive, leaving no room for reasonable doubt. *Monahan v. Monahan,* 14 Ill.2d 449, 153 N.E.2d 1, 3 (1958); *Weiss v. Beck,* 1 Ill.2d 420, 115 N.E.2d 768, 772 – 773 (1953). In *Monahan,* the Supreme Court also stated that a proponent may establish a contract to adopt by circumstantial evidence, provided that the evidence meets the requisite tests of sufficiency.

With contracts to adopt, as with other types of contracts, the courts will apply principles of equity. For example, when parties have failed to follow the Adoption Act and would therefore otherwise not meet the requirements for a valid adoption, some jurisdictions proceed on a theory of "equitable adoption." *See In re Estate of Staehli,* 86 Ill.App.3d 1, 407 N.E.2d 741, 41 Ill.Dec. 243 (1st Dist. 1980). While Illinois does not expressly recognize the theory of equitable adoption, Illinois courts may apply theories of estoppel or quasi-contract to establish an adoption when there is clear proof of an express or implied contract between the natural parents and the adopting parents. *See In re Estate of Edwards,* 106 Ill.App.3d 635, 435 N.E.2d 1379, 1381, 62 Ill.Dec. 407 (2d Dist. 1982); *Staehli, supra.*

A contract to adopt is limited to enforcement of contractual rights and does not confer the rights or legal consequences of a statutory adoption. *In re Marriage of Mancine,* 2014 IL App (1st) 111138-B, 9 N.E.3d 550, 380 Ill.Dec. 879.

3. [9.50] Construction of Instruments

In construing instruments (usually trusts) executed before 1955, Illinois courts, reflecting the social attitudes of the times, often excluded adopted individuals from the class of permissible beneficiaries based on interpretation of terms such as "lawful issue" and "descendants" as encompassing only blood offspring. These courts rationalized that they could determine a settlor's actual intent to exclude adopted persons because of the established meaning of these words. *See Ford v. Newman,* 77 Ill.2d 335, 396 N.E.2d 539, 33 Ill.Dec. 150 (1979); *Fischer v. La Fave,* 188 Ill.App.3d 16, 544 N.E.2d 55, 135 Ill.Dec. 698 (2d Dist. 1989), *appeal denied,* 129 Ill.2d 563 (1990); *Stewart v. Lafferty,* 12 Ill.2d 224, 145 N.E.2d 640 (1957); *Hale v. Hale,* 237 Ill.App. 410 (1st Dist. 1925); *Continental Illinois National Bank & Trust Company of Chicago v. Clancy,* 18 Ill.2d 124, 163 N.E.2d 523 (1959). When courts could not muster actual intent to exclude adopteds, they relied on a presumption first enunciated in *Smith v. Thomas,* 317 Ill. 150, 147 N.E. 788 (1925), called the "stranger to the adoption" rule (stranger rule). The court discussed the rationale behind this rule and expressed its perception of pre-1955 social attitudes in *Belfield v. Findlay,* 389 Ill. 526, 60 N.E.2d 403, 405 (1945):

> **But another person, who has never been a party to any adoption proceeding, who has never desired or requested to have such artificial relation established as to himself, why should his property be subjected to such an unnatural course of descent? To have it turned away upon his death from blood relations, where it would be the natural desire to have property go, and pass into the hands of an alien in blood, — to produce such effect, it seems to us, the language of the statute should be most clear and unmistakable, leaving no room for any question whatever.**

Note that at the time of *Belfield,* adopted persons were precluded from inheriting from the lineal or collateral kindred of the adopting parent by the Adoption Act of 1874.

In 1955, the Illinois legislature passed the Instruments Regarding Adopted Children Act, 760 ILCS 30/0.01, *et seq.,* and amended the Probate Act of 1975 to treat adopted persons more equally, such that a child lawfully adopted would be deemed a descendant of the adopting parent for purposes of inheritance from the adopting parent and from the adopting parent's lineal and collateral kindred. Also, for purposes of determining the property rights of any person under any written instrument executed on or after September 1, 1955, an adopted child would be deemed a natural child unless the contrary intent plainly appeared by the terms thereof. See Ill.Rev.Stat. (1980), c. 40, ¶1652. In *First National Bank of Chicago v. King,* 165 Ill.2d 533, 651 N.E.2d 127, 209 Ill.Dec. 199 (1995), the Illinois Supreme Court held that the standard for proving such contrary intent is by clear and convincing evidence.

The Instruments Regarding Adopted Children Act was prospective in nature, and the courts, for the most part, had little trouble finding that settlors had been put on notice that the old expressions such as "issue of their body" would no longer be held sufficient to exclude adopted persons. *See Wielert v. Larson,* 84 Ill.App.3d 151, 404 N.E.2d 1111, 1113, 39 Ill.Dec. 520 (2d Dist. 1980). *See also Martin v. Gerdes,* 169 Ill.App.3d 386, 523 N.E.2d 607, 119 Ill.Dec. 851 (4th Dist.), *appeal denied,* 122 Ill.2d 578 (1988).

Therefore, the rules appeared finally to be clear. For pre-1955 instruments, the stranger rule applied, and generic words such as "descendants," "issue," "children," and "heirs" were presumed to include adopted persons only when used by the adopting parent and presumed to exclude them when used by anyone else. For instruments executed on or after September 1, 1955, these words were presumed to include adopted persons regardless of who executed the instrument.

In 1988 and 1989, the First District Appellate Court issued three surprising rulings that were inconsistent with what appeared to be the established rules. In two of those cases, the courts held that children adopted by the settlor's or testator's child were included in pre-1955 instruments, while in the third case, the court held that the stranger rule violated public policy and that the ambiguity inherent in the generic terms must be resolved by extrinsic evidence in each case. *See Estate of Dawson,* 168 Ill.App.3d 391, 522 N.E.2d 770, 119 Ill.Dec. 108 (1st Dist.), *appeal denied,* 122 Ill.2d 573 (1988); *Chicago Title & Trust Co. v. Vance,* 175 Ill.App.3d 600, 529 N.E.2d 1134, 125 Ill.Dec. 58 (1st Dist. 1988), *appeal denied,* 124 Ill.2d 553 (1989); *Harris Trust & Savings Bank v. MacLean,* 186 Ill.App.3d 882, 542 N.E.2d 943, 134 Ill.Dec. 597 (1st Dist. 1989).

Meanwhile, also in 1989, the Second District Appellate Court issued an opinion following the stranger rule consistent with the cases decided prior to *Vance* and *Dawson. Fischer, supra.*

When the Illinois Supreme Court denied leave to appeal in all four cases, it left the issue in complete conflict among the appellate courts. In response to this situation, in 1989, the Illinois legislature enacted P.A. 86-842 (eff. Sept. 7, 1989), which amended the Instruments Regarding Adopted Children Act and the Probate Act to create a presumption in favor of adopted persons taking under written instruments executed prior to 1955. See 760 ILCS 30/1 (1992); 755 ILCS 5/2-4(f) (1992). These changes, rather than resolving the situation, once again prompted litigation over whether such terms as "descendants," "per stirpes," "children," or "issue," as of the date

written in the instrument but viewed through the prism of the statutory presumption, provided clear and convincing evidence of the testator's or settlor's intent to exclude adopted persons. *See, e.g., Schuttler v. Ruark,* 225 Ill.App.3d 678, 588 N.E.2d 478, 167 Ill.Dec. 837 (2d Dist.), *appeal denied,* 145 Ill.2d 644 (1992); *Continental Bank, N.A. v. Herguth,* 248 Ill.App.3d 292, 617 N.E.2d 852, 187 Ill.Dec. 395 (2d Dist.), *appeal denied,* 153 Ill.2d 558 (1993).

The Illinois Supreme Court attempted to resolve the legislative and judicial uncertainty spawned by the 1989 amendments in *King, supra.* The court held that a testator's limitation of a beneficiary class to "lawful descendants" did not demonstrate by clear and convincing evidence an intent to exclude adopted persons. The *King* court thus effectively overruled the majority opinion in *Herguth* in holding that the "plain and ordinary language" test must give way to the "clear and convincing evidence" test. The court opined that in the vast majority of cases, the settlor or testator (as well as the drafter) had no specific intentions regarding inclusion or exclusion of adopted persons and had, in fact, failed to consciously consider the matter. Therefore, what prior courts had deemed actual intent adduced by the terms used to describe a beneficiary class was actually the judicial application of a presumption or rule of construction that was overcome by the 1989 amendment's presumption. Following the decision in *King,* it would appear that the language necessary to exclude adopted persons must be quite specific to meet the clear and convincing test. For a case in which the court applies the *King* rationale, *see Segur v. Sbrizzi,* 304 Ill.App.3d 298, 709 N.E.2d 990, 237 Ill.Dec. 521 (3d Dist.), *appeal denied,* 185 Ill.2d 666 (1999). *See also In re Estate of Roller,* 377 Ill.App.3d 572, 880 N.E.2d 549, 316 Ill.Dec. 813 (4th Dist. 2007) (specifying that clear and convincing evidence test is not met by words "natural children" and "heirs of the body" and reiterating that there must be evidence that testator actually considered contingency of adoption).

Aside from the language of the instrument, certain actions of the adoptive parents may also exclude their adopted children from taking under pre-1955 instruments. The Probate Act provides that an adopted child will be deemed a child born of the adopting parent unless "[a]n adopting parent of an adopted child, in the belief that the adopted child would not take property under an instrument executed before September 1, 1955, acted to substantially benefit such adopted child when compared to the benefits conferred by such parent on the child or children born to the adopting parent." 755 ILCS 5/2-4(f)(2). The Probate Act defines "acted" as making taxable gifts to the adopted child, exercising or failing to exercise powers of appointment, or acting or failing to act in any other way. 755 ILCS 5/2-4(f)(2)(i). This presumably would include preferential treatment under the adopting parent's own estate plan if the "in the belief" intent element can be established.

4. [9.51] Equitable Adoption

The Illinois Supreme Court recognized the theory of equitable adoption in probate proceedings in *DeHart v. DeHart,* 2013 IL 114137, 986 N.E.2d 85, 369 Ill.Dec. 136. An equitable adoption arises when, even in the absence of an express or implied contract to adopt, there is clear and convincing evidence of a foster parent's intent to adopt and treat the child as his or her own adopted or natural child. *Id.* The court's holding in *DeHart* recognized equitable adoptions only in those cases in which there is sufficient, objective evidence of an intent to adopt (or fraudulently or mistakenly holding out as a natural child on a continual basis), supported by a

close and lasting family relationship. The court specifically stated that the nature of its holding "forecloses claims against the estate of any foster parent or stepparent who merely treats a foster or stepchild lovingly and on an equal basis with his or her natural or legally adopted children." [Emphasis omitted.] 2013 IL 114137 at ¶62.

Equitable adoption has only been recognized as a claim by an adult child in the context of inheritance proceedings and will contests, and it is inapplicable in the context of statutory child custody, adoption, parentage, and divorce proceedings. *See In re Parentage of Scarlett Z.,* 2015 IL 117904, 28 N.E.3d 776, 390 Ill.Dec. 123; *In re Marriage of Mancine,* 2014 IL App (1st) 111138-B, 9 N.E.3d 550, 380 Ill.Dec. 879; *In re Paternity of A.B.,* 2015 IL App. (5th) 140581-U at ¶15.

10 Statutory Rights of a Surviving Spouse

RYAN M. HARDING
JEANETTE S. HUNTER
McDermott Will & Emery LLP
Chicago

I. [10.1] INTRODUCTION

The surviving spouse of a decedent is in many ways favored under the law after the decedent's death. This special treatment arises even when the decedent has gone out of his or her way to disinherit the surviving spouse. However, there are limits to the favor that the law affords the surviving spouse, and with careful pre-death planning, a decedent generally can create an enforceable estate plan that disinherits the surviving spouse. Sometimes, though, the decedent does not act with hostility toward the surviving spouse; he or she simply wants to create a balance in the distribution of property between children from a prior marriage and the spouse. Perhaps too frequently, the passage of time and an unanticipated shift in the nature of and title to assets can create a situation in which the surviving spouse has not been afforded — from the surviving spouse's point of view — an equitable share of the decedent's estate.

This chapter analyzes statutory law and caselaw that are uniquely applicable to the surviving spouse of an Illinois decedent. Discussion of the rights granted under the law that are generally available to all of the beneficiaries and/or heirs of a decedent is limited to those circumstances in which there is a particular strategic advantage (or concern) to their exercise by a spouse. And, although the emphasis here is on the postmortem aspects of the representation of a surviving spouse, observations are made as to pre-death strategies that can limit (and sometimes defeat) the rights granted to a surviving spouse under Illinois law. As appropriate, the implications of federal tax law and aspects of Illinois law other than the Probate Act of 1975, 755 ILCS 5/1-1, *et seq.,* are included with the discussion of the various rights afforded to a surviving spouse by state law.

Same-sex marriage has been recognized in Illinois since 2014, and same-sex spouses are afforded the same rights as opposite-sex spouses under the Probate Act. Religious Freedom and Marriage Fairness Act, 750 ILCS 80/1, *et seq. See also Obergefell v. Hodges,* ___ U.S. ___, 192 L.Ed.2d 609, 135 S.Ct. 2584 (2015) (landmark Supreme Court ruling that fundamental right to marry is guaranteed to same-sex couples by both Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to United States Constitution). In addition, the Illinois Religious Freedom Protection and Civil Union Act, 750 ILCS 75/1, *et seq.,* affords a partner in a civil union the same rights as a spouse under the Probate Act. However, unmarried partners in a civil union will not be granted the same benefits as spouses under federal law, despite the Supreme Court opinion finding §3 of the Federal Defense of Marriage Act, Pub.L. No. 104-199, 110 Stat. 2419, to be unconstitutional (*United States v. Windsor,* ___ U.S. ___, 186 L.Ed.2d 808, 133 S.Ct. 2675 (2013)). Except where otherwise noted, a "spouse" includes a same-sex spouse and a partner in a civil union for all discussions of Illinois law included in this chapter.

Often, the most immediate problem faced by a surviving spouse is support during the months following the decedent's death. There is a statutory provision in the Probate Act creating a "spouse's award" that addresses the support needs of a surviving spouse. Inasmuch as the spouse's award provisions are equally applicable to the surviving spouses of both testate and intestate decedents, this discussion turns first to those provisions. The discussion is thereafter organized principally around the common ways by which property may pass at death — by intestacy, by will, by a revocable trust funded prior to death, by joint ownership, by retirement plan, and (in the case of a decedent who at one time resided in a community property state) by the rules of community property.

II. SPOUSE'S AWARD

A. [10.2] Support for Nine-Month Period

Section 15-1 of the Probate Act of 1975 seeks to address the needs of a surviving spouse to receive support from the decedent's probate estate for himself or herself, as well as minor or adult dependent children of the decedent, during the nine-month period after the decedent's death. 755 ILCS 5/15-1. *See In re Estate of Meyers,* 113 Ill.App.3d 886, 446 N.E.2d 892, 68 Ill.Dec. 721 (2d Dist. 1983) (stating that purpose of award is to help alleviate widow's problems by removing financial worries). The nine-month period arises from prior statutory provisions that effectively prevented the making of any distributions to the spouse during the first nine months after the death of the decedent.

Section 15-1 of the Probate Act provides:

> **(a) The surviving spouse of a deceased resident of this State whose estate, whether testate or intestate, is administered in this State, shall be allowed as the surviving spouse's own property, exempt from the enforcement of a judgment, garnishment or attachment in the possession of the representative, a sum of money that the court deems reasonable for the proper support of the surviving spouse for the period of 9 months after the death of the decedent in a manner suited to the condition in life of the surviving spouse and to the condition of the estate and an additional sum of money that the court deems reasonable for the proper support, during that period, of minor and adult dependent children of the decedent who reside with the surviving spouse at the time of decedent's death. The award may in no case be less than $20,000, together with an additional sum not less than $10,000 for each such child. The award shall be paid to the surviving spouse at such time or times, not exceeding 3 installments, as the court directs. If the surviving spouse dies before the award for his support is paid in full, the amount unpaid shall be paid to his estate. If the surviving spouse dies or abandons a child before the award for the support of a child is paid in full, the amount unpaid shall be paid for the benefit of the child to such person as the court directs.**
>
> **(b) The surviving spouse is entitled to the award unless the will of the decedent expressly provides that the provisions thereof for the surviving spouse are in lieu of the award and the surviving spouse does not renounce the will.** 755 ILCS 5/15-1.

The statutory language is not precise in guiding the court to the amount to be awarded. While the $20,000 minimum set forth in the Probate Act may not be denied, courts have significant discretion as to what is a "reasonable" amount of "proper support." Courts are clearly authorized to consider the lifestyle the surviving spouse enjoyed prior to the decedent's death (*In re Estate of Venturelli,* 54 Ill.App.3d 997, 370 N.E.2d 290, 12 Ill.Dec. 667 (3d Dist. 1977)), as well as later circumstances that affect the surviving spouse's needs (*In re Estate of Swisher,* 114 Ill.App.3d 42, 448 N.E.2d 182, 69 Ill.Dec. 722 (5th Dist. 1983)). In setting the award, courts also may properly take into account assets received by the surviving spouse from the decedent through nonprobate transfers, such as life insurance proceeds, joint tenancy accounts, and retirement benefits. *In re*

Estate of Parkhill, 192 Ill.App.3d 461, 548 N.E.2d 821, 139 Ill.Dec. 436 (4th Dist. 1989); *In re Estate of Caffrey,* 120 Ill.App.3d 917, 458 N.E.2d 1147, 76 Ill.Dec. 493 (1st Dist. 1983). Like the spouse's award, the minimum per-child award is set by §15-1 of the Probate Act at $10,000 per child.

At the time of death, the decedent must be an Illinois resident for the surviving spouse to qualify for the spouse's award. Other states may not have a similar residency requirement, and the surviving spouse may qualify for a spouse's award in another state if the decedent owned real property in such a state. The authors believe that the logic of the existing Illinois caselaw suggests that a court may properly take any other state's spouse's awards into consideration when evaluating a petition for an Illinois spouse's award.

Section 15-1 of the Probate Act does not require that the surviving spouse be (or ever have been) an Illinois resident, and §15-1 does not require that the spouse's award be applied for during the nine-month period after the decedent's death. Indeed, the probate of a decedent's estate might not even be commenced until after the nine-month period has passed. *See, e.g., In re Estate of Hubbard,* 54 Ill.App.3d 238, 369 N.E.2d 292, 11 Ill.Dec. 838 (2d Dist. 1977). Without a "valid reason," however, undue and excessive delay ordinarily bars the surviving spouse's right to the award. *Gahan v. Golden,* 330 Ill. 624, 162 N.E. 164, 169 (1928) (finding satisfactory explanation for delay under predecessor to §15-1). If nothing else, the complete passage of the nine-month period before application is made for a spouse's award should allow either the representative or the surviving spouse to provide details to the court as to the actual living expenses incurred by the surviving spouse during that period.

The testator can defeat the payment of a spouse's award only by including an express provision in the will, which is accepted by the surviving spouse by not renouncing the will. 755 ILCS 5/15-1(b). *See In re Estate of Harper,* 138 Ill.App.3d 571, 486 N.E.2d 295, 93 Ill.Dec. 194 (4th Dist. 1985).

B. [10.3] Application for Spouse's Award and Spouse's Right of Election

Under §15-3(a) of the Probate Act of 1975, it is the representative's duty to apply to the court to make the award. As a practical matter, however, it is the surviving spouse who often applies for the award (and therefore controls the application process). The surviving spouse, the representative, an heir or legatee, or a creditor of the estate may petition the court to increase or diminish the award. 755 ILCS 5/15-3(b). It is, however, incumbent on parties in opposition to the spouse's award (presumably because they believe it is too high) to challenge the award in an expeditious manner. *See In re Estate of Kendler,* 166 Ill.App.3d 191, 519 N.E.2d 1163, 116 Ill.Dec. 948 (2d Dist. 1988).

In estates subject to independent administration, the Probate Act grants the independent representative (but does not create any obligation) the discretion to pay a spouse's and/or child's award without application to the court, provided that the aggregate value of all awards does not exceed five percent of the gross value of the decedent's estate as of the date of death, as determined by the independent representative. 755 ILCS 5/28-7.

The Probate Act gives the surviving spouse the right to elect to take goods and chattel not specifically bequeathed by the decedent in whole or partial satisfaction of the spouse's award. 755 ILCS 5/15-4(a). One court has construed "goods and chattel" to mean tangible personal property, as distinguished from stocks, bonds, and the like. *In re Estate of Berman,* 39 Ill.App.2d 175, 187 N.E.2d 541 (2d Dist. 1963). The surviving spouse, therefore, has an enhanced ability to obtain family mementos of nominal value through a spouse's award. A decedent concerned about seeing that this property go to his or her children (instead of to the spouse) would be well advised to dispose of family mementos prior to death, specifically to bequeath the items in the will or to place them in a revocable trust where they are not subject to being a part of a spouse's award.

The surviving spouse must select the goods and chattel within 30 days after being notified of the allowance of the award, and the goods and chattel are valued at their appraised value for this purpose. If the surviving spouse dies before the expiration of the 30-day period, the representative of the surviving spouse's estate may make the selection. 755 ILCS 5/15-4(a).

C. [10.4] Death of Surviving Spouse Prior to Payment

The right to a spouse's award vests in a surviving spouse upon the decedent's death, and should the surviving spouse die during the administration of the estate, the spouse's award may be paid to the surviving spouse's personal representative. *See In re Estate of Gersch,* 43 Ill.App.2d 224, 193 N.E.2d 208 (1st Dist. 1963). As noted in §10.3 above, the surviving spouse's representative also succeeds to the right to elect to take goods and chattels. 755 ILCS 5/15-4(a). The death of the surviving spouse prior to the end of the nine-month period would seem to be an event that would reduce the amount of support required, but in the occasional case, the costs of a final illness might actually create more need for support than if the surviving spouse had remained healthy throughout the entire nine-month period after the decedent's death.

D. [10.5] Priority of Payment of Spouse's Award

The spouse's award is not an inheritable interest in the property of the deceased spouse, but it is a preferred claim and a debt of the estate. *In re Estate of Caffrey,* 120 Ill.App.3d 917, 458 N.E.2d 1147, 76 Ill.Dec. 493 (1st Dist. 1983). The spouse's award is a second-class claim against the decedent's estate, subject only to the prior payment of first-class claims (funeral and burial expenses, administration expenses, and statutory custodial claims). 755 ILCS 5/18-10; *In re Estate of Funk,* 221 Ill.2d 30, 849 N.E.2d 366, 302 Ill.Dec. 574 (2006) (finding that awards to surviving spouses and minors take precedence over debts to federal government).

In the case of an estate in which the first-class claims and the spouse's award appear to constitute the entire estate, the court has discretion to order the representative to deliver all of the estate's property to the surviving spouse. 755 ILCS 5/24-7. The surviving spouse then is liable to make the payment of the first-class claims and thereafter retain the balance of the estate's property as the spouse's award.

E. [10.6] Tax Consequences of Payment of Spouse's Award

For federal estate tax purposes, the payment of a spouse's award qualifies for the marital deduction, and despite its classification as a second-class claim under §18-10 of the Probate Act

of 1975 (755 ILCS 5/18-10), the spouse's award is not treated as a claim or debt against the decedent's estate. See 26 U.S.C. §661; 26 C.F.R. §1.661(a)-2(e); *Molner v. United States,* 175 F.Supp. 271 (N.D.Ill. 1959). Partners in a civil union are not currently entitled to a federal marital deduction. However, partners in a civil union are entitled to a marital deduction for purposes of the Illinois estate tax.

For federal income tax purposes, the spouse's award is treated as a distribution from the decedent's estate that is taxable to the spouse and deductible to the estate. *Molner, supra.* Careful tax planning can minimize the tax liability of the spouse or the decedent's estate. See Chapter 16 of this handbook.

F. [10.7] Waiver of Spouse's Award

The right to the surviving spouse's award may be barred by a valid antenuptial agreement. The antenuptial agreement need not contain the words "surviving spouse's award," as long as it was the intention of the parties that the agreement bar all claims that could be asserted by the surviving spouse at the decedent's death. *In re Estate of Cullen,* 66 Ill.App.2d 217, 213 N.E.2d 8 (3d Dist. 1965). Similarly, a valid postnuptial agreement can serve as a bar to the surviving spouse's award. *In re Estate of Brosseau,* 176 Ill.App.3d 450, 531 N.E.2d 158, 126 Ill.Dec. 25 (3d Dist. 1988).

A knowing, voluntary, and intentional waiver of the surviving spouse's award by a surviving spouse made after the decedent's death is permanent and enforceable. *In re Estate of Ferguson,* 313 Ill.App.3d 931, 730 N.E.2d 1205, 246 Ill.Dec. 740 (2d Dist. 2000). Such a waiver is invalid only if made without knowledge of all material facts and under circumstances constituting a breach of fiduciary duty by the executor. *In re Estate of Lightner,* 81 Ill.App.2d 263, 225 N.E.2d 417 (5th Dist. 1967).

G. [10.8] Rights of Unmarried Partners To Claim Spouse's Award

Like most states, Illinois has a public policy that favors the registration and solemnization of marriage. See Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/101, *et seq.* To date, no Illinois court has allowed a surviving spouse's award for the survivor of an unmarried couple who had been cohabiting prior to the decedent's death, and the authors believe that the existing Illinois caselaw suggests that the survivor of an unmarried couple would not be entitled to the spouse's award under current Illinois law. *See Hewitt v. Hewitt,* 77 Ill.2d 49, 394 N.E.2d 1204, 31 Ill.Dec. 827 (1979); *Costa v. Oliven,* 365 Ill.App.3d 244, 849 N.E.2d 122, 302 Ill.Dec. 507 (2d Dist. 2006); *In re Estate of Hall,* 302 Ill.App.3d 829, 707 N.E.2d 201, 236 Ill.Dec. 356 (1st Dist. 1998). However, in light of the Illinois Religious Freedom Protection and Civil Union Act and the Religious Freedom and Marriage Fairness Act, the First District has stated that recognizing common-law property rights between unmarried cohabitants does not contravene the public policy of strengthening and preserving the institution of marriage. *Blumenthal v. Brewer,* 2014 IL App (1st) 132250, 24 N.E.3d 168, 388 Ill.Dec. 260.

Unmarried couples (including same-sex and opposite-sex couples) are afforded all of the benefits of marriage under Illinois law if they enter into a civil union. See Illinois Religious

Freedom Protection and Civil Union Act, 750 ILCS 75/1, *et seq*. Thus, surviving spouse's awards are available for the survivor of both same-sex and opposite-sex unmarried couples who have entered into a valid civil union. 750 ILCS 75/20.

III. [10.9] INTESTATE DECEDENT

The two most important issues for a surviving spouse that arise in the context of an intestate decedent are (a) who shall inherit the property owned by the decedent that is subject to probate and (b) who shall be in charge of administering the affairs of the intestate estate. The answers to these two questions are set forth in separate provisions of the Probate Act of 1975. Section 2-1 of the Probate Act addresses the issue of who is to receive property passing by intestacy, and §9-3 of the Act addresses the issue of who shall be in charge of the intestate estate. 755 ILCS 5/2-1, 5/9-3.

A. [10.10] Right To Inherit Property

The rule regarding the right of a surviving spouse to inherit intestate property is relatively simple and depends on whether the decedent is survived by at least one descendant:

> **The intestate real and personal estate of a resident decedent and the intestate real estate in this State of a nonresident decedent, after all just claims against his estate are fully paid, descends and shall be distributed as follows:**
>
> **(a) If there is a surviving spouse and also a descendant of the decedent: ½ of the entire estate to the surviving spouse and ½ to the decedent's descendants per stirpes.**
>
> *** * ***
>
> **(c) If there is a surviving spouse but no descendant of the decedent: the entire estate to the surviving spouse.** 755 ILCS 5/2-1.

Thus, the surviving spouse is entitled to one half of the intestate estate if the decedent has a surviving descendant or all of the intestate estate if the decedent has no surviving descendant.

The Probate Act of 1975 is explicit as to the inheritance rights of a spouse, but the application of these rights can be less than clear in situations in which it is uncertain whether the decedent has been survived by a descendant. Section 2-3 of the Probate Act expressly states that a posthumous child is to be treated as if he or she were born during the decedent's lifetime. 755 ILCS 5/2-3. The Probate Act also treats adopted children (including children adopted after they reach age 18) as descendants of the decedent for purposes of §2-1 of the Act. 755 ILCS 5/2-4. Whether the decedent has been survived by an illegitimate child, however, is a question that is subject to adjudication after the decedent's death. See Chapter 9 of this handbook. Finally, in the event that an intestate parent and the sole descendant of the parent die simultaneously, §3-1(a) of the Probate Act provides that the parent shall be considered as having survived the child; thus, the surviving spouse of the deceased parent would receive all of the deceased parent's estate under §2-1 of the Act. 755 ILCS 5/3-1(a).

B. [10.11] Right To Appoint and Act as Administrator

Under §9-3 of the Probate Act of 1975, the surviving spouse is entitled to first preference in obtaining letters of administration for a decedent's intestate estate. 755 ILCS 5/9-3. The surviving spouse may nominate himself or herself to act as administrator or select another person of his or her choice. The surviving spouse has this right as long as he or she can qualify under §9-1 of the Probate Act to act as administrator (meaning that he or she must be at least 18 years old, must be a United States resident of sound mind, must not be an adjudged disabled person, and must never have been convicted of a felony). 755 ILCS 5/9-1.

In the case of a testate decedent, when there is a vacancy in the office of executor that is not filled by the terms of the decedent's will (resulting in the appointment of an administrator with will annexed), the surviving spouse (or his or her nominee) also has priority in being named administrator as long as he or she can qualify under §9-1 of the Probate Act, unless the surviving spouse has been removed by the court while acting as a representative of the estate. See 755 ILCS 5/6-9, 5/9-3.

C. [10.12] Effect of Validly Executed Prenuptial and Postnuptial Agreements on Intestate Share

Under the Illinois Uniform Premarital Agreement Act, 750 ILCS 10/1, *et seq.,* individuals about to be married are granted the right to enter into a prenuptial agreement that, if the statutory requirements for valid execution are met, is binding on them. Parties to prenuptial agreements often release their right to receive an intestate share of their spouse's estate and to act as (or have any say in the selection of) the administrator of the decedent's intestate estate. 750 ILCS 10/4(a)(3) expressly affirms the parties' rights to bargain as to the post-death distribution of property. The Act is less precise as to the authority of a party to contract with the other party as to a release of the right to act as administrator of intestate property but would seem to apply as it allows the parties to contract with respect to "the right to buy, sell, use . . . dispose of, or otherwise *manage and control* property." [Emphasis added.] 750 ILCS 10/4(a)(2). A person also may surrender rights relating to a testate spouse (*i.e.,* to claim a spouse's award pursuant to §15-1 of the Probate Act of 1975 or to renounce a will pursuant to §2-8 of the Probate Act, 755 ILCS 5/15-1, 5/2-8) by the terms of a prenuptial agreement.

Illinois law recognizes the validity of postnuptial agreements. *See, e.g., In re Estate of Brosseau,* 176 Ill.App.3d 450, 531 N.E.2d 158, 126 Ill.Dec. 25 (3d Dist. 1988). Accordingly, postnuptial agreements may contain the same kinds of releases as would be found in a typical prenuptial agreement. See 750 ILCS 5/503(a)(4).

D. [10.13] Rights of Unmarried Partners To Claim Intestate Shares

As noted in §10.8 above, Illinois public policy encourages marriage, and, to that end, there is no reported case in which the survivor of an unmarried couple who had been cohabiting has received an intestate share of the other's estate. *See Hewitt v. Hewitt,* 77 Ill.2d 49, 394 N.E.2d 1204, 31 Ill.Dec. 827 (1979) (Illinois cohabitants may not, by contract or otherwise, establish rights in each other's property except by contract as to which sexual relations provide no part of

the consideration); *Costa v. Oliven,* 365 Ill.App.3d 244, 849 N.E.2d 122, 302 Ill.Dec. 507 (2d Dist. 2006) (refusing to depart from *Hewitt* and deferring to legislature on question of rights of unmarried partners); *In re Estate of Hall,* 302 Ill.App.3d 829, 707 N.E.2d 201, 236 Ill.Dec. 356 (1st Dist. 1998) (finding that same-sex partner was not eligible for surviving spouse status). However, the First District has stated that the public policy reasons provided in *Hewitt* and *Costa* to treat unmarried partnerships as illicit no longer exist. *Blumenthal v. Brewer,* 2014 IL App (1st) 132250, 24 N.E.3d 168, 388 Ill.Dec. 260.

The surviving partner in a valid civil union under Illinois law will be entitled to claim an intestate share. 750 ILCS 75/20.

IV. TESTATE DECEDENT

A. [10.14] Renunciation of Decedent's Will

When a decedent has died testate, the surviving spouse has the right to renounce the decedent's will:

> **If a will is renounced by the testator's surviving spouse, whether or not the will contains any provision for the benefit of the surviving spouse, the surviving spouse is entitled to the following share of the testator's estate after payment of all just claims: ⅓ of the entire estate if the testator leaves a descendant or ½ of the entire estate if the testator leaves no descendant.** 755 ILCS 5/2-8(a).

As the Probate Act of 1975 makes clear, the right to renounce exists regardless of whether the decedent has provided for the surviving spouse in his or her will.

The right to renounce a will is personal to the surviving spouse and must be exercised during his or her lifetime. *Rock Island Bank & Trust Co. v. First National Bank of Rock Island,* 26 Ill.2d 47, 185 N.E.2d 890 (1962); *In re Estate of Klekunas,* 56 Ill.App.2d 70, 205 N.E.2d 497 (1st Dist. 1965). As with the surviving spouse's award, an individual also may waive his or her right to renounce the decedent's will, and such a waiver will be respected and enforced unless the surviving spouse shows that the waiver was unknowing, involuntary, or unintended. *In re Estate of Ferguson,* 313 Ill.App.3d 931, 730 N.E.2d 1205, 246 Ill.Dec. 740 (2d Dist. 2000).

When the choice cannot be exercised because the surviving spouse is incompetent, the renunciation may be made by a conservator, guardian ad litem, or next friend acting pursuant to court order. In determining whether to allow a renunciation, the court's primary focus is the best interests of the surviving spouse, considering all of the facts and circumstances. *Kinnett v. Hood,* 25 Ill.2d 600, 185 N.E.2d 888 (1962). Monetary issues may outweigh the other factors, but courts also will consider the adequacy of funds for the maintenance, care, and health of the surviving spouse and may analyze the benefit to the surviving spouse from the will as compared to renunciation. *Id.* Since the renunciation right provided by §2-8 of the Probate Act is solely for the benefit of the surviving spouse, however, courts cannot consider the interests of the heirs of the surviving incompetent spouse when making the decision to permit renunciation. *Id.; In re Estate of Dalton,* 60 Ill.2d 451, 328 N.E.2d 257 (1975).

In addition, an agent acting pursuant to a power of attorney may be able to renounce the decedent's will on behalf of an incompetent surviving spouse, provided that the agent is acting for the benefit of the surviving spouse and not his or her heirs. *See In re Estate of Stark,* 374 Ill.App.3d 516, 872 N.E.2d 1011, 313 Ill.Dec. 622 (4th Dist. 2007). In *Stark,* the decedent's son, acting as her agent under a power of attorney, renounced the decedent's will. The legatees under the will challenged the validity of the renunciation as not for the benefit of the principal. The appellate court dismissed the case on a jurisdictional issue and consequently did not reach the question of whether an agent under a power of attorney could effectively renounce the decedent's will. If available, it may be difficult for courts to ensure that the renunciation be solely for the benefit of the surviving spouse, in compliance with §2-8 of the Probate Act, without an examination of the facts and circumstances of each situation.

B. [10.15] Spouse Loses All Right To Take Under Will

While the spouse gains the right to receive either one half or one third of the decedent's estate by virtue of renouncing the will (depending on whether the decedent has a surviving descendant), the surviving spouse loses all interests provided for him or her under the will. The Probate Act of 1975 provides that the "filing of the instrument [of renunciation] is a complete bar to any claim of the surviving spouse under the will." 755 ILCS 5/2-8(b). Section 2-8(c) of the Probate Act operates to accelerate those remainder interests in testamentary trusts that are to come into existence after the surviving spouse's death unless the will expressly provides that in the case of renunciation the future interests shall not be accelerated. *Cf. Sueske v. Schofield,* 376 Ill. 431, 34 N.E.2d 399 (1941) (non-vested, contingent interests not affected by renunciation). If the surviving spouse renounces the decedent's will and a life interest in a testamentary trust is provided therein for the surviving spouse, then the will is to be construed as if the surviving spouse has predeceased the decedent. 755 ILCS 5/2-8(c). *See also Ramsay v. Ramsay,* 10 Ill.App.2d 459, 135 N.E.2d 172 (1st Dist. 1956).

Note that renunciation bars the surviving spouse from making "any claim . . . under the will." 755 ILCS 5/2-8(b). The Probate Act does not purport to bar a surviving spouse from making any claim to property received as a result of the decedent's death by reason of joint tenancy or beneficiary designation. Thus, a surviving spouse can renounce the will of his or her spouse and collect property from these other sources. Likewise, the surviving spouse cannot take a renunciatory share of property passing to others by operation of joint tenancy or beneficiary designation, absent an intent to defraud the surviving spouse. *See Hoeffner v. Hoeffner,* 389 Ill. 253, 59 N.E.2d 684 (1945); *In re Estate of Mocny,* 257 Ill.App.3d 291, 630 N.E.2d 87, 196 Ill.Dec. 390 (1st Dist. 1993).

However, it seems doubtful to these authors that a surviving spouse could benefit from the exercise of a power of appointment in his or her favor by the decedent under the will that the surviving spouse elects to renounce. After all, the benefit to the surviving spouse arises from an exercise in his or her favor by the decedent under the will. An argument to the contrary can be made, however, by reason of the appointed property passing by virtue of a different instrument.

Despite a renunciation, a surviving spouse may make one or more claims against the decedent's estate under Article 18 of the Probate Act, 755 ILCS 5/18-1, *et seq.;* a surviving spouse may be owed money by the estate for the same reasons as any third parties. In addition, spouses may have certain claims that are less likely to arise between unrelated parties, such as claims for tax payments (income and real estate) made on behalf of both spouses.

Often, decedents whose estate plans are embodied in a revocable trust and whose will is a simple pourover will have partially, but not fully, funded their revocable trust during their lifetime. A significant portion of such a decedent's assets may pass through the probate estate, and the surviving spouse may very well be tempted to renounce the will, receive the statutory share of the probate assets, and then seek to claim the benefits provided to him or her pursuant to the revocable trust.

No Illinois court has settled the question of whether a surviving spouse who renounces the decedent's will can receive the benefit of probate property after it is distributed to a revocable trust, such as through a marital trust created under the revocable trust instrument. The Probate Act provides only that the renunciation is a "complete bar to any claim of the surviving spouse under the will." 755 ILCS 5/2-8(b). Notably, the Probate Act does not deny the renouncing spouse "any benefit" from property passing under the will. In a typical pourover will estate plan, the surviving spouse's renunciation does not impact the valid claim of the trustee for all assets bequeathed to the revocable trust. If the surviving spouse is a beneficiary of the trust, the Probate Act does not explicitly prevent the surviving spouse from receiving the benefit of the trust property, even property passing through the probate estate.

To the contrary, however, the intent of §2-8 may suggest that the surviving spouse should not receive any benefit from probate property passing to a trust as a result of a pourover will. The surviving spouse's renunciation represents a rejection of the provisions made for the spouse in the decedent's will (*Gowling v. Gowling,* 405 Ill. 165, 90 N.E.2d 188 (1950)), and it seems antithetical to allow the surviving spouse to take the renunciatory share and still benefit from property passing through the probate estate into a trust of which the surviving spouse is a beneficiary. A simple, and enforceable, manner for a decedent to defeat this possibility is to provide in the revocable trust that if the surviving spouse renounces the decedent's will, then he or she shall be deemed to have predeceased the decedent for all purposes of the revocable trust.

The authors believe, however, that any property transferred to a revocable trust prior to the decedent's date of death (and thus not passing through probate) should not be affected by an election to renounce the decedent's will. No Illinois court has definitively addressed the issue, but this result is consistent with the surviving spouse's ability to claim property received by reason of joint tenancy or beneficiary designation (*i.e.,* property received through nonprobate transfers) even though he or she has renounced the will.

A renunciation filed in Illinois probate proceedings does not extend to real estate located in other states (*In re Estate of Pericles,* 266 Ill.App.3d 1096, 641 N.E.2d 10, 204 Ill.Dec. 51 (1st Dist. 1994)) and does not deprive the surviving spouse of the right to serve in a fiduciary capacity to which he or she is named in the will (*In re Donovan's Estate,* 409 Ill. 195, 98 N.E.2d 757 (1951)). Presumably, the decedent can provide to the contrary by the express terms of his or her

will, although the seven-month period for renunciation (which may be extended) (755 ILCS 5/2-8(b)) suggests that it may not be practical (or recognized by the court administering the estate) to provide that renunciation of the will means the forfeiture of an executor position granted under a will since it could interfere with the orderly administration of an estate.

Given the myriad possibilities as to how property will pass at a decedent's death, the surviving spouse will have to consider carefully the wisdom of renunciation. The Probate Act provides the surviving spouse with a choice — the ability to pick between receiving property either through the plan set forth in the decedent's will or through renunciation. The correct choice will not always be apparent in cases in which the surviving spouse is made the discretionary beneficiary of one or more trusts or is not the controlling trustee of a trust of which he or she is an intended beneficiary. In these cases, it is impossible to quantify precisely the benefit that the surviving spouse is to take under the will. The willingness of the trustee to make discretionary distributions to the surviving spouse and the ability of the surviving spouse to control the disposition of assets at death through the proper exercise of a power of appointment would seem to be the critical considerations in deciding whether to renounce the decedent's will. Assets received by renouncing the decedent's will become the property of the surviving spouse and can be disposed of in any manner the surviving spouse chooses, including by lifetime gifts to others.

If the decedent's estate is potentially subject to death taxes, the surviving spouse should consider the tax treatment of the property received by way of a renunciation. Section 2-8(a) of the Probate Act provides that the surviving spouse's share is determined after the payment of "all just claims," which includes death taxes payable as a result of the decedent's death. *In re Estate of Grant,* 83 Ill.2d 379, 415 N.E.2d 416, 47 Ill.Dec. 411 (1980). See also 755 ILCS 5/18-10. The Illinois Supreme Court has ruled that federal estate taxes constitute claims against the decedent's estate, and, consequently, the surviving spouse's renunciatory share is calculated based on the net estate remaining after the payment of death taxes. 415 N.E.2d at 419 – 420. This method of calculating the surviving spouse's share has the very real effect of diminishing the share of the estate received by the surviving spouse, even though death taxes are not generally levied on property passing to a surviving spouse. The share received by the surviving spouse is, therefore, not either one third or one half of the probate estate, depending on whether there is a surviving descendant, but is that fraction of the residue remaining after death taxes are paid. Depending on the estate tax bracket in which the estate is situated, the share received by the surviving spouse can be more like 20 percent or 30 percent of the value of the probate estate.

Unmarried surviving partners in an Illinois civil union will be subject to federal tax on property received by a decedent. Illinois will not assess a tax on such property, however, which will lead to complicated tax issues to consider.

C. [10.16] Procedure for Surviving Spouse To Renounce Will

The procedure for a surviving spouse to renounce a decedent's will is set forth in §2-8(b) of the Probate Act of 1975, which provides:

> **In order to renounce a will, the testator's surviving spouse must file in the court in which the will was admitted to probate a written instrument signed by the surviving**

> **spouse and declaring the renunciation. The time of filing the instrument is: (1) within 7 months after the admission of the will to probate or (2) within such further time as may be allowed by the court if, within 7 months after the admission of the will to probate or before the expiration of any extended period, the surviving spouse files a petition therefor setting forth that litigation is pending that affects the share of the surviving spouse in the estate. The filing of the instrument is a complete bar to any claim of the surviving spouse under the will.** 755 ILCS 5/2-8(b).

The seven-month period set by the Probate Act, or the later deadline set by the court, to file an instrument of renunciation operates as a statute of limitations, and the surviving spouse may not renounce the decedent's will after the time period has run. *In re Estate of Goodlett,* 225 Ill.App.3d 581, 588 N.E.2d 367, 167 Ill.Dec. 726 (2d Dist. 1992). *See also In re Estate of Davison,* 102 Ill.App.3d 644, 430 N.E.2d 222, 58 Ill.Dec. 280 (1st Dist. 1981). If the surviving spouse is seeking an extension of the seven-month period under §2-8(b) of the Probate Act, the statute requires that litigation be pending — not just threatened — that will affect the surviving spouse's share of the estate.

In several instances, the uncertainty of pending litigation may cause a surviving spouse to seek an extension of time before deciding whether to renounce the decedent's will. For example, there may be a will contest pending, making it impossible for the surviving spouse to know what will is being renounced. There may also be large claims pending against the estate or actions relating to whether the decedent is survived by a descendant. It is incumbent, however, on the surviving spouse to demonstrate to the court why it is necessary to obtain an extension.

The act of renunciation does not bar the surviving spouse from filing a will contest. *In re Estate of Croce,* 273 Ill.App.3d 599, 653 N.E.2d 20, 210 Ill.Dec. 433 (1st Dist. 1995). In *Croce,* the surviving spouse filed a will contest petition and then, one month later, renounced the will. The court reasoned that the election to take the renunciatory share is not an affirmation of the validity of the will and concluded that the legislature did not intend that a surviving spouse would lose his or her right to contest the decedent's will if he or she chose to renounce. The court compared the surviving spouse's ability to file a renunciation and simultaneously maintain a will contest to the permissibility of alternative pleading under Illinois law. The court, however, did not address what happens to the renunciation in the event that the surviving spouse's will contest succeeds. If the will contest is successful and intestacy results, it seems as if the election should lapse because there would be no will to renounce against. In the more confusing instance in which a prior will is probated that contains a greater share for the surviving spouse, it is unclear whether the surviving spouse would receive those increased benefits and the renunciatory share.

As stated in §10.14 above, the surviving spouse must be alive at the time the instrument of renunciation is filed with the court. Once filed, a renunciation cannot be withdrawn without court order and upon good reason shown. *In re Donovan's Estate,* 409 Ill. 195, 98 N.E.2d 757 (1951). *See, e.g., Hanson v. Clark,* 246 Ill.App. 496 (1st Dist. 1927) (discussing circumstances justifying withdrawal of surviving spouse's renunciation).

It bears mentioning that the provisions relating to renunciation in §2-8 of the Probate Act are quite different from the provisions relating to disclaiming property in §2-7 of the Probate Act. There is no authority to partially renounce a decedent's will. Renouncing a will is an all-or-nothing proposition. *See, e.g., Donovan's Estate, supra.* Also, unlike the disclaimer provisions, a surviving spouse may accept a benefit from an estate prior to renouncing the will.

A spouse who renounces his or her spouse's will remains eligible for a spouse's award pursuant to Article 15 of the Probate Act, 755 ILCS 5/15-1, *et seq.* Since the spouse's award is designed to provide support to the surviving spouse for the nine-month period after death, there is no reason that the act of renouncing the decedent's will should have any impact on the size of a spouse's award granted to the surviving spouse. A spouse's award is a claim against the estate, and the share of property due to the surviving spouse who has renounced the will is calculated after the payment of the spouse's award. Thus, the spouse's award is partially satisfied by property that would otherwise pass to the surviving spouse through the share due him or her by renunciation.

D. [10.17] Effect on Other Beneficiaries

The renunciation by the surviving spouse of a decedent's will invariably affects the interests of the other beneficiaries. Besides causing the acceleration of remainder interests as discussed in §10.15 above, §2-8 of the Probate Act of 1975 directs the payment of the elected share after the payment of all claims. Few testators contemplate or direct what happens when a sizeable portion of their estate has to be paid to an unexpected party (the surviving spouse) or when a surviving spouse renounces a will that provides for a full residuary gift in the form of a trust with discretionary provisions for the surviving spouse. Thus, the interests of the other beneficiaries may be either increased or decreased by a renunciation. If some, but not all, of the other beneficiaries of the will are the natural objects of the surviving spouse's bounty, he or she may be interested in knowing how these other beneficiaries would be affected by a renunciation.

Section 2-8(d) of the Probate Act sets forth how to deal with the effect of a renunciation that either increases or decreases the interests of the other legatees:

> **If a surviving spouse of the testator renounces the will and the legacies to other persons are thereby diminished or increased in value, the court, upon settlement of the estate, shall abate from or add to the legacies in such a manner as to apportion the loss or advantage among the legatees in proportion to the amount and value of their legacies.** 755 ILCS 5/2-8(d).

In applying §2-8(d), Illinois courts traditionally have followed the rule of discriminatory abatement by class of gift (*i.e.,* residuary legacies should abate before general legacies, and general legacies should abate before specific legacies). *Kincaid v. Moore,* 233 Ill. 584, 84 N.E. 633 (1908), *aff'g in pertinent part* 138 Ill.App. 23 (3d Dist. 1907); *Lewis v. Sedgwick,* 223 Ill. 213, 79 N.E. 14 (1906). Considering this history, courts have found that the purpose of §2-8(d) and its predecessor statutes was not to change the long-standing rule of discriminatory abatement of gifts to pay the surviving spouse's renunciatory share. *Hopper v. Beavers,* 362 Ill.App.3d 913,

841 N.E.2d 1019, 299 Ill.Dec. 287 (5th Dist. 2005); *In re Estate of Brinkman,* 26 Ill.App.3d 780, 326 N.E.2d 167 (1st Dist. 1975). Accordingly, under §2-8(d), the residuary legacies under a will must abate first, followed by the general legacies and then by the specific legacies in order to satisfy the surviving spouse's renunciatory share.

Real property subject to probate in other states should be ignored when considering the impact of a spouse's renunciation of a will. Only the Illinois property is to be considered in calculating the spouse's share. *In re Estate of Pericles,* 266 Ill.App.3d 1096, 641 N.E.2d 10, 204 Ill.Dec. 51 (1st Dist. 1994).

E. [10.18] Renunciation Against Testamentary Substitutes

As noted in §10.15 above, a decedent's estate plan commonly is embodied in a pourover will and a revocable trust. The will is called a "pourover" will because it provides that all, or substantially all, of the probate estate is to pass to the revocable trust. The decedent's intentions as to the ultimate recipients of his or her property are set forth in the trust.

If the decedent has taken no action to transfer any property to the revocable trust, then all of his or her property passes under the will, and the spouse has all of the rights described in §10.16 above as to renouncing the will and taking the forced statutory share. Indeed, unless the revocable trust expressly provides otherwise, the spouse may also stand to receive benefits under the terms of the revocable trust from the balance of the property that passes to it under the decedent's will.

The more difficult case arises when a decedent has transferred all, or substantially all, of his or her assets to a revocable trust prior to death and the revocable trust provides no benefit for the surviving spouse. The leading Illinois case on this subject is *Johnson v. La Grange State Bank,* 73 Ill.2d 342, 383 N.E.2d 185, 195, 22 Ill.Dec. 709 (1978), in which the Illinois Supreme Court held that property transferred to a revocable trust is not subject to the surviving spouse's renunciation unless the transfer to the revocable trust was "colorable, illusory, or tantamount to fraud." In *In re Estate of Defilippis,* 289 Ill.App.3d 695, 683 N.E.2d 453, 458, 225 Ill.Dec. 285 (1st Dist. 1997), the First District explained the three-part test set forth in *Johnson* as follows:

> **The supreme court in *Johnson* explained that intent to defraud the surviving spouse of his or her marital rights does not involve the traditional meaning of fraud. Rather, intent to defraud refers to a transfer that is illusory or colorable. A transfer that is illusory is one that takes back all that it gives. A transfer that is colorable is one that appears absolute on its face but due to some tacit or secret understanding between the transferor and the transferee is in fact not a transfer because the parties intended that ownership be retained by the transferor. . . . In either case, the question is really whether there was present donative intent or, instead, an intent to retain complete ownership. [**Citation omitted.**]**

Illinois courts give a great deal of weight to the rights of individuals to control their property, and the Supreme Court in *Johnson, supra,* was unmoved by the request to limit that right when the decedent acted intentionally to deprive a spouse of the right to a forced share of property. "[T]he owner of property has an absolute right to dispose of his property during his lifetime in

any manner he sees fit, and he may do so even though the transfer is for the precise purpose of minimizing or defeating the statutory marital interests of the spouse in the property conveyed." 383 N.E.2d at 192. The legislature also has created statutory protections for transfers made during lifetime that would appear to make any attack on those transfers more difficult. See Lifetime Transfer of Property Act, 755 ILCS 25/0.01, *et seq.*

A spouse's rights do not increase if divorce proceedings are pending. One spouse may change his or her estate plan to remove the other spouse as a beneficiary and may transfer assets to a revocable trust to defeat the other spouse's renunciation rights. In such a case, the soon-to-be ex-spouse's interests are not protected under the Illinois Marriage and Dissolution of Marriage Act. *In re Marriage of Centioli,* 335 Ill.App.3d 650, 781 N.E.2d 611, 269 Ill.Dec. 814 (1st Dist. 2002) (finding that husband could change his estate plan to remove his wife during pendency of divorce proceedings).

There has been criticism that Illinois law makes it too easy to completely disinherit a spouse and deprive the spouse of any meaningful forced marital share. See, *e.g.,* Helene S. Shapo, *The Widow's Mite Gets Smaller: Deficiencies in Illinois Elective Share Law,* 24 S.Ill.U.L.J. 95 (1999).

V. QUALIFIED RETIREMENT PLANS

A. [10.19] Spousal Rights Under Qualified Retirement Plans

The Retirement Equity Act of 1984, Pub.L. No. 98-397, 98 Stat. 1426, amended the Internal Revenue Code and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.,* to prevent a married participant from naming a person other than his or her spouse as a beneficiary of a qualified retirement plan benefit unless the spouse consents in writing to another person being designated as the beneficiary. See 26 U.S.C. §§401(a)(11), 417; 29 U.S.C. §1055. This requirement will not apply to partners in a civil union. Almost all qualified plan administrators are aware of this requirement, and qualified retirement plans typically have terms that specifically override the beneficiary designation of a married participant who names a beneficiary other than his or her spouse without the spouse's consent.

Even if a spouse consents to the participant's naming another person as the spouse's beneficiary, the participant cannot change the beneficiary designation to another third party unless the spouse consents in writing to the new beneficiary designation or the spouse's original written consent specifically allows the participant to change the original beneficiary designation. 26 U.S.C. §417(a).

Special care needs to be taken in instances in which a party to a prenuptial agreement purports to sign a waiver of rights as a surviving spouse under a qualified retirement plan. *See generally In re Estate of Hopkins,* 214 Ill.App.3d 427, 574 N.E.2d 230, 158 Ill.Dec. 436 (2d Dist. 1991). Prudence requires that any such waiver signed before marriage should be confirmed in writing and submitted to a plan administrator after the marriage.

Most plans also require that a new beneficiary designation be filed with the plan administrator prior to a participant's death, or it will not take effect. In cases of both divorce and remarriage, participants and surviving spouses should review and update beneficiary designations, if necessary.

In the case of a participant who is remarried, whether the new spouse is entitled to surviving spouse benefits depends on whether the prior spouse has the right to be treated as a "surviving spouse" for purposes of the plan survivor benefits and whether the participant commenced payment of benefits under the plan prior to death. 26 C.F.R. §1.401(a)-20, Q&A 25.

If a participant assigned all or part of the qualified plan benefits to his or her first spouse or named the first spouse as the surviving spouse for purposes of the qualified plan benefits under a qualified domestic relations order as part of a divorce proceeding, the current spouse may not be entitled to any surviving spouse benefits, despite any designation to the contrary. See 26 U.S.C. §414(p); 29 U.S.C. §1056(d).

In addition, if, prior to death, a participant commenced payments and designated a beneficiary for purposes of survivor annuity payments, the beneficiary of the survivor annuity typically cannot be changed even if the participant is later divorced from the beneficiary and subsequently remarries. 26 C.F.R. §1.401(a)-20, Q&A 25. But if a participant elected payment of retirement benefits in a form that provides guaranteed payments for a certain number of years (*e.g.,* payment in the form of a ten-year certain and continuous annuity), the participant may be able to change his or her beneficiary designation and name a new spouse as the beneficiary of the remaining guaranteed payments, should the participant die prior to the expiration of the certain period.

Unlike qualified retirement plans, there is no requirement that a spouse be named as a beneficiary of an individual retirement account (IRA). Moreover, the spouse need not be named as a beneficiary of the proceeds of a qualified retirement plan if they have been "rolled over" into an IRA. Since IRAs pass by beneficiary designations and are not part of a decedent's probate estate (unless the estate is named as the beneficiary), the assets of a decedent's IRA are not subject to renunciation by the surviving spouse, and neither are they available to pay a spouse's award.

In a taxable estate, the designation of a person other than a spouse (or a charity) as a beneficiary of an IRA will increase the estate's death tax obligations. Depending on the terms of the decedent's will, some of the death tax obligations may be properly apportioned to that IRA.

In addition, a surviving spouse may be entitled to survivor benefits under other employee benefit plans, including life insurance and accidental death benefit plans, if the participant designated his or her surviving spouse as beneficiary. Unlike qualified retirement plan benefits, an employee is not required by law to name his or her spouse as a beneficiary of any life insurance or other employee benefits. Beneficiary designations under life insurance or death benefit plans are typically not canceled by divorce or remarriage, so a participant must update his or her designations upon either event. *See Egelhoff v. Egelhoff,* 532 U.S. 141, 149 L.Ed.2d 264, 121 S.Ct. 1322 (2001).

Surviving spouses also may be entitled to temporary continuation of medical coverage in the event of a spouse's death if the surviving spouse had medical coverage based on his or her status as the decedent's spouse. Federal law requires most employers to allow a surviving spouse to continue medical coverage at his or her own expense for up to 36 months, and many states, including Illinois, require insurance companies to provide a similar option for surviving spouses. 26 U.S.C. §4980B; 29 U.S.C. §1162; 215 ILCS 5/367.2. Partners in a civil union would be subject to the same requirement in Illinois, but not for federal purposes unless they are legally married.

B. [10.20] The Pension Protection Act of 2006

The Pension Protection Act of 2006, Pub.L. No. 109-280, 120 Stat. 780, contains provisions that are beneficial to employees who choose to name a beneficiary of their qualified retirement plans who is not the spouse of the employee, such as unmarried partners or partners of a civil union. Section 826 of the Pension Protection Act provides more flexibility for hardship distributions (120 Stat. 999), and §829 allows account balance rollovers for non-spouse beneficiaries (120 Stat. 1002).

Under prior law, an employee benefit plan only could allow a participant to receive a hardship withdrawal due to a financial hardship affecting the participant, a spouse, or a dependent of the participant. Under the Pension Protection Act, an employee benefit plan may permit hardship distributions for medical expenses, tuition, and funeral expenses of a "primary beneficiary" under the plan. A "primary beneficiary" is the individual who is named as the beneficiary under the plan and has a right to all or a portion of the participant's account balance at death. The primary beneficiary need not be the participant's spouse and, indeed, could be an unmarried partner or partner in a civil union. Similarly, the Pension Protection Act allows non-spouse beneficiaries to roll over the decedent's account balance to an inherited IRA.

While these provisions currently are optional for employers, they represent a significant change in domestic partnership law because many, if not most, domestic partners do not meet the definition of a "dependent" under the Internal Revenue Code, and same-sex partners of a civil union do not qualify as "spouses" unless legally married.

Even following the enactment of the Illinois Religious Freedom Protection and Civil Union Act, partners in a civil union will not have spousal rights under many employee benefit plans, absent specific provisions in the plans including partners in a valid civil union under Illinois law. When creating estate plans for partners in a civil union involving significant employee benefit plan assets, careful consideration should be given to the terms and definitions of the applicable plans and how they might apply in particular situations.

VI. [10.21] COMMUNITY PROPERTY AND QUASI-COMMUNITY PROPERTY

If the decedent and the surviving spouse resided in a community property or quasi-community property state at any time during their marriage, title to the assets in the decedent's name at death does not necessarily mean that he or she owned all of the interests in

this property at his or her death. Some portion of the property may belong to the surviving spouse as his or her share of the community property. As such, the surviving spouse would be entitled to receive his or her share of the property from the decedent's estate. The surviving spouse would seek return of his or her share of the property through a citation proceeding (Article 16 of the Probate Act of 1975, 755 ILCS 5/16-1, *et seq*.) and not a claim against the decedent's estate. *In re Estate of Shandling,* 26 Ill.App.3d 610, 325 N.E.2d 444 (1st Dist. 1975) (holding that proceeding regarding decedent's title to assets is not "claim" under Probate Act). The surviving spouse's assertion in that proceeding would be that the estate is holding property that belongs to him or her.

Note that the existence of community property in the decedent's estate can be a double-edged sword if the surviving spouse also owns community property at the time of the decedent's death. The portion of this community property belonging to the decedent is properly recoverable by the decedent's estate from the surviving spouse in a citation proceeding.

11 Citations To Discover/Recover Assets

JAMES R. PRANGER
Peter J. Latz & Associates LLC
Oak Park

IICLE® gratefully acknowledges the Honorable Jeffrey A. Malak (ret.), who provided this chapter for previous editions.

I. [11.1] INTRODUCTION

The Probate Act of 1975, 755 ILCS 5/1-1, *et seq.,* "confers upon the court the power to determine all questions of title, claims of adverse title and the right of property." *In re Estate of Parker,* 2011 IL App (1st) 102871, ¶62, 957 N.E.2d 454, 354 Ill.Dec. 138. Article XVI of the Probate Act addresses "Recovery of Property and Discovery of Information" in three sections. Section 16-1(a) provides:

> **Upon the filing of a petition therefor by the representative or by any other person interested in the estate or, in the case of an estate of a ward by any other person, the court shall order a citation to issue for the appearance before it of any person whom the petitioner believes (1) to have concealed, converted or embezzled or to have in his possession or control any personal property, books of account, papers or evidences of debt or title to lands which belonged to a person whose estate is being administered in that court or which belongs to his estate or to his representative or (2) to have information or knowledge withheld by the respondent from the representative and needed by the representative for the recovery of any property by suit or otherwise. The petition shall contain a request for the relief sought.** 755 ILCS 5/16-1(a).

Section 16-2 provides:

> **Upon the filing of a petition therefor by any person and upon such notice as the court may direct, the court may order a representative having in his possession or control any personal property, book of account, paper or evidence of title to land or of debt which belongs to the petitioner to deliver the same to the petitioner or his agent. The court may hear the evidence offered by any party, may determine all questions of title, claims of adverse title and the right of property and may enter such orders and judgment as the case requires.** 755 ILCS 5/16-2.

Section 16-1 governs citations on behalf of an estate, to discover information, or to recover property for the estate. A §16-1 citation procedure "represent[s] a simple, comprehensive and summary method of discovering and recovering estate assets found to be in the possession and control of others." *Estate of Chernyk,* 138 Ill.App.3d 233, 485 N.E.2d 1169, 1171, 92 Ill.Dec. 926 (1st Dist. 1985), *appeal denied* (1986). The statutory terms "concealed," "converted," "embezzled," and "have in possession" are accorded their ordinary legal definitions absent a contrary expression of intent from the legislature. *In re Estate of Muhammad,* 123 Ill.App.3d 756, 463 N.E.2d 732, 737, 79 Ill.Dec. 178 (1st Dist. 1984).

Section 16-2 governs citations by third parties to recover property from the estate. It also has been interpreted to allow a third party the right to a discovery citation. *See Bjork v. O'Meara,* 2013 IL 114044, 986 N.E.2d 626, 369 Ill.Dec. 313. See §11.48 below.

Section 16-3 provides the right to a jury trial for any "questions of title, claims of adverse title and the right of property." 755 ILCS 5/16-3.

The provisions now codified as §§16-1 through 16-3, in various forms, have been part of the Illinois statutes since 1829. See An Act Relative to Wills and Testaments, Executors and Administrators, and the Settlement of Estates §86, Rev. Code of Laws of Ill., pp. 191, 222 (1829). The provisions have been quite similar to their current iteration for over 100 years. *See, e.g., Wahl v. Jacobs,* 146 Ill.App. 71, 73 (3d Dist. 1908).

Because citation procedures "are summary and informal in nature, the courts are liberal in the procedures they permit to be followed under these sections." *Parker, supra,* 2011 IL App (1st) 102871 at ¶62, quoting *Chernyk, supra,* 485 N.E.2d at 1172. That having been said, §16-1 creates "a statutory remedy which requires strict compliance with its provisions." *In re Estate of DeKoekkoek,* 76 Ill.App.3d 549, 395 N.E.2d 113, 116, 32 Ill.Dec. 166 (1st Dist. 1979). *See also In re Rackliffe's Estate,* 366 Ill. 22, 7 N.E.2d 754 (1937) (strict compliance with statute required).

While citations to discover and to recover are among the most useful tools in the probate arsenal, the statutory language providing for citations has never been very detailed by modern standards. Presumably, for this reason, many of the rules governing citation practice have developed and evolved through decisions of the Illinois courts over the past century.

II. [11.2] SUBJECT-MATTER JURISDICTION

Subject-matter jurisdiction for a citation proceeding exists in a court only once an estate has been opened. *Community Bank of Plano v. Otto,* 324 Ill.App.3d 471, 755 N.E.2d 532, 535, 258 Ill.Dec. 149 (2d Dist. 2001). The "mere invocation of the Probate Act is not sufficient to confer jurisdiction on the trial court." *Id.* Once an estate has been opened, an "allegation that certain property belonging to the estate is in the possession of the respondent, coupled with a prayer for a proper order by the court has been found to be a sufficient basis for the trial court's jurisdiction." *In re Estate of DeKoekkoek,* 76 Ill.App.3d 549, 395 N.E.2d 113, 116, 32 Ill.Dec. 166 (1st Dist. 1979). Absent a prayer that the court determine right and title to the property at issue, the court will lack subject-matter jurisdiction to rule on a recovery citation. *In re Conservatorship of Baker,* 79 Ill.App.2d 234, 223 N.E.2d 744 (4th Dist. 1967). *See also In re Estate of Garrett,* 81 Ill.App.2d 141, 224 N.E.2d 654, 658 – 659 (2d Dist. 1967).

A. [11.3] Verified Petition

A party seeking any citation under §16-1 or §16-2 of the Probate Act of 1975 must file a petition requesting the issuance of the applicable citation. 755 ILCS 5/16-1(a), 5/16-2. Absent a proper petition, the trial court lacks subject-matter jurisdiction to proceed on a citation. *In re Guardianship of Holm,* 236 Ill.App.3d 805, 602 N.E.2d 979, 981, 177 Ill.Dec. 84 (4th Dist. 1992). See §11.50 below regarding the requirement that the citation form accompany the petition.

Section 1-5 of the Probate Act requires that petitions be brought under oath or affirmation. 755 ILCS 5/1-5. Absent such verification, a petition may be dismissed for lack of subject-matter jurisdiction. *In re Estate of Lindheimer,* 36 Ill.App.2d 434, 184 N.E.2d 759 (1st Dist. 1962). A request from an attorney, without a certification, or an unverified request by a party does not

satisfy this requirement. However, prior to judgment, an unverified petition may be saved by a motion to amend the pleading to add the required certification. *In re Estate of Wrage,* 194 Ill.App.3d 117, 550 N.E.2d 1115, 1117 – 1118, 141 Ill.Dec. 69 (1st Dist. 1990).

B. [11.4] Verified Response

Once a recovery citation is properly served or service is waived (see §11.9 below), the pleading sequence is the same as in other cases. The respondent may move to dismiss or file a response. See §11.52 below. Since the petition must be verified, the response also must be verified. 735 ILCS 5/2-605.

C. [11.5] Proper Subject Asset; Citation May Not Be Used To Collect Debt

A recovery citation "is not a general collection tool for the estate — the indebtedness of a person to the estate is not a basis for use of section 16-1, as a debt to an estate does not make the debtor's property the estate's." *In re Estate of Yucis,* 382 Ill.App.3d 1062, 890 N.E.2d 964, 969, 322 Ill.Dec. 45 (2d Dist. 2008). *Accord Wilson v. Prochnow,* 354 Ill. 98, 187 N.E. 914 (1933); *Johnson v. Nelson,* 341 Ill. 119, 173 N.E. 77 (1930).

At least one court has held that a citation is not a proper vehicle to seek recovery of excessive attorneys' fees paid to an attorney for the estate. *In re Estate of Lundmark,* 42 Ill.App.2d 80, 191 N.E.2d 657, 659 (1st Dist. 1963). *But see In re Estate of DeKoekkoek,* 76 Ill.App.3d 549, 395 N.E.2d 113, 116, 32 Ill.Dec. 166 (1st Dist. 1979) (distinguishing *Lundmark* when petition contained "other allegations as to the ownership the money" but ruling against petitioner on other grounds). When the petition also alleges a breach of fiduciary obligation on the part of the respondent, courts have upheld §16-1 petitions (755 ILCS 5/16-1) to recover fees paid. *In re Estate of Stuffing,* 213 Ill.App.3d 921, 572 N.E.2d 458, 157 Ill.Dec. 389 (4th Dist. 1991). The *Stuffing* court noted *Lundmark* but cited *DeKoekkoek* approvingly and reversed dismissal of the citation petition for recovery of excessive fees.

Other courts have allowed use of a citation to recover moneys obtained by a fiduciary despite respondents' assertions that the amount sought was a mere debt that was not recoverable by citation. *See, e.g., In re Estate of Lashmett,* 369 Ill.App.3d 1013, 874 N.E.2d 65, 314 Ill.Dec. 155 (4th Dist. 2007); *In re Conservatorship of Baker,* 117 Ill.App.2d 332, 253 N.E.2d 550 (4th Dist. 1969); *In re Willich's Estate,* 338 Ill.App. 289, 87 N.E.2d 327 (3d Dist. 1949).

In *Lashmett, supra,* the decedent mother and her daughter had a course of dealing whereby the daughter would trade in the mother's farm equipment for new equipment titled to the daughter. Subsequently, the mother and daughter would agree on monetary compensation that the daughter would pay to the mother for the trade-in value. Shortly prior to the mother's death, the daughter traded in a piece of the mother's equipment for new equipment titled to the daughter, but did not compensate the mother before the mother's death.

The appellate court upheld the trial court's ruling that a recovery citation was a proper method for the mother's estate to recover from the daughter the trade-in value of the equipment. The court noted that if the daughter retained possession of the equipment, a recovery citation

would be appropriate, and likened the trade-in to a conversion. 874 N.E.2d at 71. "If, by her sole action, [the daughter] converted the tractor into cash, the obligation due from her to return to or repay the estate does not change the character of the obligation owed by her. In such a case, a debtor-creditor relationship between Christine and her mother did not exist." *Id.*

The conversion theory used in *Lashmett* appears to be limited to the fiduciary who actually converts an asset. *See In re Estate of Pinckard,* 94 Ill.App.3d 34, 417 N.E.2d 1360, 49 Ill.Dec. 346 (1st Dist. 1980). In *Pinckard,* a citation was held a proper vehicle to recover from an attorney who had improperly received fees from an estate, but not against his purported partners. Although they might be legally responsible under partnership law for their partner's "conversion," they were not the individual who converted estate assets, and therefore the citation was not the proper action against them. 417 N.E.2d at 1370 (noting that partners might be liable to estate as debtors: "party who is legally responsible for the act of conversion of another may well have an action at law brought against him and eventually become a judgment debtor").

As the court in *Yucis, supra,* stated: "Certain cases [*e.g., Lashmett*] use language that suggests that section 16-1 is available whenever a decedent's fiduciary is indebted to the estate." 890 N.E.2d at 969 n.1. The *Yucis* court went out of its way to "urge caution with regard to the broader language. The core purpose of section 16-1 is to recover property that is identifiably that of the estate." *Id.*

D. [11.6] Proper Subject Asset; Citation May Be Used To Recover Real Property

Since the 1960s, courts have consistently allowed citations to recover real as well as personal property. *In re Estate of Coleman,* 77 Ill.App.3d 397, 395 N.E.2d 1209, 32 Ill.Dec. 828 (2d Dist. 1979); *In re Estate of Garrett,* 81 Ill.App.2d 141, 224 N.E.2d 654, 659 (2d Dist. 1967). *See also Estate of Jackson,* 354 Ill.App.3d 616, 821 N.E.2d 1199, 1200, 290 Ill.Dec. 625 (1st Dist. 2004).

E. [11.7] Other Citation Subject Assets

Although the majority of citations concern jointly held property, a citation may be used for many purposes. Examples of attempted citation subjects (not necessarily successful) include

1. the corpus of an inter vivos trust (*Estate of Chernyk,* 138 Ill.App.3d 233, 485 N.E.2d 1169, 92 Ill.Dec. 926 (1st Dist. 1985), *appeal denied* (1986); *In re Estate of Anderson,* 69 Ill.App.2d 352, 217 N.E.2d 444 (1st Dist. 1966) (accounts in express inter vivos trusts));

2. inter vivos gifts (*Telford v. Patton,* 144 Ill. 611, 33 N.E. 1119 (1892); *In re Wright's Estate,* 304 Ill.App. 87, 25 N.E.2d 909 (2d Dist. 1940));

3. the contents of a safe-deposit box, the lease for which was in the name of the deceased (*In re Estate of Stahl,* 13 Ill.App.3d 680, 301 N.E.2d 82 (1st Dist. 1973));

4. a failed joint tenancy (*Estate of Poliquin v. Carden,* 247 Ill.App.3d 112, 617 N.E.2d 40, 186 Ill.Dec. 801 (1st Dist. 1993));

5. a *Totten* trust account (*In re Estate of Petralia,* 32 Ill.2d 134, 204 N.E.2d 1 (1965)) (*see In re Totten,* 179 N.Y 112, 71 N.E. 748 (1904));

6. a payable-on-death account (*In re Estate of Gubala,* 81 Ill.App.2d 378, 225 N.E.2d 646 (1st Dist. 1967));

7. a beneficial interest in an Illinois land trust (*In re Estate of Romanowski,* 329 Ill.App.3d 769, 771 N.E.2d 966, 265 Ill.Dec. 7 (1st Dist. 2002)); and

8. an original document revoking a prior will (*Robinson v. First State Bank of Monticello,* 97 Ill.2d 174, 454 N.E.2d 288, 290 – 291, 73 Ill.Dec. 428 (1983)).

III. [11.8] PERSONAL JURISDICTION

At the time a discovery or recovery citation is issued, it is given a return date. If the citation is timely served, the return date technically could be the examination date. More often, the parties will confer to set another date for the examination, and the return date effectively becomes a status date. The citation must be served at least ten days prior to the return date. 755 ILCS 5/16-1(b). The rules for service and return are the same as in all other civil cases. *See In re Estate of Hoellen,* 367 Ill.App.3d 240, 854 N.E.2d 774, 782, 305 Ill.Dec. 182 (1st Dist. 2006).

A. [11.9] Personal Service Required

Because of the nature of probate proceedings, the respondent may already be a party to the probate case before the citation issues. Nevertheless, absent an express waiver of service, the citation should be personally served on the respondent, not on counsel. Personal jurisdiction must be "established either by service of process in accordance with statutory requirements or if a party voluntarily submits to the court's jurisdiction." *In re Estate of Rodden,* 2015 IL App (1st) 140798, ¶7, 26 N.E.3d 417, 389 Ill.Dec. 327. Moreover, no authority suggests that a party's general appearance in a probate proceeding constitutes voluntary submission as a citation respondent. Proper service of the citation (or an express waiver of service) is necessary to establish personal jurisdiction over the respondent, despite the fact that the probate court has in rem jurisdiction over the estate and all proceedings within it. *Cf. id.*

There appears to be no case expressly requiring that the petition be served with the issued citation, but certainly the respondent should be served with both. Because the petition sets forth the cause of action giving rise to the citation (in the case of a recovery citation), the respondent must be served with the petition so that there is proper notice of the claim and the respondent can formulate an answer.

B. [11.10] Limits of Personal Jurisdiction

Personal jurisdiction extends only to the person who converted or possessed the asset at issue. *Conner v. Akin,* 29 Ill.App. 584 (4th Dist. 1888). The appellate court in *Conner* reversed the trial court's recovery order entered against both an individual who had possession of the asset at issue

and her husband because the court lacked jurisdiction over the husband. *See also Harris v. Vitale,* 2014 IL App (1st) 123514, ¶14, 8 N.E.3d 178, 380 Ill.Dec. 247 (citation was not proper vehicle to determine liability of party potentially responsible for another's conversion of estate assets); *In re Estate of Pinckard,* 94 Ill.App.3d 34, 417 N.E.2d 1360, 1370, 49 Ill.Dec. 346 (1st Dist. 1980) (citation was proper against lawyer who personally received estate assets, but not against lawyer's partners who did not).

C. [11.11] Out-of-State Respondents

Any probate proceeding "is not an action between party and party, but is in the nature of a proceeding *in rem*, acting directly on the *res*." *See In re Estate Miller,* 28 Ill.App.2d 110, 170 N.E.2d 640, 643 (1st Dist. 1960), citing *Mosier v. Osborn,* 284 Ill. 141, 119 N.E. 924, 926 (1918). To the extent that an estate asset to be recovered is located in Illinois, the Illinois court has in rem jurisdiction over the asset. In such a case, one should only need to provide statutory notice in a manner such that the respondent, wherever located, receives actual notice or there is a reasonable certainty of actual notice. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950). A petitioner should not rely on notice by publication, but service in compliance with the rules for personal service on in-state respondents should suffice, regardless of the lack of contact between the out-of-state respondent and the jurisdiction.

When the citation involves both an out-of-state respondent and an asset located outside the state, there is no authority stating that the probate court can obtain personal jurisdiction absent compliance with the long-arm statute. The out-of-state respondent will be amenable to service under the Illinois long-arm statute if he or she has the requisite minimum contacts with Illinois. 735 ILCS 5/2-209; *Estate of Jaron v. Jaron,* 98 Ill.App.3d 547, 424 N.E.2d 849, 850, 54 Ill.Dec. 99 (1st Dist. 1981). In *Jaron,* the appellate court affirmed the trial court's personal jurisdiction over an Indiana citation respondent served pursuant to the long-arm statute because the respondent had visited Illinois banks to withdraw the money at issue. The *Jaron* court also noted that a respondent who is a beneficiary of the estate and takes advantage of the Illinois estate cannot object to Illinois jurisdiction. *Id.*

If the estate representative is neither the petitioner nor the respondent, §16-1(b) nonetheless requires that the representative be given written notice of the proceeding at least five days before the return date. 755 ILCS 5/16-1(b).

IV. [11.12] VENUE/REMOVAL

The proper venue for both discovery and recovery citations is the court in which the estate is pending, regardless of whether the respondent resides elsewhere. *In re Willich's Estate,* 338 Ill.App. 289, 87 N.E.2d 327 (3d Dist. 1949).

A citation may not be removed to a federal court on the basis of diversity jurisdiction. *Georges v. Glick,* 856 F.2d 971 (7th Cir. 1988); *Fischer v. Hartford Life Insurance Co.,* 486 F.Supp.2d 735, 739 (N.D.Ill. 2007) (referring to "probate exception" to federal court diversity jurisdiction). There is no Illinois authority directly addressing whether such an exception would

also apply in a federal question case, but at least one federal court (Judge Shadur) has allowed removal of a citation to recover on federal question grounds, without any discussion of federal deference to state court probate proceedings. *Estate of Slack,* 195 F.Supp.2d 1052, 1054 (N.D.Ill. 2002) ("it is nonetheless clear . . . that the removal is well-founded because ERISA is squarely implicated").

At least one trial court in Illinois has determined that a citation seeking to recover an out-of-jurisdiction asset from an out-of-state respondent is amenable to a forum non conveniens motion. *See In re Estate of Hoof,* Probate No. P. Ka. 96 0715 (Kane Cty.Cir. Apr. 19, 1999).

V. STANDING OF PETITIONER

A. [11.13] Section 16-1 of the Probate Act

In addition to the representative of the estate, §16-1(a) of the Probate Act of 1975 confers standing to bring a §16-1 citation petition on "any other person interested in the estate" or, in the case of the estate of a ward, "any other person." 755 ILCS 5/16-1(a). Examples of persons who might have standing include

1. heirs at law in an intestate estate (*see, e.g., In re Estate of Oliver,* 21 Ill.App.3d 416, 315 N.E.2d 331, 332 (5th Dist. 1974));

2. legatees in a testate estate (*see, e.g., In re Halaska's Estate,* 307 Ill.App.176, 30 N.E.2d 119, 120 – 121 (1st Dist. 1940));

3. creditors of a decedent's estate seeking to have assets returned to the estate to satisfy their claims (*see, e.g., In re Estate of Costello,* 72 Ill.App.2d 112, 218 N.E.2d 769 (1st Dist. 1966));

4. a vested contingent remainderperson, subject to defeasance (*In re Estate of Arnold,* 142 Ill.App.3d 258, 491 N.E.2d 458, 462 – 463, 96 Ill.Dec. 412 (5th Dist. 1986)); and

5. creditors of a disabled adult's estate, even after the allowance of their claims, based on the statute's "any other person" language in the estate of a ward (*In re Estate of Hayden,* 105 Ill.App.3d 60, 433 N.E.2d 1161, 60 Ill.Dec. 923 (4th Dist. 1982)).

In those instances in which the estate representative is the respondent, Probate Act §16-1(c) provides that the court may appoint a special administrator, who will have standing to prosecute the citation on behalf of the estate. 755 ILCS 5/16-1(c). See §11.18 below.

1. [11.14] Standing of a Disinherited Heir

One of the more significant disputed issues in citation practice is the standing of a disinherited heir: does an heir disinherited by a will, who contests the will's validity but has not yet prevailed in that contest, have standing to seek a citation? At first reading, the authority

appears to be in conflict. *See In re Estate of Lipchik,* 27 Ill.App.3d 331, 326 N.E.2d 464 (1st Dist. 1975). *But see In re Estate of Lundmark,* 42 Ill.App.2d 80, 191 N.E.2d 657 (1st Dist. 1963).

The case that has been cited for the negative position is *Lundmark.* There, a putative heir not named in the deceased's will petitioned for recovery of allegedly excessive fees paid to the estate's conservator and attorney under the predecessor to §16-1 of the Probate Act of 1975. 191 N.E.2d at 658. The petitioner had engaged attorneys to prosecute a will contest but had yet to file the contest. The trial court dismissed the petition. The issue before the appellate court was "whether the petition comes within the provisions of" the statute. *Id.* However, a close reading of the case suggests that the appellate court did not decide the petitioner's standing as an excluded heir.

Prior to filing his citation petition, the heir had moved to intervene in the estate. *Id.* The trial court denied that motion, and the appellate court speculated regarding its reasons: "[T]he probate court undoubtedly denied petitioner's motion to intervene in the probate of the estate because it appeared that he had no interest therein." *Id.* The trial court gave the heir leave to renew his motion to intervene, but he "instead filed the [citation] petition in question." *Id.* After reciting this background, the appellate court addressed and apparently decided the case on the issue of whether the citation statute "is intended to apply to what petitioner claims was the payment of excessive fees." 191 N.E.2d at 659.

The appellate court also noted that the petition failed to meet the procedural requirement of a prayer for relief, because the heir "nowhere prays for the issuance of a citation." *Id.* While the appellate court noted that the petitioner's "averment that he is an heir-at-law is . . . still in the wishful stage and will not be realized unless he succeeds in his will contest," it neither expressly nor clearly decided whether the heir lacked standing as a citation petitioner for that reason. 191 N.E.2d at 658.

Unlike *Lundmark, Lipchik, supra,* clearly and directly addressed the standing of a disinherited heir to petition for a citation. 326 N.E.2d at 467 – 468. In *Lipchik,* disinherited heirs filed a will contest and then petitioned for appointment of a special administrator to discover and recover assets (under the predecessor provisions to Probate Act §§16-1 and 16-3). The respondent executor moved to dismiss the petition, asserting inter alia that the "plaintiffs had no standing to file a recovery citation against [respondent] until and unless the will was set aside," because until that time, they would have no interest in the estate. 326 N.E.2d at 467. The trial court agreed and dismissed the petition. *Id.* The appellate court reversed, holding that the petitioners had standing. 326 N.E.2d at 468.

The appellate court observed that there was "no Illinois case defining when a person is 'interested in the estate' " under the citation statute. *Id.* The court did not cite *Lundmark,* citing instead *In re Estate of King,* 91 Ill.App.2d 342, 235 N.E.2d 276 (1st Dist. 1968), in which it was held that the term "interested persons" in the Probate Act's will contest provision included legatees of a prior will who stood to take if the contested will were set aside. By the same logic, the *Lipchik* court found that the petitioners' "interest, though uncertain, is enough" to convey standing to assert a citation petition. 326 N.E.2d at 468.

After *Lipchik* was decided, the legislature amended the Probate Act to expressly define "interested person" as one who "has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative." 755 ILCS 5/1-2.11. It has been argued, including in the prior iteration of this chapter, that this amendment effectively overrules *Lipchik* because a disinherited heir who has yet to prevail in a will contest lacks a financial interest "at the time of reference."

However, courts continued to favorably cite the standing decision in *Lipchik. See, e.g., In re Estate of Keener,* 167 Ill.App.3d 270, 521 N.E.2d 232, 233 – 234, 118 Ill.Dec. 164 (3d Dist. 1988) (disinherited heir has standing to bring will contest); *Kelley v. First State Bank of Princeton,* 81 Ill.App.3d 402, 401 N.E.2d 247, 255, 36 Ill.Dec. 566 (3d Dist. 1980) (disinherited legatee under prior will has standing to bring will contest). *Cf. In re Estate of Staehli,* 86 Ill.App.3d 1, 407 N.E.2d 741, 745, 41 Ill.Dec. 243 (1st Dist. 1980) (plaintiff who was neither heir nor legatee under prior will lacked standing to intervene and bring will contest). There appear to be no reported cases criticizing the *Lipchik* standing rationale. Likewise, the legislative history of the amendment adding the definition does not indicate any intent to overrule *Lipchik.*

While no reported case since *Lipchik* expressly addresses the issue of a disinherited heir's standing to bring a citation petition, the Illinois Supreme Court has ruled that a disinherited heir is automatically an interested person under the Probate Act. *In re Estate of Schlenker,* 209 Ill.2d 456, 808 N.E.2d 995, 1000, 283 Ill.Dec 707 (2004) (disinherited heir was "interested person" with standing to bring will contest: "one's status as an heir is sufficient, in itself, to confer standing" — "[i]f you are an heir, you qualify as a matter of law as an 'interested person' "). Thus, heirs are "interested persons" even though their financial interest at the time of reference is contingent on the future success of a will contest. It must be noted that one member of the court disagreed with the majority's rationale, asserting that it rendered superfluous the definition's requirements of "financial interest, property right or fiduciary status." 808 N.E.2d at 1001 (Garman, J., specially concurring).

Unless the Illinois Supreme Court resolves the issue, the standing of a disinherited heir to seek a recovery citation under the Probate Act will remain less than clear.

2. [11.15] Standing of a Trustee to Recover for a Trust

Given the trend of equating wills and testamentary trusts, it should not be surprising that at least one trustee has attempted to petition under §16-1 of the Probate Act of 1975 (755 ILCS 5/16-1) for a citation to recover assets into a trust estate. *See In re Estate of Boyar,* 2012 IL App (1st) 111013, ¶12, 964 N.E.2d 1248, 358 Ill.Dec. 226, *rev'd on other grounds,* 2013 IL 113655. In *Boyar,* a testamentary trust trustee filed a petition for citations to discover and recover, for the trust, personal property held by the administrator of the settlor's probate estate. *Id.* The trustee petitioned not just under Probate Act §16-2, but also under §16-1. *Id.*

The Illinois appellate court and Supreme Court decided the case on grounds unrelated to the citation petition. However, in dicta, the Supreme Court noted that the trustee's petition was

brought in part under §16-1 and opined that, because the trustee had "no authority over or interest in Decedent's estate in any capacity," §16-1 would be "inapplicable." *In re Estate of Boyar,* 2013 IL 113655, ¶15 n.1, 986 N.E.2d 1170, 369 Ill.Dec. 534. Accordingly, while §16-1 may be invoked to recover assets into a decedent's or guardianship estate, the *Boyar* dicta suggests that a trustee under a testamentary trust lacks standing to bring a §16-1 petition to recover for a trust estate.

B. [11.16] Section 16-2 of the Probate Act

Section 16-2 of the Probate Act of 1975 confers standing to bring a citation petition under that section to "any person." 755 ILCS 5/16-2. Examples of persons who might have standing to petition for a §16-2 citation include

1. a person claiming an ownership interest in an intellectual property asset held in the estate (*see, e.g., In re Estate of Brown,* 2014 IL App (1st) 122857, 13 N.E.3d 271, 382 Ill.Dec. 858);

2. a person claiming an ownership interest in financial accounts held by the estate (*see, e.g., Bjork v. O'Meara,* 2013 IL 114044, 986 N.E.2d 626, 369 Ill.Dec. 313);

3. a joint tenant with the decedent in financial accounts when the estate representative obtained the assets of the accounts (as agent under a power of attorney) before the decedent's death and personally possessed those assets after the decedent's death (*see, e.g., In re Estate of Miller,* 334 Ill.App.3d 692, 778 N.E.2d 262, 265 – 266, 268 Ill.Dec. 276 (5th Dist. 2002)); and

4. a trustee of a testamentary trust claiming an ownership interest in personal property held in the settlor's probate estate (*see, e.g., In re Estate of Boyar,* 2013 IL 113655, ¶15 n.1, 986 N.E.2d 1170, 369 Ill.Dec. 534 (trustee asserted §16-2 petition, but "whether section 16-2 is the proper vehicle" for trustee was not before court and its decision "should not be construed as expressing any view" regarding trustee's standing)).

VI. [11.17] NECESSARY AND PROPER RESPONDENTS

The citation petitioner must name as respondent the party or parties claimed to be in possession of the assets at issue or who may have come into possession of some part of the assets. *In re Estate of Weisberg,* 62 Ill.App.3d 578, 378 N.E.2d 1152, 1157, 1159, 19 Ill.Dec. 277 (1st Dist. 1978). Such parties can be joined in an original petition for citation to recover or by way of an amended or supplemental petition if their names are not known when the original petition for citation to discover assets is filed. *See In re Estate of Garrett,* 81 Ill.App.2d 141, 224 N.E.2d 654, 659 (2d Dist. 1967).

A person who is suspected of having knowledge of estate assets but not of being in possession of some or all of the assets in question is not a proper respondent in a recovery citation. *See Harris v. Vitale,* 2014 IL App (1st) 123514, ¶14, 8 N.E.3d 178, 380 Ill.Dec. 247; *In*

re Estate of Pinckard, 94 Ill.App.3d 34, 417 N.E.2d 1360, 1370, 49 Ill.Dec. 346 (1st Dist. 1980) (citation was proper against lawyer who converted estate assets, but not against lawyer's partners who did not receive any part of assets, even if they might be legally responsible for their partner's conversion); *Conner v. Akin,* 29 Ill.App. 584 (4th Dist. 1888). Of course, such a person might be a proper respondent for a discovery citation.

VII. [11.18] APPOINTMENT OF A SPECIAL ADMINISTRATOR

Section 16-1(c) of the Probate Act of 1975 provides:

> **If the representative is the respondent, the court may appoint a special administrator to represent the estate. The court may permit the special administrator to prosecute or defend an appeal.** 755 ILCS 5/16-1(c).

The purpose of §16-1(c) is to provide "for the appointment of a disinterested person to represent the estate when the duly appointed administrator is confronted with a conflict of interest concerning his right to property as opposed to the estate's right to the same property." *In re Estate of Lipchik,* 27 Ill.App.3d 331, 326 N.E.2d 464, 467 (1st Dist. 1975). The statutory predecessor to §16-1(c) provided that the court could appoint a guardian ad litem, rather than a special administrator, a difference only in form, not substance. *In re Estate of Oliver,* 21 Ill.App.3d 416, 315 N.E.2d 331 (5th Dist. 1974).

A special administrator appointed under §16-1(c) "is not equivalent to an administrator [of the estate] appointed pursuant to the Probate Act." *Community Bank of Plano v. Otto,* 324 Ill.App.3d 471, 755 N.E.2d 532, 535, 258 Ill.Dec. 149 (2d Dist. 2001). The special administrator "is empowered only" to pursue "the action in which he is appointed; no letters of office to administer the estate issue." *Id.*

When the court determines to appoint a special administrator pursuant to §16-1(c), it may appoint the petitioner in that capacity to prosecute the citation. *See, e.g., In re Estate of Miller,* 334 Ill.App.3d 692, 778 N.E.2d 262, 265 – 266, 268 Ill.Dec. 276 (5th Dist. 2002). Of course, there is no requirement that the petitioner be appointed as the special administrator. It appears that the court has discretion regarding whether and who to appoint.

VIII. COUNTERCLAIMS

A. [11.19] Counterclaims Are Permitted

A recovery citation respondent may file a counterclaim. Section 16-1 citation (755 ILCS 5/16-1) respondents have attempted to assert counterclaims in decedent's estates in varying circumstances. *See, e.g., In re Estate of Parker,* 2011 IL App (1st) 102871, ¶40, 957 N.E.2d 454, 354 Ill.Dec. 138 (counterclaim sought recovery for services rendered to decedent prior to death); *In re Estate of Rice,* 154 Ill.App.3d 591, 507 N.E.2d 78, 79 – 80, 107 Ill.Dec. 414 (1st Dist. 1987)

(when petitioner sought recovery from decedent's former partnership, respondent counterclaimed for overcompensation of decedent, breach of partnership agreement, and unjust enrichment).

B. [11.20] Timeliness of Counterclaim

The reported decisions regarding citation counterclaim issues revolve around whether the counterclaim was time-barred. *See, e.g., In re Estate of Parker,* 2011 IL App (1st) 102871, ¶53, 957 N.E.2d 454, 354 Ill.Dec. 138; *In re Estate of Rice,* 154 Ill.App.3d 591, 507 N.E.2d 78, 79 – 80, 107 Ill.Dec. 414 (1st Dist. 1987). Since a counterclaim against the estate representative in a decedent's estate constitutes a claim against the estate, it is subject to the jurisdictional limitations of §18-12 of the Probate Act of 1975. 755 ILCS 5/18-12.

In both *Rice* and *Parker,* the petitioners filed for recovery citations after the claim deadline, and the respondents asserted counterclaims thereafter. *Parker, supra,* 2011 IL App (1st) 102871 at ¶53; *Rice, supra,* 507 N.E.2d at 79 – 80. In both cases, the petitioners moved to dismiss the counterclaims as time-barred pursuant to Probate Act §18-12, and the trial courts dismissed the counterclaims. *Parker, supra,* 2011 IL App (1st) 102871 at ¶¶41, 44; *Rice, supra,* 507 N.E.2d at 79 – 80. In each case, the respondent asserted that the counterclaim was permitted pursuant to the savings clause of §13-207 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq. Parker, supra,* 2011 IL App (1st) 102871 at ¶42; *Rice, supra,* 507 N.E.2d at 79 – 80.

Section 13-207 provides in pertinent part:

> **A defendant may plead a set-off or counterclaim barred by the statute of limitation, while held and owned by him or her, to any action, the cause of which was owned by the plaintiff or person under whom he or she claims, before such set-off or counterclaim was so barred, and not otherwise.** 735 ILCS 5/13-207.

In *Rice,* the appellate court reversed dismissal of the counterclaim, holding that Code of Civil Procedure §13-207 applies to save a counterclaim otherwise barred by Probate Act §18-12. 507 N.E.2d at 80. Critical to the court's decision was its answer to the question, "Where the assertion of a claim by a decedent [through the executor] may invite a defense or counterclaim, is it the duty of the executor to withhold the claim until the passage of [the claim bar date] and then invoke section 18-12 as a bar? We think not." *Id.*

The *Rice* court worried that "upholding the trial court's order would encourage executors or administrators to delay the assertion of claims against third parties" until after the bar date. *Id.* The court also expressed concern that a representative who promptly asserted estate claims before the bar date, thereby encouraging counterclaims, might be attacked for breach of fiduciary duty. 507 N.E.2d at 81. The court also noted that the purpose of Probate Act §18-12 is "to encourage the prompt settlement of claims and the early closing of estates" and reasoned that encouraging representatives to delay action until after the claim bar date would subvert that purpose. 507 N.E.2d at 80.

In *Parker, supra,* the appellate court affirmed dismissal of the counterclaim, holding that Code of Civil Procedure §13-207 does not apply to save actions barred by Probate Act §18-12.

2011 IL App (1st) 102871 at ¶¶57 – 58, 69. The court noted that "Illinois courts have long held" that §18-12 is "a grant of jurisdiction not a general statute of limitations." 2011 IL App (1st) 102871 at ¶¶55, 57 (implying that Code of Civil Procedure §13-207 did not apply because counterclaim is not otherwise "barred by the statute of limitation" as required for application of §13-207).

The *Parker* court also relied on the rationale that "[t]he filing of a claim within the statutory period is mandatory, and 'no exception to the filing period may be engrafted by judicial decision.' " 2011 IL App (1st) 102871 at ¶58, quoting *In re Marriage of Epsteen,* 339 Ill.App.3d 586, 791 N.E.2d 175, 185, 274 Ill.Dec. 379 (1st Dist. 2003), and *In re Estate of Hoheiser,* 97 Ill.App.3d 1077, 424 N.E.2d 25, 28, 53 Ill.Dec. 612 (1st Dist. 1981). "Once the statutory time period expires, the court has no power or jurisdiction to adjudicate a claim against the estate." 2011 IL App (1st) 102871 at ¶58. The court also held that the petitioners' filing of the recovery citation related back to the filing of their discovery citation against the respondent, which occurred well before the claim bar date. 2011 IL App (1st) 102871 at ¶66.

The *Parker* court went on to distinguish *Rice, supra,* implying that the *Rice* representative's delay in filing was deliberate, while the *Parker* petitioners' reason for delay was not "because [the citation might] result in set-offs or counterclaims against the estate" but instead was "caused by respondent's failure to comply" with trial court orders in the citation process. 2011 IL App (1st) 102871 at ¶¶61, 67.

Rice and *Parker* present conflicting authority on the counterclaim time-bar issue. *Parker* is a more current indicator of the First District Appellate Court's view of this issue and more likely to be followed in subsequent cases, at least in that district. However, *Parker* appears to encourage representatives to delay filing a recovery citation petition until after the claim bar date, at least if they have any reason to anticipate potential counterclaims. That result would be in conflict with the goals of §§16-1 and 18-12 of the Probate Act: to provide an expeditious, comprehensive, and summary method of recovering estate assets (*Estate of Chernyk,* 138 Ill.App.3d 233, 485 N.E.2d 1169, 92 Ill.Dec. 926 (1st Dist. 1985), *appeal denied* (1986); *Shanahan v. Bowen,* 59 Ill.App.3d 269, 375 N.E.2d 508, 512, 16 Ill.Dec. 635 (3d Dist. 1978)) and to encourage prompt claims settlements and estate closings (*Rice, supra,* 507 N.E.2d at 80, citing *Estate of Garaway,* 80 Ill.App.3d 401, 399 N.E.2d 1024, 35 Ill.Dec. 735 (2d Dist. 1980)). *Accord Parker, supra,* 2011 IL App (1st) 102871 at ¶66.

IX. [11.21] STATUTE OF LIMITATIONS

Few reported cases address any statutory limitations period applicable to §16-1 or §16-2 citations to discover or recover. 755 ILCS 5/16-1, 5/16-2. With respect to recovery citations, it has been reasonably suggested that the limitations statute applicable to the cause of action stated in the citation should apply, but the courts that have addressed the issue have not followed that approach.

A. [11.22] First District Authority

The First District has not directly confronted the issue whether a §16-1 citation (755 ILCS 5/16-1) is subject to any limitations statute. Rather, the reported First District cases have involved recovery citations that related back to discovery citations, where there was no issue with the timeliness of the discovery citation. *Estate of Chernyk,* 138 Ill.App.3d 233, 485 N.E.2d 1169, 1171 – 1172, 92 Ill.Dec. 926 (1st Dist. 1985), *appeal denied* (1986). *See also In re Estate of Parker,* 2011 IL App (1st) 102871, ¶66, 957 N.E.2d 454, 354 Ill.Dec. 138.

In *Chernyk,* the representative filed a §16-1 discovery citation petition that questioned the validity of a revocable inter vivos trust set up by the decedent. 485 N.E.2d at 1170. The petition was filed within six months of the decedent's death, and the respondents were the cotrustees of the putative trust. *Id.* At the conclusion of the discovery citation proceeding (18 months after the date of death), the court granted the representative leave to amend her petition to seek a citation to recover. *Id.* Nearly two years later, the representative filed her amended petition for citation to recover the assets used to fund the trust. 485 N.E.2d at 1170 – 1171.

The respondents argued that the recovery citation petition constituted an action to set aside a revocable inter vivos trust funded by a legacy from the decedent's will. 485 N.E.2d at 1171, citing Code of Civil Procedure §13-233, 735 ILCS 5/13-233. Pursuant to that provision, any such action must be brought within six months after admission of the will to probate. 485 N.E.2d at 1170. Accordingly, the respondents argued, the recovery citation petition was time-barred. The trial court agreed. The appellate court reversed, finding that "the amended petition relates back to the time of filing the original [discovery] petition and . . . was therefore not time-barred by the limitation provision of section 13-223." 485 N.E.2d at 1172. The court found that the "original petition sufficiently notified the defendants of [the representative's] subsequent attack on the trust agreement." *Id.*

The First District applied this same logic more recently in *Parker, supra.* As discussed in §11.20 above, the issue in *Parker* was whether a counterclaim asserted by the citation respondent was time-barred. The court nevertheless cited and followed *Chernyk,* stating that the "amended petition for citation to recover assets relates back to [the] original petition for citation to discover assets against respondent." 2011 IL App (1st) 102871 at ¶66.

The First District has addressed limitations regarding a §16-2 citation (755 ILCS 5/16-2) somewhat more directly. *See In re Estate of Shandling,* 26 Ill.App.3d 610, 325 N.E.2d 444, 446 (1st Dist. 1975). There, the court held that a petition brought under the predecessor to §16-2 (former §187 of the Probate Act) "is not subject to the statute limiting the time in which to file claims" against the estate. *Id.* Because a citation is a "proceeding which places in issue decedent's title to specific assets," it "is not considered to be a 'claim' in the context of probate law." *Id.*

B. [11.23] Second District Authority

The Second District confronted the limitations question in *In re Estate of Kolbinger,* 175 Ill.App.3d 315, 529 N.E.2d 823, 827 – 828, 124 Ill.Dec. 842 (2d Dist. 1988). In *Kolbinger,* the representative of a decedent's estate petitioned under Probate Act of 1975 §16-1, 755 ILCS 5/16-1, for a citation "to discover assets . . . seeking recovery" of two certificates of deposit, as

well as monies that the respondent had obtained by closing out a third account. 529 N.E.2d at 826. The respondent was the estate representative of the decedent's son (the son died less than two months after his mother). 529 N.E.2d 825 – 826. The petition was filed more than nine months after the issuance of letters of office in the son's estate. The respondent representative of the son's estate appealed the trial court judgment in favor of the petitioner, arguing that the citation was a claim against the son's estate, which was time-barred because the claim deadline in the son's estate passed before the petition was filed. 529 N.E.2d at 827.

The appellate court ruled that the citation was not time-barred as to the two certificates. *Id.* The court relied on *Illinois Masonic Children's Home v. Flynn,* 109 Ill.App.3d 744, 441 N.E.2d 126, 747 – 748, 65 Ill.Dec. 334 (5th Dist. 1982), and *In re Estate of Shandling,* 26 Ill.App.3d 610, 325 N.E.2d 444, 446 (1st Dist. 1975), for the proposition that a proceeding "which places in issue a decedent's title to specific assets is not considered to be a claim" subject to the claim limitation statute. 529 N.E.2d at 827. However, the court ruled that the petitioner's claim for monies representing the proceeds of the third account was not a claim for a "specific asset." 529 N.E.2d at 828. Accordingly, that part of the petitioner's claim "was subject to the limitation period of the Probate Act." *Id.*

C. [11.24] Fourth District Authority

The Fourth District has refused to apply any statute of limitations to a citation to recover assets. *See In re Estate of Lashmett,* 369 Ill.App.3d 1013, 874 N.E.2d 65, 69, 314 Ill.Dec. 155 (4th Dist. 2007). The *Lashmett* estate representative filed an initial citation petition less than two months after the decedent's passing. *Id.*. The citation issued and was the subject of a prompt hearing, after which the court discharged it. More than five years later, the representative filed an "amended" petition. *Id.* The respondent argued that the second petition was barred by the five-year limitations statute applicable to "all civil actions not otherwise provided for." *Id.,* citing 735 ILCS 5/13-205. The petitioner argued that the amended petition was timely because it related back to the original. 874 N.E.2d at 69.

In contrast to the First District approach, the *Lashmett* court rejected the relation-back argument, finding that the discharge of the original petition left "nothing extant to which [the amended petition] could relate back." *Id.* However, the court went on to rule that "[t]he trial court's jurisdiction sitting in probate extends to all property of the decedent, no matter where it may be found or when." *Id.* "To allow the statute of limitations to bar the recovery of an asset of the estate would serve to defeat the jurisdiction of the probate court and effectively restrict the statutory and common law power of the court to supervise the administration and disposition of estates." *Id.* Accordingly, the limitations statute "does not and cannot apply." *Id.*

D. [11.25] Fifth District Authority

The Fifth District has not addressed the applicability of limitations statutes to citations but has addressed a very comparable circumstance. *See Illinois Masonic Children's Home v. Flynn,* 109 Ill.App.3d 744, 441 N.E.2d 126, 128 – 129, 65 Ill.Dec. 334 (5th Dist. 1982). The plaintiff in *Flynn* did not assert a citation under the Probate Act of 1975, instead filing a complaint after the

claim bar date, seeking a declaration "that the plaintiff is entitled to receive all of the assets of the estate, that the executor holds all the property of the estate as trustee for the benefit of the plaintiff and that the legatees under" a contested will "have no interest in the assets of the estate." 441 N.E.2d at 128.

The respondent argued that the complaint was time-barred because it was filed after the claim bar date. *Id.* The appellate court rejected the respondent's argument, ruling that a proceeding that "places in issue a decedent's title to specific assets is not considered to be a claim" subject to the claim limitation statute. *Id.,* citing *In re Estate of Shandling,* 26 Ill.App.3d 610, 325 N.E.2d 444, 446 (1st Dist. 1975). As stated in §11.23 above, *Flynn* was cited and relied on by the Second District in *In re Estate of Kolbinger,* 175 Ill.App.3d 315, 529 N.E.2d 823, 827 – 828, 124 Ill.Dec. 842 (2d Dist. 1988).

E. [11.26] Summary of Limitations Authority

The reported cases addressing the applicability of limitations statutes to citation petitions generally support the proposition that a citation seeking an appropriate specific asset is not a "claim" subject to any particular statute of limitations. Given the case authority allowing the use of citations to pursue monies paid to fiduciaries and monies representing converted assets in various circumstances (see, *e.g.,* §11.5 above), might a party assert an otherwise time-barred monetary claim against an estate by characterizing it as a §16-2 citation petition (755 ILCS 5/16-2)? In such a case, the court should conduct the analysis used by the Second District in *In re Estate of Kolbinger,* 175 Ill.App.3d 315, 529 N.E.2d 823, 124 Ill.Dec. 842 (2d Dist. 1988), to limit the subject matter of a money recovery citation to "specific assets" of the estate that can be properly identified and distinguished from monies that merely constitute a (time-barred) claim.

X. [11.27] LACHES

Equitable doctrines including laches apply in citation proceedings. *Robinson v. Dennis,* 335 Ill.App. 340, 81 N.E.2d 765 (2d Dist. 1948) (abst.). The *Robinson* court applied laches to bar a petition brought 46 years after the estate at issue had been closed. Laches was discussed but not applied to bar a citation in at least two subsequent cases. *See In re Estate of Polley,* 111 Ill.App.3d 873, 444 N.E.2d 714, 719 – 720, 67 Ill.Dec. 478 (1st Dist. 1982); *In re Estate of Moskal,* 50 Ill.App.3d 291, 365 N.E.2d 592, 594, 8 Ill.Dec. 354 (1st Dist. 1977). Laches was asserted as a defense in *Estate of Oppenheim,* 63 Ill.App.2d 284, 211 N.E.2d 403, 406 – 407 (1st Dist. 1965), but the appellate court held that laches was not established when the petitioner mistakenly but diligently pursued the wrong remedy.

The First District more recently reversed a trial court's application of laches in a citation petition. *In re Estate of Brown,* 2014 IL App (1st) 122857, ¶¶26 – 27, 13 N.E.3d 271, 382 Ill.Dec. 858. The appellate court set forth a detailed description of the elements and proper application of laches, but found that the delay at issue was not "so unreasonable as to bar" the petition. 2014 IL App (1st) 122857 at ¶28 (trial court abused its discretion in barring claim on particular facts).

XI. [11.28] BURDEN OF PROOF

Examination of the case authority reveals that there is no burden of proof unique to recovery citations. A petition for a recovery citation must adequately allege a cause of action, such as unjust enrichment, conversion, fraud, undue influence, etc. Logic suggests that the burden of proof on a recovery citation should be the burden of proof applicable to the cause of action stated. Accordingly, the burden of proof may vary from one citation to another. While no reported case states that the burden is based on the cause of action stated, the burdens applied in reported cases are consistent with that conclusion.

"In citation proceedings the burden of proof is generally upon the petitioner." *Greig v. Johnson,* 22 Ill.App.3d 646, 317 N.E.2d 627, 631 (1st Dist. 1974), quoting *In re Estate of Vercillo,* 27 Ill.App.2d 151, 169 N.E.2d 364, 367 (1st Dist. 1960); *In re Estate of Baumgarth,* 23 Ill.App.2d 319, 163 N.E.2d 201, 204 (1st Dist. 1959). The petitioner must establish the existence of the subject asset and that the respondent has possession of it. *Baumgarth, supra,* 163 N.E.2d at 204. Of course, the petitioner must establish that the asset belonged to the decedent (or, in a §16-2 citation (755 ILCS 5/16-2), the petitioner). The petitioner must establish this prima facie case by a preponderance of the evidence. *In re Estate of Hill,* 42 Ill.App.2d 396, 192 N.E.2d 429, 431 (1st Dist. 1963).

Once the petitioner establishes a prima facie case, the burden of proof shifts to the respondent to establish his or her right of ownership in the property. *In re Estate of Bickford,* 74 Ill.App.2d 190, 219 N.E.2d 159 (3d Dist. 1966), citing *Hill, supra, Storr v. Storr,* 329 Ill.App. 537, 69 N.E.2d 916 (2d Dist. 1946).

At least two reported cases simply conclude, without reference to the nature of the respondent's relationship to the decedent or ward, or the nature of the respondent's defense, that this shifted burden must be met by clear and convincing evidence. *In re Estate of Elias,* 408 Ill.App.3d 301, 946 N.E.2d 1015, 1029, 349 Ill.Dec. 519 (1st Dist. 2011); *In re Estate of Casey,* 155 Ill.App.3d 116, 507 N.E.2d 962, 965 – 966, 107 Ill.Dec. 809 (4th Dist. 1987). However, both *Elias* and *Casey* involved facts giving rise to a legal presumption that would require application of the higher clear and convincing burden. *See Elias, supra,* 946 N.E.2d at 1032 – 1033 (respondent was fiduciary); *Casey, supra,* 507 N.E.2d at 967 (respondent claimed inter vivos gift).

These presumptions are addressed in the §§11.30 – 11.34 below. Absent such presumptions (for example, when a respondent with no relationship to the decedent defends on the basis of an undocumented arm's-length purchase of the asset), the respondent's shifted burden ought to be merely by a preponderance of the evidence. In practice however, once the petitioner establishes a prima facie case, almost all recovery proceedings involve a presumption and heightened burden.

Illinois courts apply the "bursting bubble" theory of presumptions. *In re Estate of Walsh,* 2012 IL App (2d) 110938, ¶59, 972 N.E.2d 248, 361 Ill.Dec. 763. When the party against whom a presumption applies submits evidence sufficient to rebut the presumption, "the presumption vanishes from the case and the evidence must be weighed without taking the presumption into account." *Id.,* citing *Franciscan Sisters Health Care Corp. v. Dean,* 95 Ill.2d 452, 448 N.E.2d

872, 878, 69 Ill.Dec. 960 (1983). "At that point, the court must consider whether the party having the burden of proof has shown by a preponderance of the evidence that he is entitled to prevail." 2012 IL App (2d) 110938 at ¶59, citing *In re Estate of Shea,* 364 Ill.App.3d 963, 848 N.E.2d 185, 190, 302 Ill.Dec. 185 (2d Dist. 2006).

There is confusion in the reported cases regarding the definition of clear and convincing evidence. Many Illinois courts have referred to clear and convincing evidence as the "quantum of proof which leaves no reasonable doubt in the mind of the trier of fact of the truth of the fact in issue." *See, e.g., In re Estate of Weaver,* 75 Ill.App.2d 227, 220 N.E.2d 321, 322 (4th Dist. 1966) (and cases cited therein). However, it has been held to be error to instruct a jury with that language on a recovery citation, due to the likelihood of confusion with the higher burden in criminal cases. *Casey, supra,* 507 N.E.2d at 967. In fact, "[c]lear and convincing evidence falls midway on the spectrum of degrees of proof, between the normal civil burden of 'preponderance' and the criminal burden of 'beyond a reasonable doubt.' " *Id.*

A. [11.29] Legal Presumptions and Shifting/Heightened Burdens

Depending on the factual circumstances and the cause of action underlying the citation petition, established legal presumptions may also dictate the burden of proof as to all or part of a claim. Rebuttable presumptions arise and heightened burdens of proof apply in situations including, without limitation, those that involve fiduciary respondents, parent-child transfers, provision of services, respondents claiming a gift, and joint tenancies.

1. [11.30] Fiduciary Respondents

When a respondent is a fiduciary of a decedent or ward at the time the respondent took possession of the asset, there is a rebuttable presumption of fraud against the respondent. *In re Estate of Feinberg,* 2014 IL App (1st) 112219, ¶69, 6 N.E.3d 310, 379 Ill.Dec. 233; *In re Estate of Elias,* 408 Ill.App.3d 301, 946 N.E.2d 1015, 1032 – 1033, 349 Ill.Dec. 519 (1st Dist. 2011); *In re Estate of Miller,* 334 Ill.App.3d 692, 778 N.E.2d 262, 266, 268 Ill.Dec. 276 (5th Dist. 2002). The respondent then has the burden of rebutting the presumption — proving by clear and convincing evidence that the transaction was fair and equitable and did not result from undue influence. *Feinberg, supra,* 2014 IL App (1st) 112219 at ¶69; *In re Estate of DeJarnette,* 286 Ill.App.3d 1082, 677 N.E.2d 1024, 1029, 222 Ill.Dec. 490 (4th Dist. 1997).

To trigger the heightened burden, the petitioner must establish that the respondent is a fiduciary, either "at law" or "in fact." Fiduciaries "at law" include, for example, attorneys acting as such, executors, estate administrators, agents under powers of attorney, guardians, and trustees. The burden to prove a fiduciary relationship "at law" is by a preponderance of the evidence. *Hickey v. Hickey,* 371 Ill. 476, 21 N.E.2d 579, 581 (1939).

Fiduciaries "in fact" are those that owe a fiduciary duty by virtue of particular factual circumstances involving a relationship of trust. The burden to prove a fiduciary relationship "in fact" is by clear and convincing evidence. *Pottinger v. Pottinger,* 238 Ill.App.3d 908, 605 N.E.2d 1130, 1137 – 1138, 179 Ill.Dec. 116 (2d Dist. 1992).

Once the presumption of fraud is established, factors to be considered in determining whether the respondent has overcome the presumption include (a) a showing that the fiduciary made a full and frank disclosure, (b) proof that the fiduciary paid fair value for the property obtained, and (c) proof that the principal received competent and independent advice. *Feinberg, supra,* 2014 IL App (1st) 112219 at ¶69; *DeJarnette, supra,* 677 N.E.2d at 1029; *Miller, supra.*

2. [11.31] Parent-Child Transfers

A transfer of an asset from a parent to a child raises a rebuttable presumption that the transfer was a gift. *Frey v. Wubbena,* 26 Ill.2d 62, 185 N.E.2d 850 (1962); *In re Estate of Duncan,* 77 Ill.App.3d 927, 397 N.E.2d 497, 500, 34 Ill.Dec. 41 (3d Dist. 1979). The presumption can only be rebutted by clear and convincing evidence. *Id.*

3. [11.32] Gratuitous/Non-Gratuitous Services

When a citation or defense is based on the assertion of services provided, a rebuttable presumption arises that the services were non-gratuitous. *In re Estate of Mallas,* 100 Ill.App.2d 88, 241 N.E.2d 482, 484 (1st Dist. 1968). *See In re Estate of Sewart,* 274 Ill.App.3d 298, 652 N.E.2d 1151, 210 Ill.Dec. 175 (1st Dist. 1995).

However, when the service provider is a family member, a rebuttable presumption arises that the services were gratuitous. *In re Estate of Templeton,* 339 Ill.App.3d 310, 789 N.E.2d 1265, 1268, 273 Ill.Dec. 833 (4th Dist. 2003); *In re Estate of Milborn,* 122 Ill.App.3d 688, 461 N.E.2d 1075, 1078 – 1079, 78 Ill.Dec. 241 (3d Dist. 1984). "The amount of evidence sufficient to rebut the presumption of gratuity depends on the facts of each case; the presumption diminishes in direct proportion to the remoteness of the degree and character of the family relationship and the character of the duties performed." *Templeton, supra,* 789 N.E.2d at 1268.

4. [11.33] Respondent Claiming Gift

In the absence of any contrary presumption (such as that raised by a parent-child transfer), when a respondent claims to have received the subject asset as an inter vivos gift, the burden shifts to the respondent to prove all essential elements of the gift by clear and convincing evidence. *Shanahan v. Bowen,* 59 Ill.App.3d 269, 375 N.E.2d 508, 513, 16 Ill.Dec. 635 (3d Dist. 1978), citing *In re Estate of Skinner,* 111 Ill.App.2d 267, 250 N.E.2d 295 (3d Dist. 1969); *In re Estate of Vercillo,* 27 Ill.App.2d 151, 169 N.E.2d 364, 367 (1st Dist. 1960).

5. [11.34] Joint Tenancy Accounts

The proper establishment of a joint tenancy raises a rebuttable presumption that the transfer was a gift. *Murgic v. Granite City Trust & Savings Bank,* 31 Ill.2d 587, 202 N.E.2d 470, 471 (1964). The presumption can only be rebutted by clear and convincing evidence (*id.*), but evidence that the joint tenancy was established as a convenience account may be used to overcome the presumption.

Joint tenancies have long been the most frequent targets of citation proceedings. Traditionally, creation of a joint tenancy account by the depositor's execution of a signature card was conclusive to establish the right of the joint tenant, absent strong proof of mistake, lack of capacity, or fraud. *Estate of McIlrath,* 276 Ill.App. 408 (4th Dist. 1934). In 1955, Illinois courts first accepted the concept of a convenience account to defeat the joint tenant's claim. *See In re Estate of Schneider,* 6 Ill.2d 180, 127 N.E.2d 445 (1955). After *Schneider,* the state legislature passed the Joint Tenancy Act, 765 ILCS 1005/0.01, *et seq*. In *Frey v. Wubbena,* 26 Ill.2d 62, 185 N.E.2d 850 (1962), the Supreme Court discussed the provisions of the Joint Tenancy Act as they applied to survivorship accounts in banks, savings and loans, corporate stock, and U.S. savings bonds.

In *Murgic, supra,* the Supreme Court established the seminal rule that

> **an instrument creating a joint account under the statutes presumably speaks the whole truth; and, in order to go behind the terms of the agreement, the one claiming adversely thereto has the burden of establishing by clear and convincing evidence that a gift was not intended.** 202 N.E.2d at 472.

Despite passage of the Joint Tenancy Act and the ruling in *Murgic, supra,* uncertainty continued regarding certificates of deposit since they do not require the execution of a signature card. However, in 1973, the Illinois Supreme Court settled the issue, ruling that certificates of deposit were "other evidences of indebtedness or of interest" within the meaning of §2(b) of the Joint Tenancy Act. *In re Estate of Baxter,* 56 Ill.2d 223, 306 N.E.2d 304, 307 – 308 (1973). Accordingly, no signature card is required in order to establish a joint tenancy in a certificate of deposit. *Id.*

"Each case involving a joint tenancy account must be evaluated on its own facts and circumstances. A fact or circumstance having great significance in one case may have very little in another." *In re Estate of Hayes,* 131 Ill.App.2d 563, 268 N.E.2d 501, 505 (1st Dist. 1971). "In determining whether the donor actually intended to transfer his interest in the account at his death to the surviving joint tenant, it is proper to take into consideration the facts surrounding the creation of the joint account and all circumstances and events occurring after the creation of the joint account." *In re Estate of Guzak,* 69 Ill.App.3d 552, 388 N.E.2d 431, 433, 26 Ill.Dec. 716 (1st Dist. 1979). Several criteria bear on whether evidence is sufficient to overcome the presumption of a gift:

> **Especially relevant to such a determination is the exercise of authority and control over the joint account. . . . The fact that the surviving joint tenant did not consider himself as having any ownership in the account may be considered in determining the intent of the creator of the account. . . . Evidence that the transfer was made for the mere convenience of the creator of the account is an indication of lack of donative intent. . . . Another factor to be considered is the quantity of personal property involved in comparison to the total assets of the estate. [**Citations omitted.**]** *Id.*

Accord In re Estate of Denler, 80 Ill.App.3d 1080, 400 N.E.2d 641, 647, 36 Ill.Dec. 221 (3d Dist. 1980).

The argument that an account is a "mere convenience" has become the focus of most attacks on joint tenancy accounts and attempts to overcome the presumption. A "convenience account" has been defined as

> **an account, apparently held in some form of joint tenancy, where in fact the creator did not intend the other tenant to have any interest, present or future, but had some other intent in creating the account. An example of a convenience account is an account where the creator only wanted the other tenant to write checks at the creator's direction, and not to have any share in the account during the creator's life or on the creator's death.** *In re Estate of Harms,* 236 Ill.App.3d 630, 603 N.E.2d 37, 41, 177 Ill.Dec. 256 (4th Dist. 1992).

"Illinois authority treats evidence establishing that a joint account was used as a convenience account as overcoming the presumption of a gift. . . . A convenience account is an account that is nominally a joint account, but is intended to allow the nominal joint tenant to make transactions only as specified by, and on behalf of, the account's creator. . . . The typical purpose of such an account is to allow the nominal joint tenant to pay the true owner's bills while the true owner is unable to do so." [Citations omitted.] *In re Estate of Shea,* 364 Ill.App.3d 963, 848 N.E.2d 185, 191, 302 Ill.Dec. 185 (2d Dist. 2006).

The *Shea* court rejected the nominal joint tenant's argument that the owner intended to make a gift at his death: "[I]f the gift of an account is to take effect only on the creator's death, its ownership is different from that for which a joint account agreement provides — the function of a joint account agreement is to *immediately* share ownership." [Emphasis in original.] *Id.* The appellate court affirmed the trial court's finding that the presumption was rebutted and that the account at issue was a convenience account.

The current prevalence of the "convenience account" argument does not mean that the presumption of donative intent is easily overcome. For example, the facts that the joint tenant has no use of the funds and no control of the account passbooks during the deceased's lifetime have been held insufficient by themselves to overcome the presumption. *In re Estate of Martin,* 201 Ill.App.3d 1061, 559 N.E.2d 1112, 1116 – 1117, 147 Ill.Dec. 772 (4th Dist. 1990).

Several cases have addressed apparent "buyer's remorse" on the part of the donor. *In re Estate of Marx,* 11 Ill.App.3d 727, 297 N.E.2d 637 (1st Dist. 1973) (deceased contacted attorney about removing joint tenant from account); *Estate of Zengerle,* 2 Ill.App.3d 98, 276 N.E.2d 128 (1st Dist. 1971) (deceased requested passbook from joint tenant and, when it was not received, requested that institution freeze account); *In re Estate of Stang,* 71 Ill.App.2d 314, 218 N.E.2d 854 (1st Dist. 1966) (later holographic will attempting to give account to someone else). In each case, the court held that none of these actions were relevant to the question of donative intent because they did not relate back to the time of creation of the joint tenancy. In general, the mere fact that a donor may have changed his or her mind is insufficient as a matter of law to sever the joint tenancy. *In re Estate of Vale,* 55 Ill.App.3d 712, 371 N.E.2d 198, 13 Ill.Dec. 503 (3d Dist. 1977).

However, when a decedent sent a letter to a credit union changing the name on a previous joint account to his name solely, under the rules of the credit union, this did, in fact, sever the joint tenancy. *In re Estate of Gruske,* 179 Ill.App.3d 675, 534 N.E.2d 692, 128 Ill.Dec. 510 (3d Dist. 1989). Additionally, a court may consider facts including deposits made after the account was opened, retention of the passbook, and declarations by the surviving joint tenant. *Dixon National Bank v. Morris,* 33 Ill.2d 156, 210 N.E.2d 505 (1965). In short, the court can consider all matters and declarations occurring after establishment of the joint account as an aid to discerning the intent of the deceased at the time the account was established. *In re Estate of Dawson,* 103 Ill.App.2d 362, 243 N.E.2d 1 (3d Dist. 1968).

B. [11.35] Dueling Presumptions

It is not unusual that more than one presumption may apply in the same case, and in some cases, applicable presumptions may conflict with each other. The most commonly occurring example occurs when the respondent is a fiduciary of the decedent or ward, but the asset in question is in joint tenancy with the decedent or ward. The fiduciary relationship creates a presumption of fraud against the respondent (*In re Estate of Feinberg,* 2014 IL App (1st) 112219, ¶69, 6 N.E.3d 310, 379 Ill.Dec. 233), while the existence of the joint tenancy account creates a conflicting presumption of donative intent in favor of the respondent (*Murgic v. Granite City Trust & Savings Bank,* 31 Ill.2d 587, 202 N.E.2d 470 (1964)). The decisions of the Illinois appellate courts addressing which presumption takes precedence vary from district to district and even within the districts.

1. [11.36] First District

Relying on cases decided in other districts, the First District originally deferred to the presumption of donative intent, provided that the statutory requirements for proper formation of a joint tenancy account were met. *Estate of Wilkening,* 109 Ill.App.3d 934, 441 N.E.2d 158, 162, 65 Ill.Dec. 366 (1st Dist. 1982). The *Wilkening* court held that "proof of a fiduciary relationship does not rebut the presumption of donative intent without evidence of abuse of that relationship or betrayal of a confidence." *Id.* The court did "recognize that each case involving a joint tenancy account must be evaluated on its own facts and circumstances" and that a fact "having great significance in one case may have very little in another." 441 N.E.2d at 165.

The First District followed *Wilkening* when it decided *In re Estate of Kirchwehm,* 145 Ill.App.3d 280, 495 N.E.2d 1243, 1244 – 1246, 99 Ill.Dec. 508 (1st Dist. 1986). The court applied the presumption of donative intent in favor the respondent fiduciary but found that the petitioner had rebutted the presumption with clear and convincing evidence that the intent was only to create convenience accounts. 495 N.E.2d at 1246. Interestingly, the *Kirchwehm* court noted that the joint tenancies predated the fiduciary relationship, but did not appear to rely on that fact in determining which presumption would control.

Without discussing either *Wilkening* or *Kirchwehm,* the First District later materially departed from the *Wilkening* precedent. *See In re Estate of Teall,* 329 Ill.App.3d 83, 768 N.E.2d 124, 129 – 130, 263 Ill.Dec. 364 (1st Dist. 2002). The *Teall* court relied on more recent decisions in other districts, most notably the Fourth District decisions culminating with *In re Estate of*

DeJarnette, 286 Ill.App.3d 1082, 677 N.E.2d 1024, 222 Ill.Dec. 490 (4th Dist. 1997). The *Teall* court approvingly cited authority that when the joint tenancy predates the fiduciary relationship, the conflicting presumptions cancel out, leaving the court free to make a determination based on the facts and the credibility of the witnesses. 768 N.E.2d at 129 – 130. The court also cited *DeJarnette* for the proposition that when the fiduciary "uses his position to create the joint tenancies the presumptions do not cancel; instead the controlling presumption is the presumption of fraud." 768 N.E.2d at 130. In *Teall,* the fiduciary relationship preceded the joint tenancies, and the fiduciary was actively involved in creating the joint tenancies. *Id.* The appellate court upheld the "trial court's finding that the joint accounts were convenience accounts" to be returned to the estate because that finding was "not against the manifest weight of the evidence." *Id.*

Still more recently, the First District decided *In re Estate of Pawlinski,* 407 Ill.App.3d 957, 942 N.E.2d 728, 730, 347 Ill.Dec. 525 (1st Dist. 2011). Without citing *Teall* or *DeJarnette,* on the issue of competing burdens, the *Pawlinski* court ruled that the presumption of undue influence applied against the fiduciary because the fiduciary relationship preceded the joint tenancy at issue. 942 N.E.2d at 739.

2. [11.37] Second District

The Second District has discussed the competing joint tenancy/fiduciary burdens but has not clearly determined which presumption prevails under given circumstances. *See In re Estate of Trampenau,* 88 Ill.App.3d 690, 410 N.E.2d 918, 922 – 923, 43 Ill.Dec. 785 (2d Dist. 1980); *In re Estate of Shea,* 364 Ill.App.3d 963, 848 N.E.2d 185, 188 – 189, 302 Ill.Dec. 185 (2d Dist. 2006).

In *Trampenau,* the court referenced both the presumption of donative intent arising from a joint tenancy and the presumption of fraud arising from a fiduciary relationship. 410 N.E.2d at 922. However, the decedent in *Trampenau* had never signed a joint tenancy agreement or a common signature card, so the presumption of donative intent never came into play. *Id.* Instead, the court applied the presumption of fraud and upheld the trial court ruling against the respondent fiduciary.

In *Shea, supra,* the joint tenancy predated the fiduciary relationship. 848 N.E.2d at 188 – 189. The petitioner argued that the presumption of fraud arising from the fiduciary relationship trumped the presumption of donative intent. *Id.* The appellate court never addressed any impact of the fiduciary relationship. It simply ruled that the presumption of donative intent applied, then went on to find that the petitioner had overcome the presumption by clear and convincing evidence. 848 N.E.2d at 190, 192 – 193.

3. [11.38] Third District

The Third District has applied the presumption of donative intent in favor of a fiduciary respondent even when the alleged fiduciary relationship preceded the creation of the joint tenancy. *See In re Estate of Copp,* 132 Ill.App.2d 974, 271 N.E.2d 1, 2 – 5 (3d Dist. 1971). In *Copp,* the joint tenancy accounts at issue were established in the month before the decedent's death. 271 N.E.2d at 2 – 3. The respondent had "taken care" of the decedent and saw to the payment of the decedent's bills for "a couple of years" prior to creation of the joint accounts. 271

N.E.2d at 2. The *Copp* majority applied the presumption of donative intent, citing authority that the "burden of proof was not reversed by reason of the fact that there was a fiduciary relationship." 271 N.E.2d at 5, citing *In re Estate of Foster,* 104 Ill.App.2d 447, 244 N.E.2d 620 (5th Dist. 1969). The *Copp* court stated: "[A]ssuming that a fiduciary relationship did in fact exist . . . there is no evidence [that] such relationship was abused or that any confidence reposed was ever betrayed." 271 N.E.2d at 5.

Because *Copp* appears to be the only Third District case to address the issue, it should be noted that it was not unanimous. The dissenting justice disagreed that the presumption of donative intent should be "uneffected by the existence of a fiduciary relationship" and would have applied the presumption of fraud. 271 N.E.2d at 6 (Stouder, J. dissenting).

4. [11.39] Fourth District

The Fourth District has thoroughly examined the competing joint tenancy/fiduciary burdens and has established a nuanced approach that depends on the timing of certain facts. In its first notable decision on the issue, the Fourth District ruled that "conflicting presumptions cancel each other," leaving the trial court free "to make a determination based on the facts and the credibility of the witnesses." *In re Estate of Harms,* 236 Ill.App.3d 630, 603 N.E.2d 37, 44, 177 Ill.Dec. 256 (4th Dist. 1992). In *Harms,* the joint tenancy accounts largely predated the establishment of the fiduciary relationship, but significant transactions in those accounts appear to have been conducted by the fiduciary after establishment of the relationship. 603 N.E.2d at 38 – 40.

Less than two years later, the Fourth Circuit limited the *Harms* rule to situations in which the joint tenancy accounts were created before the fiduciary relationship began and deposits made during the fiduciary relationship followed a procedure established before the relationship. *In re Estate of Rybolt,* 258 Ill.App.3d 886, 631 N.E.2d 792, 795, 197 Ill.Dec. 570 (4th Dist. 1994). *Rybolt* involved a grandchild acting under a power of attorney for his grandmother. 631 N.E.2d at 794 – 795. The respondent grandchild, in his fiduciary capacity, was active in the creation of the joint tenancies. As a result of his actions, the majority of the grandmother's assets were transferred into joint tenancy with him. *Id.* The appellate court largely affirmed the trial court's ruling in favor of the petitioner. 631 N.E.2d at 795 – 796.

On the same day that it issued the *Rybolt* decision, the same majority of the same panel of the Fourth District decided *In re Estate of Savage,* 259 Ill.App.3d 328, 631 N.E.2d 797, 197 Ill.Dec. 575 (4th Dist.), *appeal denied,* 157 Ill.2d 502 (1994). In *Savage,* the joint tenancy accounts at issue were created prior to establishment of a fiduciary relationship (but the respondent daughter was actively involved in transferring substantially all of her father's assets to the joint accounts after she began acting under power of attorney). 631 N.E.2d at 799 – 800. The appellate court acknowledged the conflicting presumptions. 631 N.E.2d at 799. The trial court had applied "the presumption of donative intent as described in *Murgic* [*v. Granite City Trust & Savings Bank,* 31 Ill.2d 587, 202 N.E.2d 470 (1964)]," but found that the presumption had been rebutted by clear and convincing evidence that the joint tenancies were merely convenience accounts. *Id.* The appellate court affirmed on the same basis. 631 N.E.2d at 799 – 800.

The Fourth District's evolving approach to the competing burden issue culminated with *In re Estate of DeJarnette,* 286 Ill.App.3d 1082, 677 N.E.2d 1024, 222 Ill.Dec. 490 (4th Dist. 1997). There, the court confirmed its prior rulings that the competing presumptions arising from joint tenancies and fiduciary relationships cancel out only "where the joint tenancy accounts were created prior to the fiduciary relationship and where deposits made during the fiduciary relationship followed a procedure established prior to the relationship." 677 N.E.2d at 1029. When the fiduciary "actively uses his position to create the joint tenancies the presumptions do not cancel; instead, the controlling presumption is the presumption of fraud." *Id.*

5. [11.40] Fifth District

The Fifth District's first notable decision on the competing joint tenancy/fiduciary burdens issue was *In re Estate of Foster,* 104 Ill.App.2d 447, 244 N.E.2d 620 (5th Dist. 1969). The *Foster* court applied the presumption of donative intent, holding that the existence of a fiduciary duty would not "change[ ] the effect of the ruling in *Murgic* [*v. Granite City Trust & Savings Bank,* 31 Ill.2d 587, 202 N.E.2d 470 (1964)]" absent evidence of abuse of the fiduciary relationship or evidence of betrayal. 224 N.E.2d at 624.

More recently, the Fifth District decided *In re Estate of Miller,* 334 Ill.App.3d 692, 778 N.E.2d 262, 268 Ill.Dec. 276 (5th Dist. 2002). In *Miller,* the joint tenancies predated the establishment of the fiduciary relationship. 778 N.E.2d at 269 – 270. The appellate court acknowledged the competing burdens, then followed the Fourth District's *Harms*/*DeJarnette* approach (*In re Estate of Harms,* 236 Ill.App.3d 630, 603 N.E.2d 37, 177 Ill.Dec. 256 (4th Dist. 1992); *In re Estate of DeJarnette,* 286 Ill.App.3d 1082, 677 N.E.2d 1024, 1029, 222 Ill.Dec. 490 (4th Dist. 1997)), finding that the presumptions canceled each other and affirming the trial court's ruling that the petitioner had not met the ordinary burden of proof. 778 N.E.2d at 270.

In the time period between *Foster, supra,* and *Miller, supra,* the Fifth District decided *Lemp v. Hauptmann,* 170 Ill.App.3d 753, 525 N.E.2d 203, 121 Ill.Dec. 397 (5th Dist. 1988). *Lemp* involved different competing burdens, specifically the parent-child transfer presumption of donative intent and the fiduciary presumption of fraud. 525 N.E.2d at 205 – 206. The court noted that the fiduciary relationship predated the parent-child transfer at issue. The court acknowledged both presumptions, but applied the fiduciary presumption of fraud. Quoting *In re Estate of LaRue,* 53 Ill.App.2d 467, 203 N.E.2d 47, 51 (1st Dist. 1964), the *Lemp* court stated: "Where a fiduciary relationship exists, even as between parent and child, a gift is never presumed, but rather the burden of proof is on the party claiming there was a gift" to establish the gift by "clear and convincing evidence." 525 N.E.2d at 206.

Overall, the decisional trend appears to be moving toward the *Harms*/*DeJarnette* approach, and not just in Illinois. *See Russ v. Russ,* 302 Wis.2d 264, 734 N.W.2d 874, 884 – 885 (2007) (Wisconsin Supreme Court expressly adopts *Harms* approach). However, in the absence of a decision by the Illinois Supreme Court, the appellate court decisions in each district are binding in that district. *State Farm Fire & Casualty Co. v. Yapejian,* 152 Ill.2d 533, 605 N.E.2d 539, 541 – 542, 178 Ill.Dec. 745 (1992).

XII. APPLICABILITY OF DEAD-MAN'S ACT

A. [11.41] Probate Act §16-1 Citation Proceedings

All witnesses in a §16-1 citation to recover (755 ILCS 5/16-1) are witnesses of the court. *Shanahan v. Bowen,* 59 Ill.App.3d 269, 375 N.E.2d 508, 512, 16 Ill.Dec. 635 (3d Dist. 1978). Moreover, in a citation proceeding, the rules of evidence are liberally applied. *In re Estate of Parker,* 2011 IL App (1st) 102871, ¶62, 957 N.E.2d 454, 354 Ill.Dec. 138; *Estate of Chernyk,* 138 Ill.App.3d 233, 485 N.E.2d 1169, 1171 – 1172, 92 Ill.Dec. 926 (1st Dist. 1985), *appeal denied* (1986); *In re Estate of Weisberg,* 62 Ill.App.3d 578, 378 N.E.2d 1152, 19 Ill.Dec. 277 (1st Dist. 1978). This liberal approach may include admission of testimony that otherwise would be barred by the Dead-Man's Act, 735 ILCS 5/8-201. *In re Estate of Maslowski,* 204 Ill.App.3d 379, 561 N.E.2d 1183, 1187, 149 Ill.Dec. 487 (1st Dist. 1990); *In re Estate of Kaminski,* 200 Ill.App.3d 309, 558 N.E.2d 142, 147, 146 Ill.Dec. 179 (1st Dist. 1990); *In re Estate of Hill,* 30 Ill.App.2d 243, 174 N.E.2d 233 (1st Dist. 1961).

However, not all evidentiary rules are relaxed. "[S]tatements of a decedent, which are not against his interest, are inadmissible if made outside of the presence of the person affected by the statements." *In re Estate of Vercillo,* 27 Ill.App.2d 151, 169 N.E.2d 364, 367 (1st Dist. 1960). *See also In re Estate of Baumgarth,* 23 Ill.App.2d 319, 163 N.E.2d 201, 204 (1st Dist. 1959) ("unsworn self-serving declarations of the decedent, not subject to cross-examination and out of the presence of the respondent, would not have been competent as against respondent . . . even if the decedent were alive").

Moreover, "courts lend a very unwilling ear to statements by interested persons about what dead men have said; . . . such evidence is subject to great abuse and . . . will be carefully scrutinized as well as considered with all the other evidence in the case." *Keshner v. Keshner,* 376 Ill. 354, 33 N.E.2d 877, 881 – 882 (1941). *Accord In re Estate of Trampenau,* 88 Ill.App.3d 690, 410 N.E.2d 918, 922 – 923, 43 Ill.Dec. 785 (2d Dist. 1980). When a decedent's statements to the respondent are admitted, "sufficient corroborative evidence is required so as to make the proof of a gift clear and convincing." *In re Estate of Hackenbroch,* 35 Ill.App.2d 155, 182 N.E.2d 375, 378 (1st Dist. 1962). *Cf. In re Estate of Nelson,* 132 Ill.App.2d 544, 270 N.E.2d 65, 68 – 69 (1st Dist. 1971); *In re Estate of Skinner,* 111 Ill.App.2d 267, 250 N.E.2d 295 (3d Dist. 1969). The current case authority suggests that a trial court in a §16-1 recovery citation proceeding has discretion to allow testimony that would otherwise be barred by the Dead-Man's Act, but may limit such testimony and/or require corroborating evidence before admitting it.

B. [11.42] Probate Act §16-2 Citation Proceedings

No reported decision directly addresses the applicability of the current Dead-Man's Act provisions in a §16-2 citation proceeding (755 ILCS 5/16-2). However, the First District appellate court did address the applicability of the predecessor of the Dead-Man's Act to a citation proceeding under the predecessor of §16-2. *See In re Estate of McVicker,* 39 Ill.App.2d 389, 188 N.E.2d 731, 734 – 735 (1st Dist. 1963) (ruling that Dead-Man's Act applies to preclude testimony in citation proceedings brought under equivalent of §16-2).

The *McVicker* court noted that the predecessor of Probate Act of 1975 §16-1 contained the language "the court may examine the respondent." 188 N.E.2d at 735. This language gave the court power to call the respondent as a witness "even though he otherwise would be incompetent under [the Dead-Man's Act]." *Id.* The court ruled that the same logic did not extend to §16-2's predecessor because it lacked that operative language. *Id.* Current §16-1(d) contains the same operative language as its predecessor, but §16-2 does not. Accordingly, at least in the First District, the only available authority supports applicability of the Dead-Man's Act in §16-2 citation proceedings.

XIII. PROCEDURE ON CITATION TO DISCOVER

A. [11.43] Probate Act §16-1 Discovery Citation

The discovery citation is simply a means to obtain information, and a petition for a discovery citation under §16-1 (755 ILCS 5/16-1) does not have to allege a cause of action. *In re Estate of Shugart,* 81 Ill.App.3d 538, 401 N.E.2d 611, 613 – 614, 36 Ill.Dec. 770 (3d Dist. 1980) (distinguishing discovery and recovery citations and stating that petition seeking "recovery" must state cause of action). *Cf. Estate of Chernyk,* 138 Ill.App.3d 233, 485 N.E.2d 1169, 1172, 92 Ill.Dec. 926 (1st Dist. 1985), *appeal denied* (1986) ("in order to *recover* estate assets, the petition must be sufficient to state a cause of action" [Emphasis added.]); *Schwaan v. Schwaan,* 320 Ill.App. 287, 50 N.E.2d 861, 863 (1st Dist. 1943).

The *Schwaan* court stated that it has never been held that a discovery citation petitioner has the "duty of making up and trying out the issue with reference to the matter in controversy, in such a way as to cause a final determination of it to be made." *Id.* Instead, a discovery citation properly may be "merely a fishing expedition for the discovery of evidence." *Keshner v. Keshner,* 376 Ill. 354, 33 N.E.2d 877, 880 (1941).

Because the pleading requirements of discovery and recovery citations differ, "[i]n order that the court and all parties before it can determine the type of procedure which the petitioner intends to pursue, the statute requires that [t]he petition shall contain a request for the relief sought." [Internal quotation marks omitted.] *Shugart, supra,* 401 N.E.2d at 613.

Short of a failure to properly serve process, there is no authority recognizing any defense to a discovery citation. However, in one case, the respondents moved to dismiss a petition for a discovery citation on several grounds, including that the petitioners improperly sought discovery of an original will revocation document rather than an asset of the estate. *Robinson v. First State Bank of Monticello,* 97 Ill.2d 174, 454 N.E.2d 288, 290 – 291, 73 Ill.Dec. 428 (1983). Presumably, the respondents in *Robinson* were able to file their motion before the court issued any citation on the petition because they already were parties to the probate action, and as such were served with the petition when it was filed. The trial court granted the motion to dismiss the citation petition. 454 N.E.2d at 291. The order dismissing the citation was not appealed; rather, the petitioners filed a separate complaint that became the basis for the appeal. *Id.* Nevertheless, *Robinson* suggests one possible argument in defense of a discovery citation — that it does not seek an asset of the estate.

1. [11.44] Procedure to Have Citation Issued and Served

Along with the petition, the practitioner must file a notice of motion (or petition), setting a date for presentation of the petition. The notice must be provided to all parties of record in any existing estate/guardianship proceeding. There is no requirement to serve the notice on a respondent who has not yet appeared of record in the existing proceeding (instead, the respondent must be served with the citation once it has issued). At the scheduled presentation, the court should enter an order granting the petition and stating that the citation to discover will issue.

In addition to the petition and the notice, the petitioner must prepare the citation to be issued by the court. A few counties (including at least Cook, DuPage, and Will) have specific forms for citations to be used in probate proceedings, which may be downloaded from the websites of the respective county court clerks. See Cook County Form CCP 0368, http://12.218.239.52/forms/pdf_files/ccp0368.pdf; Will County Decedent Estate Packet Form 35F, www.circuitclerkofwillcounty.com/court-forms/decedent-estate-packet. See also www.dupageco.org/courtclerk/courtforms.aspx. The practitioner will select the return date to list on the citation, taking into account the service requirements (see §11.8 above).

The citation itself is the summons that commands the respondent's appearance, and a separate summons is not required (although the First District recently stated in dicta that a petitioner who improperly sought monetary recovery in a petition for an accounting "could have [framed] his pleading as a citation to recover assets and [served it on respondent] along with a summons" (*In re Estate of Rodden,* 2015 IL App (1st) 140798, ¶7, 26 N.E.3d 417, 389 Ill.Dec. 327)). Service of the citation must comply with the state and, where applicable, county rules for proper placement for service, service, and return of service of a summons.

A discovery citation will issue upon the petitioner's statement that the respondent has property possibly belonging to the estate or may have information or knowledge of property that the petitioner may need in order to obtain a recovery of such property. "The statute thus contemplates two distinct types of proceedings, one merely in the nature of discovery." *In re Estate of Garrett,* 81 Ill.App.2d 141, 224 N.E.2d 654, 658 (2d Dist. 1967). The court may not try questions of title nor order property to be turned over to the estate on a discovery citation. *Id.; Keshner v. Keshner,* 376 Ill. 354, 33 N.E.2d 877 (1941). Accordingly, there is no right to a jury trial on a discovery citation. *Cf. In re Conservatorship of Baker,* 79 Ill.App.2d 234, 223 N.E.2d 744 (4th Dist. 1967).

2. [11.45] Scope of Discovery Allowed

One might expect a discovery citation to provide all of the discovery tools afforded by the Code of Civil Procedure and the Illinois Supreme Court Rules. However, on its face, §16-1 merely requires that the respondent appear before the court, be sworn, and testify. 755 ILCS 5/16-1. No reported opinion addresses the issue, but there are reported cases in which citation petitions were accompanied by document riders and documents were produced in response, apparently prior to any examination and without any objection that the rider was beyond the scope of a discovery citation. *See, e.g., In re Estate of Parker,* 2011 IL App (1st) 102871, ¶¶7 – 9, 957 N.E.2d 454, 354 Ill.Dec. 138; *In re Estate of Rice,* 154 Ill.App.3d 591, 507 N.E.2d 78, 79 – 80, 107 Ill.Dec. 414 (1st Dist. 1987). Although it provides no authority on the issue, it is

interesting to note that DuPage County "Citation to Discover Assets — Probate" Form 3843 contains a field for specification of documents to be produced "at the examination." The form does not address document production prior to examination.

Section 16-1 provides for discovery citation examinations to occur before the judge, but in practice most discovery citation examinations occur in an attorney's office, in the manner of a deposition. While the Probate Act of 1975 expressly incorporates by reference the Civil Practice Law, 735 ILCS 5/2-101, *et seq.,* and Supreme Court Rules (755 ILCS 5/1-6), there is no authority to suggest that a discovery citation examination is subject to the three-hour limitation on discovery depositions set by S.Ct. Rule 206(d), and, in the author's experience, most practitioners take the position that it is not so limited. This follows logically because, under §16-1(d), the respondent is technically the court's witness, not a witness summoned by a party to a discovery deposition.

Section 16-1(d) sets forth potential penalties for failing to answer questions propounded in a discovery citation examination, including the possibility of jail time. In *Estate of Jaron v. Jaron,* 98 Ill.App.3d 547, 424 N.E.2d 849, 54 Ill.Dec. 99 (1st Dist. 1981), the appellate court affirmed the trial court's finding of contempt for failure to appear as ordered and the imposition of a fine against the respondents.

3. [11.46] Order of Discharge/Conversion

After examination of the respondent and review of any records produced, a petitioner must determine whether there is a viable cause of action for recovery against the respondent. If not, the citation should be discharged by order of the court at the next status hearing. If there is a viable cause of action, the petitioner may seek leave to convert the discovery citation to a recovery citation, and the court may order that conversion. *See, e.g., In re Estate of York,* 2015 IL App (1st) 132830, ¶10, 30 N.E.3d 682, 391 Ill.Dec. 412 (appeal dismissed on unrelated grounds); *In re Estate of Feinberg,* 2014 IL App (1st) 112219, ¶106, 6 N.E.3d 310, 379 Ill.Dec. 233.

In the event of conversion, the petitioner must file an amended petition that complies with the pleading requirements for a recovery citation (see §11.51 below). If the petitioner lacks sufficient facts at that time to amend to a recovery citation, he or she may assert a recovery citation against that respondent at a later time, and the prior discovery citation will not be res judicata in the subsequent proceeding. *See Schwaan v. Schwaan,* 320 Ill.App. 287, 50 N.E.2d 861, 862 – 863 (1st Dist. 1943) (and cases cited therein). New service will be necessary in the subsequent proceeding.

4. [11.47] Combined Petition To Discover and Recover

Although a petition for a discovery citation may be filed standing alone, it also may be combined at the outset with a request for a recovery citation. *See, e.g., In re Estate of Boyer,* 2012 IL App (1st) 111013, ¶12, 964 N.E.2d 1248, 358 Ill.Dec. 226 (petitioner filed "petition for issuance of a citation to discover and recover assets"), *rev'd on other grounds,* 2013 IL 113655. When addressing a combined petition, a court may first issue the discovery citation, progressing to the recovery citation only when the discovery citation is discharged or converted. *See, e.g., In*

re Estate of York, 2015 IL App (1st) 132830, ¶10, 30 N.E.3d 682, 391 Ill.Dec. 412 (court "entered an order amending and converting the citation to discover assets to a citation to recover assets"); *Piehl v. Norwegian Old Peoples' Home Society of Chicago, Illinois,* 127 Ill.App.3d 593, 469 N.E.2d 705, 706, 83 Ill.Dec. 98 (1st Dist. 1984) (administrator filed "Petition for Citation to Discover and Recover"; court issued only citation to discover, subsequently dismissing it on other grounds). If the court follows this sequential procedure, the petitioner should request that the petition for recovery citation be entered and continued, rather than initially denied, to avoid any argument that the subsequent recovery citation does not relate back for all purposes.

Combining the discovery and recovery citations will not excuse the pleading requirement of stating a cause of action for the recovery citation (see §11.51 below). Thus, a combined petition will have to state a cause of action and set forth factual allegations sufficient to withstand a motion to dismiss. One might question the need for a discovery citation if the petitioner already has facts adequate to support a recovery citation. However, as set forth in §11.45 above, in limited circumstances, a discovery citation might provide greater latitude than discovery under the Code of Civil Procedure, which will govern if only a recovery citation is asserted. *See In re Estate of Wrage,* 194 Ill.App.3d 117, 550 N.E.2d 1115, 1118, 141 Ill.Dec. 69 (1st Dist. 1990).

B. [11.48] Availability of Discovery Citation Under Probate Act §16-2

Based on the differences in the texts of Probate Act of 1975 §§16-1 and 16-2, it was long presumed that a discovery citation is not available under §16-2. 755 ILCS 5/16-1, 5/16-2. Section 16-2 does not expressly provide for the court to order the "appearance before it" of the respondent as a witness, as do §§16-1(a) and 16-1(d). Section 16-2 appears to convey to the court only the power to determine title and "order delivery" of an asset in question. The prior iteration of this chapter therefore concluded that §16-2 does not provide for a discovery citation.

However, more recent Illinois Supreme Court authority appears to dispel that conclusion. In *Bjork v. O'Meara,* 2013 IL 114044, ¶30, 986 N.E.2d 626, 369 Ill.Dec. 313, the court unequivocally stated that "[s]ection 16-2 of the Probate Act allows third-party claimants to bring *two* types of summary and informal citation proceedings, *discovery* and adjudication, concerning the right and title to property in the possession of the estate representative." [Emphasis added.] Presumably under this authority, the same procedure would apply as in a §16-1 discovery citation.

XIV. [11.49] PROCEDURE ON CITATION TO RECOVER

Unlike a discovery citation, a recovery citation seeks the determination of "the right and title to property." *In re Estate of Shugart,* 81 Ill.App.3d 538, 401 N.E.2d 611, 613, 36 Ill.Dec. 770 (3d Dist. 1980). *Accord In re Estate of Weisberg,* 62 Ill.App.3d 578, 378 N.E.2d 1152, 1157, 19 Ill.Dec. 277 (1st Dist. 1978). The purpose of a recovery citation is to recover possession of specific property or, if converted, its proceeds or value. *In re Estate of Shanks,* 282 Ill.App. 1 (3d Dist. 1935). It is a summary method for recovery of property of the decedent from a party retaining possession thereof or who embezzled it. *Wilson v. Prochnow,* 359 Ill. 148, 194 N.E. 246 (1934).

A. [11.50] Requirement of Citation Form

Like a discovery citation petition, a Probate Act of 1975 §16-1 recovery citation petition must include the prepared citation form with a stated return date. 755 ILCS 5/16-1. Unlike §16-1, Probate Act §16-2 does not expressly require that a citation must issue. 755 ILCS 5/16-2. It provides merely that notice of the petition must be given to the representative "as the court may direct." *Id.* This suggests that the representative must be given a notice of motion concerning filing of the petition. In the author's experience, petitioners nevertheless seek issuance of a citation under §16-2. A respondent who already is a party of record (as the estate representative would be in a decedent's estate) often will agree to waive personal service.

B. [11.51] Petition Must Adequately Allege a Cause of Action

Unlike a petition for a discovery citation, a petition for a recovery citation must adequately allege a cause of action. *In re Estate of Yanni,* 2015 IL App (2d) 150108, ¶28; *In re Estate of Hoellen,* 367 Ill.App.3d 240, 854 N.E.2d 774, 784, 305 Ill.Dec. 182 (1st Dist. 2006); *Estate of Chernyk,* 138 Ill.App.3d 233, 485 N.E.2d 1169, 1172, 92 Ill.Dec. 926 (1st Dist. 1985), *appeal denied* (1986); *In re Estate of Shugart,* 81 Ill.App.3d 538, 401 N.E.2d 611, 613 – 614, 36 Ill.Dec. 770 (3d Dist. 1980). This gives the respondent the necessary notice of the claim and opportunity to reply and prepare a defense. *In re Estate of Weisberg,* 62 Ill.App.3d 578, 378 N.E.2d 1152, 19 Ill.Dec. 277 (1st Dist. 1978); *In re Estate of McIntire,* 44 Ill.App.3d 726, 358 N.E.2d 903, 3 Ill.Dec. 360 (5th Dist. 1976); *In re Estate of Garrett,* 81 Ill.App.2d 141, 224 N.E.2d 654 (2d Dist. 1967). In each of these cases, the appellant/respondent argued that the citation was for discovery only, and therefore the court was without jurisdiction to determine ownership. However, the appellate court in each case upheld the trial court recovery orders because the petitions at issue adequately notified respondents that recovery was sought.

Absent adequate allegations of a cause of action and a proper prayer for relief in the citation petition, the court will lack subject-matter jurisdiction and any order entered will be invalid. *In re Guardianship of Holm,* 236 Ill.App.3d 805, 602 N.E.2d 979, 981, 177 Ill.Dec. 84 (4th Dist. 1992). Likewise, any order entered that exceeds the prayer for relief in effect at the time the order is entered will be invalid. *Id.; Schlieper v. Rust,* 46 Ill.App.3d 319, 360 N.E.2d 1192, 4 Ill.Dec. 817 (5th Dist. 1977). *But cf. In re Estate of Miller,* 334 Ill.App.3d 692, 778 N.E.2d 262, 270 – 272, 268 Ill.Dec. 276 (5th Dist. 2002).

C. [11.52] Applicability of Code of Civil Procedure and Supreme Court Rules

Once the respondent has been properly served, a recovery citation should proceed in the same manner as any other civil suit. The provisions of the Code of Civil Procedure and the discovery provisions of the Illinois Supreme Court Rules apply. 755 ILCS 5/1-6. *See In re Estate of Wrage,* 194 Ill.App.3d 117, 550 N.E.2d 1115, 1118, 141 Ill.Dec. 69 (1st Dist. 1990).

The respondent may assert motions to dismiss a recovery citation under Code of Civil Procedure §§2-615 and 2-619. 735 ILCS 5/2-615, 5/2-619. *See, e.g., Piehl v. Norwegian Old Peoples' Home Society of Chicago, Illinois,* 127 Ill.App.3d 593, 469 N.E.2d 705, 83 Ill.Dec. 98 (1st Dist. 1984); *In re Estate of Pinckard,* 94 Ill.App.3d 34, 417 N.E.2d 1360, 49 Ill.Dec. 346 (1st

Dist. 1980); *In re Estate of Cochrane,* 72 Ill.App.3d 812, 391 N.E.2d 35, 28 Ill.Dec. 836 (1st Dist. 1979). The respondent and any additional parties who might be named in a supplemental petition are entitled to answer the petition and assert affirmative defenses or counterclaims. *In re Estate of Rice,* 154 Ill.App.3d 591, 507 N.E.2d 78, 107 Ill.Dec. 414 (1st Dist. 1987).

The trial court has the power to enforce its orders relating to a citation, including the power to incarcerate and/or hold a party in contempt. *Estate of Palm,* 11 Ill.App.3d 24, 295 N.E.2d 580, 583 (1st Dist. 1973).

D. [11.53] Right to a Jury

The parties in Probate Act of 1975 §16-1 or §16-2 recovery citation proceedings have the right to trial by jury. 755 ILCS 5/16-3; *In re Estate of Shugart,* 81 Ill.App.3d 538, 401 N.E.2d 611, 36 Ill.Dec. 770 (3d Dist. 1980).

E. [11.54] Res Judicata Effect of Final Order on Recovery Citation

Unlike discharge orders on discovery citations, final merits orders on recovery citations are res judicata and preclude relitigation of at least the same specific issues between the same parties in subsequent proceedings. *Sims v. Powell,* 390 Ill. 610, 62 N.E.2d 456, 458 – 459 (1945); *Skidmore v. Johnson,* 334 Ill.App. 347, 79 N.E.2d 762, 769 (1st Dist. 1948).

XV. APPEAL FROM THE TRIAL COURT

A. [11.55] Appeal from a Discovery Citation

A discovery citation typically results in an attempt to convert to a recovery citation or an order of discharge at the petitioner's behest. Neither of these situations results in an order on the discovery citation that is appealable as of right. See generally S.Ct. Rules 303 and 304.

When a trial court denies a discovery citation petition and/or refuses to issue a discovery citation, a petitioner might argue that the right or status of a party had been finally determined and that S.Ct. Rule 304(b)(1) applies to allow appeal as of right. But unless the order denying the discovery citation expressly precludes further action against the respondent, the petitioner theoretically still could petition for a recovery citation. *Cf. Schwaan v. Schwaan,* 320 Ill.App. 287, 50 N.E.2d 861, 862 – 863 (1st Dist. 1943) (discharge of discovery citation does not preclude later recovery citation against same respondent). As such, the argument that a final determination has occurred might require a demonstration that a recovery citation is not possible in the absence of discovery. Alternatively, an appeal might be taken from an order dismissing or denying a discovery citation petition if the trial court is persuaded to include S.Ct. Rule 304(a) language in the order.

B. Appeal from a Recovery Citation

1. [11.56] In General

An order entered upon the conclusion of a recovery citation by definition determines the right to the property or properties being sought by the petition and the rights of the parties regarding that property. A final order may be entered after a dismissal with prejudice, a summary judgment, or a trial and would be immediately appealable under S.Ct. Rule 304(b)(1). The fact that there may be many other estate activities remaining does not affect the right to appeal from such an order. Accordingly, such an appeal must be filed within 30 days after entry of the order unless a timely posttrial motion is filed, in which case the appeal must be filed within 30 days after entry of the last order disposing of the last pending timely filed postjudgment motion. S.Ct. Rules 303, 304.

2. [11.57] Standard of Review

A trial court ruling on the merits in a recovery citation proceeding will be reversed only if it is contrary to the manifest weight of the evidence. *In re Estate of Zagaria,* 2013 IL App (1st) 122879, ¶26, 997 N.E.2d 913, 375 Ill.Dec. 602; *In re Estate of Pawlinski,* 407 Ill.App.3d 957, 942 N.E.2d 728, 730, 347 Ill.Dec. 525 (1st Dist. 2011); *In re Estate of Lashmett,* 369 Ill.App.3d 1013, 874 N.E.2d 65, 71, 314 Ill.Dec. 155 (4th Dist. 2007); *Pottinger v. Pottinger,* 238 Ill.App.3d 908, 605 N.E.2d 1130, 1137 – 1138, 179 Ill.Dec. 116 (2d Dist. 1992); *In re Estate of Weisberg,* 62 Ill.App.3d 578, 378 N.E.2d 1152, 1159, 19 Ill.Dec. 277 (1st Dist. 1978). *See Clow v. Chicago Title & Trust Co.,* 9 Ill.App.3d 168, 292 N.E.2d 44, 48 (3d Dist. 1972).

A trial court's ruling on an issue of law is reviewed de novo. *Pawlinski, supra,* 942 N.E.2d at 734 – 735. Issues such as whether a presumption has operated to shift the burden of proof are questions of law. 942 N.E.2d at 735. However, once the trial court has established a burden to be applied, its determination whether the burden has been met is a fact determination, subject to review only on a manifest weight of the evidence standard. *Id.; Desiderato v. Sullivan,* 84 Ill.App.3d 1117, 406 N.E.2d 116, 120, 40 Ill.Dec. 415 (1st Dist. 1980).

XVI. [11.58] CITATION NOT EXCLUSIVE REMEDY

A citation is not an exclusive remedy. *In re Estate of Roeske,* 205 Ill.App. 366, 369 – 370, (1st Dist. 1917). *See also In re Estate of Rodden,* 2015 IL App (1st) 140798, ¶¶8 – 9, 26 N.E.3d 417, 389 Ill.Dec. 327. In *Rodden,* the public guardian filed a "Petition for Accounting" against the ward's former agent under a power of attorney for property. 2015 IL App (1st) 140798 at ¶¶1 – 3. The respondent was provided notice and an opportunity for hearing, and the guardian subsequently obtained a judgment for the return of $17,000 that the respondent had taken from the estate. 2015 IL App (1st) 140798 at ¶4. The respondent moved to vacate the judgment, arguing that the guardian was required to seek a citation under §16-1 (755 ILCS 5/16-1) but had failed to do so. 2015 IL App (1st) 140798 at ¶6. The appellate court affirmed the denial of the motion to vacate, stating that the "[respondent] correctly notes that that the public guardian could have accomplished a similar result by framing his pleading as a citation to recover"; however, "the remedies were not as limited as [respondent] contends." 2015 IL App (1st) 140798 at ¶8.

12 Overview of the Probate Process

MICHAEL R. CONWAY, JR.
JPMorgan Chase Bank, NA
Chicago

I. Decedent's Estate

II. Place of Administration

III. Representative of the Estate

IV. Uncertainty Regarding Death, Heirship, and Contents of Will

A. [12.26] Presumption of Death
   1. [12.27] Petition for Letters
   2. [12.28] Proof of Presumption of Death
   3. [12.29] Evidence of Death
   4. [12.30] Time of Death

B. [12.31] Simultaneous Deaths

C. [12.32] Lost or Destroyed Will

V. [12.33] Uncertainty Regarding Administrative Matters

A. [12.34] Ademption

B. [12.35] Satisfaction

C. [12.36] Lapse

D. [12.37] Advancement

E. [12.38] Abatement

F. [12.39] Disclaimers

G. [12.40] Joint Safe-Deposit Box

H. [12.41] Presumptively Void Transfers

VI. Forms

A. [12.42] Small Estate Affidavit

B. [12.43] Safe-Deposit Box Opening Affidavit

I. DECEDENT'S ESTATE

A. [12.1] In General

During their lifetimes, people have the ability to acquire assets, to manage their own affairs, and to dispose of their assets as they see fit. The death of the person, however, presents a problem. What happens to the decedent's assets and liabilities when the person dies? The law provides a solution, *i.e.,* the administration of the decedent's estate. The administration of a decedent's estate is the process by which the decedent's affairs are taken care of after death. In general, the administration of the decedent's estate allows for the collection and preservation of assets that were owned by the decedent at the time of death. It also allows for the disposition of claims against the decedent and for the payment of expenses incurred in the administration of the estate. Finally, the administration allows for the orderly distribution of the remainder of the decedent's estate to the decedent's heirs or legatees, as the case may be.

B. [12.2] Nonadministration

Occasionally, a decedent's estate does not need to be administered. This normally will occur when the decedent did not own any assets in his or her own name. However, there are exceptions even for the "dry estate," such as when the estate needs to initiate a suit on behalf of the decedent or when a creditor forces administration. In this case, the lawsuit can technically be viewed as an asset of the estate. Although a creditor of the decedent is permitted to force the administration of an estate with few or no assets, a creditor for practical reasons will never do so because it will never get paid.

C. [12.3] Nonjudicial Administration

In certain circumstances, discussed in §§12.4 and 12.5 below, a decedent's estate can be administered without the assistance of the probate court system.

1. [12.4] Small Estate Affidavit

Perhaps the most frequently used method of administering a decedent's estate outside the judicial process is through the use of a small estate affidavit. The current small estate affidavit form can be found in §25-1 of the Probate Act of 1975, 755 ILCS 5/25-1, and is also included in §12.42 below. Effective January 1, 2015, the current small estate affidavit form requires additional information and representations regarding the decedent's debts. A small estate affidavit can be used when the value of the personal estate of the decedent is less than $100,000. *Id.* By statute, the small estate affidavit permits a person, corporation, or financial institution holding personal property of the decedent to transfer that property to the decedent's proper heirs or legatees, as the case may be. Upon payment, delivery, or transfer of the property in accordance with a properly executed affidavit, the person, corporation, or financial institution delivering such property is released to the same extent as if the person made payment to the representative of the decedent's estate.

Although widely used and very convenient, the small estate affidavit is not without risk to the affiant. This is because the affiant of the small estate affidavit indemnifies and holds harmless all creditors and heirs of the decedent and anyone else who relies on the affidavit. In the event that there are misstatements in the affidavit, the aggrieved party could seek recovery against the affiant. Although the aggrieved party's recovery is limited to the amount of the loss as a result of the affidavit, the aggrieved party is entitled to recover reasonable attorneys' fees and costs from the affiant. Thus, because of the risks involved, individuals should be hesitant to sign a small estate affidavit unless they are the individuals entitled to receive the decedent's property pursuant to the affidavit.

In addition, all of the individuals who are entitled to receive the property of the decedent pursuant to the small estate affidavit (other than minors or unascertained persons or persons with a disability) may appoint one or more agents to access a safe-deposit box owned by the decedent or receive and sell property to facilitate the distribution of property to the persons entitled to receive a distribution. See §12.43 below for a sample safe-deposit box opening affidavit.

2. [12.5] Bond in Lieu of Probate

Like a small estate affidavit, a bond in lieu of probate may be used to protect individuals when real or personal property is transferred outside the judicial process by an heir or legatee claiming title. The person claiming title purchases a bond in lieu of probate (from a bonding or title company) to protect the person relying on the bond. In practice, however, bonds in lieu of probate are now only infrequently used and only with respect to real estate because with respect to personal property, a small estate affidavit is far more efficient. Moreover, notwithstanding the beneficiary's desire to bypass probate and use a bond in lieu of probate, the holder of property is under no obligation to accept a bond (unlike a small estate affidavit with respect to personal property). In addition, the bond protects only the person who relies on the bond. It does not protect the heirs who receive the property as a matter of law (with respect to real estate) or those heirs or legatees who otherwise lay claim to personal property.

The premium for the bond is based on the value of the property. In even modest situations, the bond premium may exceed the cost of probate.

One situation in which a bond in lieu of probate is still used is for transfers of real estate. Because real property descends as a matter of law to the heirs of the decedent upon the decedent's death, the heirs of the decedent are the owners of the real property subject to the claims of creditors, homestead rights, and the right of the personal representative in probate to claim possession during the period of administration. *In re Estate of Stokes,* 225 Ill.App.3d 834, 587 N.E.2d 564, 167 Ill.Dec. 295 (4th Dist. 1992); 755 ILCS 5/20-1. If a decedent dies intestate, the heirs may choose to avoid the cost of probate. If the heirs retain the property, there is no need to post a bond until the property is sold. Depending on when the property is eventually sold, the buyers may or may not insist on a bond in lieu of probate.

A bond in lieu of probate typically does not protect against claims for taxes. If tax waivers are not obtained, a holder of property should not accept the bond.

D. [12.6] Summary Administration

Rarely used in practice (for good reason), the summary administration of estates is authorized by the Probate Act when the personal estate and the real estate are valued at $100,000 or less. 755 ILCS 5/9-8. Because of the limitations of summary administration and the similarity in the costs associated with it and a regular probate administration, it is hard to imagine a case in which summary administration would be used. Some of the disadvantages are the inability to administer real property (despite the fact its value is included in the calculation of estate size), the requirement of unanimous consent of heirs and legatees, the inability to shorten the two-year claim bar date, the inability to resolve disputes among heirs and legatees, the inability to enforce probate court orders without a separate civil suit, and the requirement that distributees post surety bonds for amounts distributed to them.

E. [12.7] Administrator To Collect

Under certain circumstances, an administrator to collect may be appointed to sue and collect the personal estate and debts due the decedent. 755 ILCS 5/10-4. The authority of an administrator to collect is confined to preserving the estate until an executor or administrator is appointed. *In re Estate of Gebis,* 186 Ill.2d 188, 710 N.E.2d 385, 237 Ill.Dec. 755 (1999). The administrator to collect may also exercise the powers vested in the administrator of an estate with leave of court. *In re Estate of Breault,* 29 Ill.2d 165, 193 N.E.2d 824 (1963).

1. [12.8] When Appointed

Normally, an administrator to collect is appointed because of a delay in the issuance of letters of office or when an individual is missing from his or her usual place of residence and cannot be located or while an individual is in the military and has been reported as missing in action. 755 ILCS 5/10-1. Delays in the issuance of letters of office might occur when a dispute regarding the appointment of an administrator occurs or when an active attempt is being made to prove the existence of a lost will. In most testate estates, however, there is no need to appoint an administrator to collect because the named executor has the ability to administer the estate prior to the issuance of letters of office. 755 ILCS 5/6-14; *In re Estate of Wolfner,* 58 Ill.App.2d 423, 207 N.E.2d 724 (1st Dist. 1965).

It is far more likely that an administrator to collect will be appointed for a missing person. Because a person generally cannot be presumed dead until he or she is missing for seven years, the appointment of an administrator to collect in the interim period may be necessary.

2. [12.9] Qualifications and Appointment

Any interested person may file a petition for the appointment of an administrator to collect. The petitioner must state the necessary facts required by §10-2 of the Probate Act and give notice as required by §10-3. 755 ILCS 5/10-2, 5/10-3. The qualifications of an administrator to collect are the same as those of an administrator of the estate. 755 ILCS 5/10-1(a). When appointing the administrator to collect, the court should give due consideration to the person named as the executor, if any, or, if none, then to the person nominated in accordance with the preferences listed in §9-3. 755 ILCS 5/10-1(b).

3. [12.10] Revocation of Letters

The powers of the administrator to collect terminate, and the letters of office are revoked, upon the issuance of letters of office for the person's estate or upon satisfactory proof of the survival and location of the missing person. *In re Estate of Faught,* 111 Ill.App.3d 1043, 445 N.E.2d 54, 67 Ill.Dec. 762 (5th Dist. 1983); 755 ILCS 5/10-5.

F. [12.11] Normal Administration

Unless there are no assets held in the decedent's name, the vast majority of estates will require the appointment of a representative to administer the probate estate of the decedent. Representatives of estates are granted various powers to administer the estate in the decedent's will, if any, and by the Probate Act. Although a discussion of these powers is beyond the scope of this chapter, it should be noted for purposes of this chapter that the ability of an interested person to object to actions taken or not taken on behalf of the estate, in general, is increased when the estate is not independently administered. See 755 ILCS 5/28-1, *et seq.;* ILLINOIS ESTATE ADMINISTRATION (IICLE®, 2014). In that regard, an interested person, subject to certain exceptions, has the right to cause the court to terminate independent administration. 755 ILCS 5/28-4. In addition, the court will not be required to terminate independent administration when independent administration is directed in the will and the petitioner is unable to demonstrate good cause, or the petitioner is a creditor or non-residuary legatee who cannot demonstrate that termination is necessary to protect the petitioner's interest (by termination or other means).

II. PLACE OF ADMINISTRATION

A. [12.12] Venue

The probate or administration of the estate of a decedent or a missing person in Illinois shall be in the following county of Illinois: (1) where the decedent or missing person has a known place of residence in Illinois; (2) where the greater part of the decedent's real estate is located at the time of his or her death if the decedent has no place of residence in Illinois; or (3) where the greater part of the decedent's personal estate is located at the time of his or her death if the decedent has no place of residence in Illinois and no real estate located in Illinois. 755 ILCS 5/5-1.

B. [12.13] Collateral Attack and Finality

The judgment of one court in Illinois is not rendered void by a later determination that venue is proper in another county. *See In re Estate of Hardy,* 35 Ill.App.3d 823, 342 N.E.2d 729 (1st Dist. 1976). Further, an order denying or granting a change of venue is interlocutory in character and not appealable without proper certification. *In re Estate of Querciagrossa,* 65 Ill.App.2d 280, 213 N.E.2d 13 (3d Dist. 1965).

C. [12.14] Administration of Estates for Nonresident Decedents

For purposes of granting administration of both testate and intestate estates of nonresident decedents, the administration shall be in the county where the greater part of the decedent's real estate is located, if any, otherwise, in the county in which the greater part of the decedent's personal property is located. 755 ILCS 5/5-1. For this purpose, the situs of tangible personal property is where it is located, and the situs of intangible personal property is where the instrument evidencing the share, interest, debt, obligation, stock, or chose in action is located or where the debtor resides in Illinois if there is no such instrument located in Illinois. 755 ILCS 5/5-2. *See In re Estate of Zorn,* 118 Ill.App.3d 988, 455 N.E.2d 864, 74 Ill.Dec. 435 (4th Dist. 1983).

D. [12.15] Administration of Estates for Nonresident Missing Persons

In the case of a nonresident missing person, the plain language of §§5-1(b) and 5-1(c) of the Probate Act confers jurisdiction and governs the proper venue of a nonresident, but it speaks only about the location of property "at the time of his death." 755 ILCS 5/5-1(b), 5/5-1(c). Although no precedent exists, the better view is that the legislature intended that estates of nonresident missing persons located in Illinois should be administered in accordance with the priority set forth in §5-1 without regard to the reference "at the time of his death."

III. REPRESENTATIVE OF THE ESTATE

A. [12.16] Executor of the Estate

In a testate estate, the court will appoint as the executor or the executors, as the case may be, the person or persons nominated in the will by the testator if such person or persons are qualified and accept the office, and letter of office shall issue. 755 ILCS 5/6-8. If one of several executors who are named in the will fails to qualify and accept the office or ceases to act, then the remaining individuals or any successors named shall continue to act or shall be appointed. 755 ILCS 5/6-9.

Even before the issuance of letters, the executor's power and authority extend to carrying out any gift of the decedent's body or any part thereof, the burial of the decedent, the payment of necessary funeral charges, and the preservation of the estate. 755 ILCS 5/6-14. If the will is not admitted to probate, the executor is not personally liable, except when he or she has refused to deliver the estate to the person authorized by law to receive it or for waste or misapplication of the estate. *Id.*

B. [12.17] Administrator of the Estate

The court will need to appoint an administrator of an estate when an executor is not named, qualified, and willing to act in a testate estate (an administrator with the will annexed), for an intestate estate (an administrator), for a missing person in case of emergency (an administrator to collect), or in a case of conflict (a special administrator).

C. Qualifications To Act as Representative

1. [12.18] Individual

A person is qualified to act as a representative (an executor or administrator) if he or she has attained the age of 18, is a resident of the United States, is not of unsound mind, is not an adjudicated a person with a disability, and has not been convicted of a felony. 755 ILCS 5/6-13(a), 5/9-1. The provision prohibiting convicted felons from acting as executors and administrators has been ruled constitutional under and consistent with the Equal Protection Clause. *In re Estate of Muldrow,* 343 Ill.App.3d 1148, 799 N.E.2d 497, 278 Ill.Dec. 779 (1st Dist. 2003). The focus of the qualification is at the time of appointment and administration. For example, a convicted felon who received a pardon for his crimes from the Governor was qualified to act. *Estate of Smolen,* 6 Ill.App.3d 806, 286 N.E.2d 588 (1st Dist. 1972). If a representative is or becomes a nonresident of Illinois, he or she must file in the court in which the estate is pending a designation of a resident agent to accept service of process, notice, or demand required or permitted by law to be served on the representative. 755 ILCS 5/1-11. If the representative fails to do so, the clerk of the court is constituted as agent. *Id.* Further, the court may in its discretion require a nonresident executor to furnish a bond in such amount and with such surety as the court determines, notwithstanding any contrary provision of the will. 755 ILCS 5/6-13(b).

If an individual named as executor is not qualified to act at the time of admission of the will to probate, but thereafter becomes qualified, he or she may file a petition for the issuance of letters as coexecutor with any existing executor or as the sole executor if an administrator with the will annexed was appointed. *Id.*

Although a person may be qualified to act as administrator, the person does not have an absolute right to do so. The court may consider a person's fitness to act. *Estate of Lindberg,* 98 Ill.App.3d 212, 424 N.E.2d 1161, 54 Ill.Dec. 258 (1st Dist. 1981). The fact that the person seeking appointment has interests opposed to the interests of other heirs or legatees can also be considered. *In re Estate of Hartman,* 65 Ill.App.3d 380, 381 N.E.2d 1221, 21 Ill.Dec. 677 (3d Dist. 1978).

2. [12.19] Corporation

Any corporation qualified to accept and execute trusts in Illinois is qualified to act as the administrator of an estate. 755 ILCS 5/1-3; *In re Young's Estate,* 414 Ill. 525, 112 N.E.2d 113 (1953). Although a limited liability company is technically not a corporation, the better view is that the statute should be read as permitting a limited liability company to act if it is authorized to accept and execute trusts in Illinois.

3. [12.20] Removal of Representative or Revocation of Letters

Generally, a representative, once appointed, should be removed only for cause as set forth in §23-2 of the Probate Act, 755 ILCS 5/23-2. *In re Estate of Smith,* 41 Ill.App.2d 86, 190 N.E.2d 175 (1st Dist. 1963). A representative may be removed by petition of an interested party or on the court's own motion. *In re Estate of Hubbard,* 54 Ill.App.3d 238, 369 N.E.2d 292, 11 Ill.Dec. 838 (2d Dist. 1977).

There is one exception to the general rule that allows a court to revoke the letters of administration and issue new letters without a showing of cause as required under §23-2 of the Probate Act. If the petitioner for letters of administration did not mail a copy of the petition to a person who is entitled to administer or nominate a person to administer equally with or in preference to the petitioner, then the person entitled to administer or nominate may, within three months from the date letters originally issued, file a petition seeking the issuance of new letters to himself or herself or to his or her nominee. 755 ILCS 5/9-7. At the hearing, with at least ten days' notice to the administrator, the court may revoke the letters previously issued and issue new letters. *Id.*

The ability of the court to revoke and issue new letters within the guidelines set forth in §9-7 of the Probate Act does not preclude the removal of an administrator after three months under §23-2 of the Probate Act if the aggrieved party can show cause, such as the petitioner's failure to send appropriate notice when that information was available to the original petitioner.

D. [12.21] Preference To Administer Estate

Preferences for obtaining letters of administration and nominating persons for administrator are set forth in §9-3 of the Probate Act, 755 ILCS 5/9-3. If there is a surviving spouse, he or she, or any person nominated by the surviving spouse, has preference over anyone else. The statute also gives preference to legatees ahead of children and, among the legatees, gives preference to children who are legatees.

Although courts rarely depart from the statutorily set preferences, the preference to administer or nominate is not an absolute right. *In re Abell's Estate,* 395 Ill. 337, 70 N.E.2d 252 (1946). In *Abell,* the Illinois Supreme Court upheld the appointment of a disinterested third person over the objection of persons in preferential positions when the trial court found it in the best interests of the estate.

Absent extraordinary circumstances, courts generally will appoint the person with preference to administer or the person nominated by such person. *In re Estate of Savio,* 388 Ill.App.3d 242, 902 N.E.2d 1113, 327 Ill.Dec. 727 (3d Dist.), *appeal denied,* 232 Ill.2d 580 (2009). In *Savio,* the court appointed the decedent's father and sibling over the objection of the former executor and the decedent's former spouse as a result of their perceived conflicts of interest when the former spouse was a likely defendant in the decedent's wrongful-death action. When persons hold equal preferences to administer or nominate and disagree among themselves, however, courts are free to exercise discretion, including considering the wishes of heirs or legatees not entitled to administer. *Estate of Roselli,* 70 Ill.App.3d 116, 388 N.E.2d 87, 26 Ill.Dec. 463 (1st Dist. 1979).

Although there are no set rules and each case is decided based on its own facts, courts tend to give a member of a class preference over someone nominated by a member of a class. *See, e.g., In re Estate of Hartman,* 65 Ill.App.3d 380, 381 N.E.2d 1221, 21 Ill.Dec. 677 (3d Dist. 1978). Similarly, courts have preferred administrators or nominees of kindred to public administrators. *See, e.g., In re Glass' Estate,* 351 Ill.App. 242, 114 N.E.2d 467 (3d Dist. 1953) (abst.).

Only a person qualified to act as an administrator may nominate an administrator, except that the guardian of the estate, if any, or, if none, the guardian of the person of a person who is not qualified to act as administrator solely because of minority or legal disability, may nominate on behalf of the minor or a person with a disability in accordance with the order of preference set forth in §9-3. Nomination rights, however, are not personal and may be exercised by representatives, such as a guardian on behalf of a minor descendant. *In re Estate of Zenkus,* 346 Ill.App.3d 741, 805 N.E.2d 1257, 282 Ill.Dec. 240 (2d Dist. 2004) (guardian was former spouse and had no independent right to nominate); *In re Estate of Cage,* 381 Ill.App.3d 110, 885 N.E.2d 477, 319 Ill.Dec. 206 (1st Dist. 2008) (guardian who was mother of decedent's children had preference over decedent's sibling and could name herself).

E. [12.22] Petition for Letters of Administration

A person seeking to have letters of administration issued for an intestate estate should file a petition in the proper county setting forth those facts required under §9-4 of the Probate Act, 755 ILCS 5/9-4. A person seeking to have letters of administration with the will annexed issued should file a petition in the proper county setting forth those facts required under §6-2 of the Probate Act, 755 ILCS 5/6-2. These facts include a statement regarding the person nominated to administer and those persons, if any, with an equal or preferred right to nominate. Persons entitled to obtain such letters, whether for an intestate estate or a will annexed, are listed in preferred order in §9-3 of the Probate Act. *In re Estate of Poole,* 328 Ill.App.3d 964, 767 N.E.2d 855, 263 Ill.Dec. 129 (3d Dist. 2002) (biological father of illegitimate stillborn child had priority over maternal grandmother to be named administrator of estate when he had acknowledged fetus as his own and supported fetus through his support of mother).

F. [12.23] Notice to Persons with Equal or Preferred Right To Administer

Not less than 30 days prior to the hearing on the petition to issue letters, if any persons are entitled to administer or nominate an administrator equally with or in preference to the petitioner, then the petitioner must mail a copy of the petition to such persons whose addresses are stated in the petition setting forth the time and place of the hearing. 755 ILCS 5/9-5(a). These notice requirements can be waived by filing a formal waiver of notice or if the persons entitled to notice actually attend the hearing. *In re Estate of Hartman,* 65 Ill.App.3d 380, 381 N.E.2d 1221, 21 Ill.Dec. 677 (3d Dist. 1978). Because a nonresident of the United States loses his or her right to nominate, no notice prior to the hearing need be given to such a person. *In re Estate of Gingolph,* 114 Ill.App.2d 363, 252 N.E.2d 726 (1st Dist. 1969).

G. [12.24] Notice After Issuance to Heirs and Legatees Without Equal or Preferred Right To Administer

Not more than 14 days after the entry of the order directing that original letters of office shall issue, the administrator must mail a copy of the petition and a copy of the order showing the date of its entry to each of the decedent's heirs who was not entitled to notice of the hearing. If the name or address of an heir is not known, the administrator must publish notice as provided in the statute. 755 ILCS 5/9-5(b). Likewise, in the situation in which a surviving spouse nominates the

administrator with the will annexed and notice would not be required to legatees under §9-5 of the Probate Act, notice to legatees should be given in accordance with §6-10 of the Probate Act, 755 ILCS 5/6-10.

H. [12.25] Issuance of Letters of Administration

Letters of administration will be issued upon proper petition in accordance with the preferences in §9-3 of the Probate Act, 755 ILCS 5/9-3. An administrator of an intestate estate has only the powers conferred on the administrator by the Probate Act. An administrator with the will annexed, unless expressly provided by the will, has all of the powers and duties of the executor under the will but is not excused from giving surety on his or her bond. 755 ILCS 5/6-16.

IV. UNCERTAINTY REGARDING DEATH, HEIRSHIP, AND CONTENTS OF WILL

A. [12.26] Presumption of Death

A person desiring to cause letters of administration or letters testamentary to be issued for someone presumed to be dead must follow the procedures outlined in §§9-6 and 6-20 of the Probate Act, 755 ILCS 5/9-6, 5/6-20. Once granted, the reappearance of an individual legally presumed dead does not invalidate the letters of administration of an estate or the actions of the administrator. *In re Estate of Zagaria,* 2013 IL App (1st) 122879, 997 N.E.2d 913, 375 Ill.Dec. 602. The property held by the estate technically remains the estate's property and subject to estate expenses. *Id.*

1. [12.27] Petition for Letters

In addition to the normal requirements of a petition for letters testamentary or letters of administration, the petition in the case of presumption of death must set forth the facts and circumstances raising the presumption, the last known address of the decedent, and the name and address of each person in possession or control of any of the decedent's property. 755 ILCS 5/6-20(a), 5/9-6(a).

Not less than 30 days before the hearing date, the petitioner must mail a copy of the petition, which must set forth the time and place of the hearing, to the decedent at his or her last known address, to each of the decedent's heirs (in the case of an intestate estate) if their addresses are known, to each of the testator's heirs and legatees (in the case of a testate estate) if their addresses are known, and to each person in possession or control of the decedent's property. 755 ILCS 5/6-20(b), 5/9-6(b). In addition, the petitioner must publish notice of the hearing once a week for three successive weeks, the first publication being not less than 30 days before the hearing. A copy of the petition need not be sent to any person not designated in the petition as a minor or a person with a disability and who personally appeared before the court at the hearing or who filed a waiver of notice. 755 ILCS 5/6-20(c), 5/9-6(c).

2. [12.28] Proof of Presumption of Death

The presumption of death is raised when (a) the person has disappeared or is continuously absent for at least seven years from his or her home without explanation, (b) those persons with whom the missing person would likely communicate have not heard from the missing person or heard anything about the person that would suggest that the person is alive, and (c) a diligent search has been made at the missing person's last known place of abode without obtaining information that the person is alive. *In re Estate of Morrison,* 92 Ill.2d 207, 441 N.E.2d 68, 65 Ill.Dec. 276 (1982).

The presumption of death may also be inferred when the person is away from his or usual abode and if survival of the person to the date in question would be beyond human expectation or experience. 441 N.E.2d at 71. However, old age, standing alone, if less than 100 years, has been held not to raise the presumption. *Id.*

The presumption of death can also be established by circumstantial evidence that establishes that the person is missing after having been in a place of peril. *Veselsky v. Bankers Life Co.,* 248 Ill.App. 176 (1st Dist. 1928); *Davis v. Metropolitan Life Insurance Co.,* 285 Ill.App. 398, 2 N.E.2d 141 (4th Dist. 1936).

The presumption of death must be proved by a preponderance of evidence. It is also rebuttable and can be rebutted by evidence that the person is alive. *In re Estate of King,* 304 Ill.App.3d 479, 710 N.E.2d 1249, 238 Ill.Dec. 147 (2d Dist.), *appeal denied,* 185 Ill.2d 627 (1999).

3. [12.29] Evidence of Death

For the most part, the presumption of death can be established by circumstantial evidence, especially when the person's disappearance is linked to being in a place of peril. *Veselsky v. Bankers Life Co.,* 248 Ill.App. 176 (1st Dist. 1928). Lack of communication and a diligent search, however, should be proved by evidence that such communication did not take place and that a diligent search was indeed undertaken. "A diligent inquiry is one that a reasonably prudent person would make in similar circumstances. It should encompass all of the places where information is likely to be obtained and extend to all of the people who would be likely to hear from the missing person." *In re Estate of Morrison,* 92 Ill.2d 207, 441 N.E.2d 68, 72, 65 Ill.Dec. 276 (1982). The court in *Morrison* suggested that, at a minimum, marriage, postal, employment, and local utility records should be checked. *Id.*

4. [12.30] Time of Death

Once the presumption of death is established, the presumption of life ceases. *In re Estate of King,* 304 Ill.App.3d 479, 710 N.E.2d 1249, 238 Ill.Dec. 147 (2d Dist.), *appeal denied,* 185 Ill.2d 627 (1999). Thus, without any other specific evidence, it has been held that the date of death of the person presumed dead is set at the end of the seven-year period. *Id.*

There is no presumption as to the time of death. *Whiting v. Nicholl,* 46 Ill. 230 (1867). If it is important to establish the specific time of death, the party intending to do so must establish the

time of death by evidence of some sort. 46 Ill. at 241 – 242. Indeed, the time of death may be established by circumstantial evidence alone (especially in cases other than ordinary disappearances), and the weight of the evidence is in the province of the trier of fact. *Zahn v. Muscarello,* 336 Ill.App. 188, 83 N.E.2d 504 (1st Dist. 1948); *Veselsky v. Bankers Life Co.,* 248 Ill.App. 176 (1st Dist. 1928).

B. [12.31] Simultaneous Deaths

Illinois law has adopted in substance the Uniform Simultaneous Death Act. See Article III of the Probate Act, 755 ILCS 5/3-1, *et seq*. Indeed, the statute is to be construed and interpreted as to make the law uniform with those states enacting similar statutes. 755 ILCS 5/3-2. Thus, when appropriate, caselaw from other states adopting the Uniform Simultaneous Death Act should be persuasive. *In re Estate of Parisi,* 328 Ill.App.3d 75, 765 N.E.2d 123, 262 Ill.Dec. 297 (1st Dist. 2002).

When there is no sufficient evidence that persons have died other than simultaneously and title to property depends on the priority of death and there is no other provision in the governing instrument, if any, that governs this situation, then the property of each person shall be disposed of as if each person had survived the other. 755 ILCS 5/3-1(a). Similar rules apply to different situations, including beneficiary designations, joint property, and insurance proceeds. 755 ILCS 5/3-1(b) through 5/3-1(d).

The burden of proving one party survived the other is on the party making the allegation. *In re Estate of Lowrance,* 66 Ill.App.3d 159, 383 N.E.2d 703, 22 Ill.Dec. 895 (5th Dist. 1978). "Sufficient evidence" of survivorship must be proved by a preponderance of the evidence. *Janus v. Tarasewicz,* 135 Ill.App.3d 936, 482 N.E.2d 418, 90 Ill.Dec. 599 (1st Dist. 1985). In *Janus,* sufficient evidence of survivorship of the wife was shown by a physician's diagnosis of death of the husband on one day based on the usual and customary medical standards when a physician using the same medical standards would not diagnose the wife as dead.

Simultaneous death will not be rebutted solely by evidence of age and health of persons and speculation as to which person would have survived. *In re Estate of Moran,* 77 Ill.2d 147, 395 N.E.2d 579, 32 Ill.Dec. 349 (1979). As a practical matter, courts appear to require clear evidence of survivorship when the distribution of estates will be drastically affected. *See Lowrance, supra*.

C. [12.32] Lost or Destroyed Will

When an original will cannot be found or has been destroyed, the decedent is presumed to have revoked the will. *In re Morgan's Estate,* 389 Ill. 484, 59 N.E.2d 800 (1945). The contents of a lost or a destroyed will, however, can be admitted to probate as the will of the decedent if the presumption can be overcome and the contents proved by satisfactory proof. *Id.*

In lost-will cases, courts have looked at the following evidence to overcome the presumption of revocation: (1) letters from the decedent to legatees informing them of the testamentary gift; (2) testimony as to a "close family connection" between the decedent and the legatees; (3) the decedent's failure to require any inter vivos payments from the legatees who were already in

possession of the decedent's land during the decedent's lifetime; and (4) the absence of any evidence that the decedent at any time ever indicated any displeasure with the will provisions. *In re Estate of Babcock,* 119 Ill.App.3d 482, 456 N.E.2d 671, 74 Ill.Dec. 950 (3d Dist. 1983), *aff'd,* 105 Ill.2d 267 (1985). As noted in *Babcock,* care should be taken not to admit any evidence in violation of the Dead-Man's Act, 735 ILCS 5/8-201. *See also In re Estate of Strong,* 194 Ill.App.3d 219, 550 N.E.2d 1201, 141 Ill.Dec. 155 (1st Dist. 1990). Moreover, a person may not become competent to testify by releasing or disclaiming any interest for the purpose of permitting testimony that would otherwise be barred by the Dead-Man's Act. *In re Estate of Phillips,* 359 Ill.App.3d 114, 833 N.E.2d 895, 295 Ill.Dec. 689 (1st Dist. 2005). Evidence of an estate's settlement of another claim that is based on the lost will being admitted is also prohibited. *Id.*

Although not a necessity, it is certainly helpful to prove the contents of a lost will by submitting a photocopy of the original will. *In re Estate of Weir,* 120 Ill.App.3d 18, 458 N.E.2d 134, 75 Ill.Dec. 966 (3d Dist. 1983). The existence of an original codicil is evidence to be considered in the determination of whether the original will was revoked and in turn the validity of the codicil. *In re Estate of Koziol,* 366 Ill.App.3d 171, 851 N.E.2d 198, 303 Ill.Dec. 300 (1st Dist. 2006).

V. [12.33] UNCERTAINTY REGARDING ADMINISTRATIVE MATTERS

Sections 12.34 – 12.41 below briefly cover miscellaneous issues involving the administration of a decedent's estate.

A. [12.34] Ademption

In general, ademption occurs when a testator executes a will containing a specific bequest and the specific gift is not in the testator's estate at the time of death. Such a bequest is extinguished and is ineffective. *In re Estate of Krotzsch,* 60 Ill.2d 342, 326 N.E.2d 758 (1975). It is immaterial whether the gift was owned by the testator at the time the testator drafted the will. *Lawless v. Lawless,* 17 Ill.App.2d 481, 150 N.E.2d 646 (3d Dist. 1958). Because ademption applies only to specific bequests, not general or demonstrative bequests, it is important to distinguish the two kinds of bequests.

A specific legacy is a bequest of a specific thing or of a particular fund, which the testator distinguishes from all the rest of the testator's estate of the same kind. *Lenzen v. Miller,* 378 Ill. 170, 37 N.E.2d 833 (1941); *In re Estate of Berman,* 39 Ill.App.2d 175, 187 N.E.2d 541 (2d Dist. 1963). Bequests of real property, by their nature, are specific bequests.

On the other hand, a general legacy is a gift of personal property that is not a bequest of any particular money, thing, or fund that is designated and distinguished by the testator from all other moneys, things, or funds of the same kind. *Lenzen, supra; Berman, supra.*

The boundary between specific bequests and other bequests is not always clear. If a specific item is held by an estate, and if it can be demonstrated that the testator clearly intended a specific thing to pass to the residuary legatee, courts have held that a residuary bequest can be specific in

nature as to that specific item. *In re Estate of Comiskey,* 24 Ill.App.2d 199, 164 N.E.2d 535 (1st Dist. 1960) (intent to leave shares of stock of baseball club to daughter as part of residuary bequest found to be specific bequest); *In re Estate of Appel,* 13 Ill.App.3d 546, 300 N.E.2d 845 (1st Dist. 1973) (shares of stock in named corporation specific in nature).

If a specific thing bequeathed is no longer held by an estate, courts are inclined to construe such a bequest as general or demonstrative in nature, rather than specific, unless the will clearly requires an ademption. *Lenzen, supra.* The rationale employed by the courts is that it is more likely that the testator intended to give something to the legatee rather than limiting the legatee to some particular thing owned at the time of the testator's death. *Lawless, supra; Allen v. National Bank of Austin,* 19 Ill.App.2d 149, 153 N.E.2d 260 (1st Dist. 1958).

A bequest can share some of the characteristics of a general and a specific bequest. A demonstrative legacy, for example, is a bequest of a pecuniary amount that is payable out of a specific fund. *Lenzen, supra.* If the fund is insufficient to provide for the pecuniary bequest, courts will presume that the testator did not intend for the bequest to fail and will generally find that the bequest is payable out of the general assets of the estate as a general bequest. *Id.* This presumption, however, can be overcome if it is clear from the intent of the testator that the satisfaction of the bequest was limited to a particular fund and not the estate as a whole. *Tanton v. Keller,* 167 Ill. 129, 47 N.E. 376 (1897).

Partial ademptions are possible. For example, when a testator transfers only a portion of real estate specifically bequeathed, the ademption relates only to the extent conveyed. *Brady v. Paine,* 391 Ill. 596, 63 N.E.2d 721 (1945).

When, however, property can be traced and substantially identified as the property bequeathed, ademption will not apply. *Knight v. Bardwell,* 32 Ill.2d 172, 205 N.E.2d 249 (1965). Also, when property specifically bequeathed in a will and the whole or any part of the property remains executory at the time of the testator's death, the disposition of the property does not revoke the bequest, but the property passes to the legatee subject to the contract. 755 ILCS 5/4-8.

B. [12.35] Satisfaction

The doctrine of ademption, discussed in §12.34 above, should not be confused with satisfaction. Satisfaction can occur when a testator makes a bequest in a will but, prior to death and after the execution of his or her will, satisfies the bequest during his or her lifetime. The distinction can generally be made in that ademption applies to specific gifts, while satisfaction applies to general or residuary bequests. *Tanton v. Keller,* 167 Ill. 129, 47 N.E. 376 (1897).

C. [12.36] Lapse

A bequest will lapse, or fail, and pass as part of the residue when the legatee predeceases the testator unless the bequest is to a descendant of the testator and it is saved by the antilapse statute or the testator provides otherwise in his or her will. 755 ILCS 5/4-11. The testator in his or her will can override the provisions of the antilapse statute. In order to avoid the antilapse statute, a will must clearly express an intention on the part of the testator to bar application of the statute. *In*

re Estate of Smith, 2015 IL App (5th) 140225-U (30-day survival clause not sufficient express evidence to override statute); *In re Estate of Bulger,* 224 Ill.App.3d 456, 586 N.E.2d 673, 166 Ill.Dec. 715 (1st Dist. 1991); *Schneller v. Schneller,* 356 Ill. 89, 190 N.E. 121, 122 (1934) (when testator's will left estate to his children, "or to the survivors or survivor of them, to be distributed equally share and share alike," intention to disinherit any grandchildren from predeceasing descendant was not clearly expressed). If not overridden, the descendants of the descendant-legatee who is deceased when the legacy is to take effect take the legacy per stirpes. 755 ILCS 5/4-11(a).

A legacy payable to a legatee "if she survives me" has been found to override the antilapse statute. *Aurora National Bank v. Old Second National Bank,* 59 Ill.App.3d 384, 375 N.E.2d 544, 549, 16 Ill.Dec. 671 (2d Dist. 1978).

D. [12.37] Advancement

Technically, an advancement (as opposed to a satisfaction) applies only to intestate estates. 755 ILCS 5/2-5. An advancement must be established by a writing by the decedent or by a written acknowledgment of the person to whom the gift is made. *Id.; Young v. Young,* 204 Ill. 430, 68 N.E. 532 (1903). Because evidence of an advancement must be in writing, no essential part of the proof necessary to establish the advancement can be proved by parol statements or declarations. *Young, supra; Elliott v. Western Coal & Mining Co.,* 243 Ill. 614, 90 N.E. 1104 (1910).

E. [12.38] Abatement

Unless otherwise provided in the will, if the estate of a testator is insufficient to pay all legacies under his or her will, specific legacies shall be satisfied pro rata before general legacies, which shall be satisfied pro rata. 755 ILCS 5/24-3. For abatement purposes, there is no longer any distinction between real and personal legacies. *Id.* Indeed, unless modified by the will, the representative should charge the expenses and taxes in the following order: intestate property; residuary legacies; general legacies; demonstrative legacies; and then specific legacies. *Landmark Trust Co. v. Aitken,* 224 Ill.App.3d 843, 587 N.E.2d 1076, 167 Ill.Dec. 461 (5th Dist. 1992); *Kincaid v. Moore,* 233 Ill. 584, 84 N.E. 633 (1908).

Logically, gifts within the same class abate proportionately with similar class gifts. In the event that it is necessary to sell specifically bequeathed property for abatement purposes, the other legatees of the same class shall contribute to the legatee whose legacy was sold to equalize the effect of abatement on that particular class of gifts. 755 ILCS 5/24-3. A testator, however, may override the statutory abatement rules by providing otherwise in the testator's will. *Id.* In order to do so, courts require that the intention of the testator must be beyond dispute by the terms of the will. *In re McDonald's Estate,* 314 Ill.App. 148, 41 N.E.2d 128 (2d Dist. 1942); *Landmark Trust, supra* (testator's will did not otherwise provide for equitable apportionment as ordered by trial court). Pro rata abatement is a presumption that may be overcome only by a clear indication, set forth in the will, of a contrary intent. *In re Estate of Fleer,* 21 Ill.App.3d 56, 315 N.E.2d 260 (1st Dist. 1974). The order, placement, or separation of specific legacies does not by itself overcome this presumption. *Handelsman v. Handelsman,* 366 Ill.App.3d 1122, 852 N.E.2d 862, 304 Ill.Dec. 406 (2d Dist. 2006).

When not provided by the testator, the surviving spouse's renunciation share should be payable from intestate property, if any, first and then from the residue. *Kincaid, supra.* The discriminatory rule of abatement by classes states that losses or changes in value by a spouse's renunciation are apportioned with regard to class, with residuary legatees paying before general and specific legatees are charged. *Hopper v. Beavers,* 362 Ill.App.3d 913, 841 N.E.2d 1019, 299 Ill.Dec. 287 (5th Dist. 2005).

F. [12.39] Disclaimers

The right to disclaim property in Illinois is governed by §2-7 of the Probate Act, 755 ILCS 5/2-7. The Illinois statute does not track the federal disclaimer statute exactly. See 26 U.S.C. §2518. For example, an individual in Illinois is given a reasonable time to disclaim property, whereas to be a qualified disclaimer under federal law, the disclaimer needs to be executed within nine months of the decedent's death. A disclaimer relates back to the date of the death of the testator. 755 ILCS 5/2-7(d). The effect of the disclaimer is that the property will descend or be transferred as if the disclaimant predeceased the date of the transfer. *Id.* A devisee-debtor's disclaimer filed prior to filing a bankruptcy petition is not a "transfer of property" by the debtor that can be set aside. *Barmann v. Wood (In re Wood),* 291 B.R. 829, 831 (Bankr. C.D.Ill. 2003).

The disclaimer must describe the property to be disclaimed, be signed by the disclaimant or his or her representative, and declare the disclaimer and the extent thereof. 755 ILCS 5/2-7(b). In addition, the disclaimer must be delivered to the transferor, donor, or titleholder or, if none of those persons is readily determinable, to the person in possession of the property to be disclaimed. 755 ILCS 5/2-7(c). An executed counterpart of the disclaimer may, but need not, be filed in probate court in the case of an interest passing from a decedent or recorded in the real estate records in the case of real property. *Id.*

The right to disclaim property shall be barred by, among other things, the acceptance of the property by the disclaimant prior to executing his or her disclaimer. 755 ILCS 5/2-7(e). Devisees cannot disclaim after dealing with the property in a manner that is inconsistent with a complete renunciation of any interest in the property. *Tompkins State Bank v. Niles,* 127 Ill.2d 209, 537 N.E.2d 274, 130 Ill.Dec. 207 (1989).

A representative of a decedent's estate may disclaim on behalf of a decedent only with leave of court. *In re Estate of Morgan,* 74 Ill.App.3d 853, 393 N.E.2d 692, 30 Ill.Dec. 656 (1st Dist. 1979), *aff'd,* 82 Ill.2d 26 (1980). When the result of a disclaimer rendered an estate insolvent to pay creditors, the representative was not permitted to disclaim. *In re Estate of Heater,* 266 Ill.App.3d 452, 640 N.E.2d 654, 203 Ill.Dec. 734 (4th Dist. 1994). *See Williams v. Chenoweth (In re Chenoweth),* 143 B.R. 527 (S.D.Ill. 1992) (for bankruptcy purposes, interest in estate arises upon death of individual, not when will is admitted to probate).

G. [12.40] Joint Safe-Deposit Box

In Illinois, there is no presumption that the contents of a joint safe-deposit box are joint property. In fact, other competent evidence must establish the ownership of the property. *In re*

Estate of Wilson, 404 Ill. 207, 88 N.E.2d 662 (1949); *In re Estate of Stahl,* 13 Ill.App.3d 680, 301 N.E.2d 82 (1st Dist. 1973); *In re Estate of Kloss,* 57 Ill.App.2d 118, 207 N.E.2d 92 (1st Dist. 1965).

Opening of safe-deposit boxes is governed by the Safety Deposit Box Opening Act, 755 ILCS 15/0.01, *et seq.* For a sample safe-deposit box opening affidavit that satisfies the requirements of the Act, see §12.43 below.

H. [12.41] Presumptively Void Transfers

In 2014, the Illinois legislature responded to a growing concern of fraudulent or coerced transfers to caregivers. See 755 ILCS 5/4a-10. "Transfer instruments" (including wills, trusts, payable-on-death contracts, deeds, or other instruments taking effect on or after the transferor's death) executed on or after January 1, 2015, that purport to transfer property in excess of $20,000 to a nonfamily member "caregiver" are presumed to be void when challenged in a civil action prior to the shorter of the expiration of the will contest period or two years from the date of the decedent's death. *Id.* The presumption can be overcome by the transferee by proving (1) by a preponderance of the evidence that the share received is not greater than the amount that would have been received under another instrument in effect prior to the time the transferee becomes a caregiver or (2) by clear and convincing evidence that the transfer was *not* the product of fraud, duress, or undue influence. 755 ILCS 5/4a-15. If a caregiver attempts to and fails to rebut the presumption, the caregiver *shall* bear the costs of the proceeding, including reasonable attorneys' fees. 755 ILCS 5/4a-25.

VI. FORMS

A. [12.42] Small Estate Affidavit

[NOTE: This form is set forth in 755 ILCS 5/25-1(b).**]**

SMALL ESTATE AFFIDAVIT

I, [name of affiant**], on oath state:**

1. (a) My post office address is _____;

(b) My residence address is _____; and

(c) I understand that, if I am an out-of-state resident, I submit myself to the jurisdiction of Illinois courts for all matters related to the preparation and use of this affidavit. My agent for service of process in Illinois is:

Name _____
Address _____
City _____
Telephone _____

I understand that if no person is named above as my agent for service or, if for any reason, service on the named person cannot be effectuated, the clerk of the circuit court of _____ [County**] [**Judicial Circuit**], Illinois, is recognized by Illinois law as my agent for service of process.**

2. The decedent's name is _____.

3. The date of decedent's death was _____, 20__, and I have attached a copy of the death certificate hereto.

4. The decedent's place of residence immediately before [his**] [**her**] death was _____.**

5. No letters of office are now outstanding on the decedent's estate, and no petition for letters is contemplated or pending in Illinois or in any other jurisdiction, to my knowledge.

6. The gross value of the decedent's entire personal estate, including the value of all property passing to any party either by intestacy or under a will, does not exceed $100,000.

[Here, list each asset, *e.g.,* cash, stock, and its fair market value.**]**

7. (a) All of the decedent's funeral expenses and other debts have been paid; or

(b) All of the decedent's known unpaid debts are listed and classified as follows (include the name, post office address, and amount):

Class 1: Funeral and burial expenses, which include reasonable amounts paid for a burial space, crypt, or niche; a marker on the burial space; and care of the burial space, crypt, or niche; expenses of administration; and statutory custodial claims as follows:

_____

Class 2: The surviving spouse's award or child award, if applicable, as follows:

_____

Class 3: Debts due the United States, as follows:

_____

Class 4: Money due employees of the decedent of not more than $800 for each claimant for services rendered within four months prior to the decedent's death and expenses of attending the last illness, as follows:

_____

Class 5: Money and property received or held in trust by the decedent that cannot be identified or traced, as follows:

_____

Class 6: Debts due the State of Illinois and any county, township, city, town, village, or school district located within Illinois, as follows:

_____

Class 7: All other claims, as follows:

_____

(Strike either 7(a) or 7(b)).

8. I understand that all valid claims against the decedent's estate described in paragraph 7 must be paid by me from the decedent's estate before any distribution is made to any heir or legatee. I further understand that the decedent's estate should pay all claims in the order set forth above, and if the decedent's estate is insufficient to pay the claims in any one class, the claims in that class shall be paid pro rata.

9. There is no known unpaid claimant or contested claim against the decedent, except as stated in paragraph 7 above.

10. (a) The names and places of residence of any surviving spouse, minor children, and adult dependent* children of the decedent are as follows:

Name and Relationship	**Place of Residence**	**Age of Minor Child**

***Note: An adult dependent child is one who is unable to maintain himself or herself and is likely to become a public charge.**

(b) The award allowable to the surviving spouse of a decedent who was an Illinois resident is $_____ [$20,000, plus $10,000 multiplied by the number of minor children and adult dependent children who resided with the surviving spouse at the time of the decedent's death. If any such child did not reside with the surviving spouse at the time of the decedent's death, so indicate.**].**

(c) If there is no surviving spouse, the award allowable to the minor children and adult dependent children of a decedent who was an Illinois resident is $_____ [$20,000, plus $10,000 multiplied by the number of minor children and adult dependent children**], to be divided among them in equal shares.**

11. (a) The decedent left no will. The names, places of residence, and relationships of the decedent's heirs and the portion of the estate to which each heir is entitled under the law where decedent died intestate are as follows:

Name, Relationship, and Place of Residence	**Age of Minor**	**Portion of Estate**

(or)

(b) The decedent left a will, which has been filed with the clerk of an appropriate court. A certified copy of the will on file is attached. To the best of my knowledge and belief, the will on file is the decedent's last will and was signed by the decedent and the attesting witnesses as required by law and would be admittable to probate. The names and places of residence of the legatees and the portion of the estate, if any, to which each legatee is entitled are as follows:

Name, Relationship, and Place of Residence	**Age of Minor**	**Portion of Estate**

(Strike either 11(a) or 10(b).)

(c) Affiant is unaware of any dispute or potential conflict as to the heirship or will of the decedent.

12. My relationship to the decedent or the decedent's estate is as follows:

_____

13. [The following paragraph should appear in bold type and in not less than 14-point font.**] I understand the decedent's estate must be distributed first to satisfy the claims against the decedent's estate as set forth above in paragraph 8 of this affidavit before any distribution is made to any heir or legatee. By signing this affidavit, I agree to indemnify and hold harmless all creditors of the decedent's estate, the decedent's heirs and legatees, and other persons, corporations, or financial institutions relying on this affidavit who incur any loss because of reliance on this affidavit, up to the amount lost because of any act or omission by me. I further understand that any person, corporation, or financial institution recovering under this indemnification provision shall be entitled to reasonable attorneys' fees and the expenses of recovery.**

14. After the payment by me from the decedent's estate of all debts and expenses listed in paragraph 7, any remaining property described in paragraph 6 of this affidavit should be distributed as follows:

Name	**Specific Sum or Property To Be Distributed**

The foregoing statement is made under the penalties of perjury. A fraudulent statement made under the penalties of perjury is perjury, as defined in §32-2 of the Criminal Code of 2012, 720 ILCS 5/32-2.

_____
Signature of Affiant

Signed and sworn to
before me this [date signed**].**

_____
Notary Public

B. [12.43] Safe-Deposit Box Opening Affidavit

SAFE-DEPOSIT BOX OPENING AFFIDAVIT

Pursuant to the Illinois Safety Deposit Box Opening Act, 755 ILCS 15/0.01, *et seq.*, [Petitioner**], on oath states:**

(a) [Decedent**] died [**date of death**] a resident of _____ County, Illinois. An original death certificate for [**Decedent**] is attached hereto.**

(b) My address is _____.

(c) I am the [relationship**] of [**Decedent**] and am interested in the filing of [**his**] [**her**] will.**

(d) I believe the safe-deposit box of [Decedent**] may contain [**his**] [**her**] will.**

(e) I am the [relationship**] of [**Decedent**] and an heir of [**his**] [**her**] estate, and I am an interested person within the meaning of the Illinois Safety Deposit Box Opening Act.**

(f) No letters of office are now outstanding on the estate of [Decedent**], and no petition for letters is contemplated or pending in Illinois or in any other jurisdiction, to my knowledge.**

Further affiant saith not.

_____
[Petitioner**]**

Signed and sworn to
before me this [date signed**].**

_____
Notary Public

13 Guardianship Litigation

KERRY R. PECK
Peck Ritchey, LLC
RAY J. KOENIG III
Clark Hill PLC
Chicago

The authors acknowledge Christopher Hopkins of Clark Hill PLC, Chicago; Leslie Gutierrez of Whyte Hirschboeck Dudek S.C., Milwaukee; and Jesse A. Footlik, Patrick J. Bushell, and Kyle T. Fahey of Peck Ritchey, LLC, Chicago, for their contributions to this chapter.

B. Minor
   1. [13.52] Standard of Review
   2. [13.53] Standard of Review When Minor's Parents Are Living
   3. [13.54] Considerations When Seeking Appointment of Standby Guardian as Guardian
   4. [13.55] Considerations When Seeking Appointment of Guardian for Minor Who Is at Least 14 Years of Age
   5. [13.56] Role of Court-Appointed Guardian ad Litem in Matters Involving Minor's Estate
   6. [13.57] Appointment of Guardian

VI. Post-Adjudication and Post-Appointment

A. Adult with a Disability
   1. [13.58] Decision-Making Standard To Be Applied by Guardians of the Person and the Estate
      a. [13.59] Guardian of the Person
         (1) [13.60] Substituted-judgment standard
         (2) [13.61] Best-interests standard
      b. [13.62] Guardian of the Estate
   2. Guardian of the Person's Duties, Limitations, and Liabilities
      a. Duties
         (1) [13.63] Generally
         (2) [13.64] Residential placement
         (3) [13.65] Involuntary commitment
      b. [13.66] Liability
   3. Guardian of the Estate's Duties, Limitations, and Liabilities
      a. [13.67] Duties
         (1) [13.68] Inventory and accounts
         (2) [13.69] Filing and settling lawsuits, including personal injury
         (3) [13.70] Estate planning
      b. [13.71] Liability
   4. Interaction Between Guardian of the Estate and/or Person and a Power of Attorney for Healthcare and/or Property
      a. [13.72] Guardian of the Estate
      b. [13.73] Guardian of the Person

B. Minor
   1. [13.74] Decision-Making Standard To Be Applied by Guardians of the Person and the Estate
   2. [13.75] Duties of Guardian of the Person

XI. Orders of Protection — When Appropriate To Seek

I. [13.1] INTRODUCTION

The focus of this chapter is on litigation within guardianship cases involving adults with disabilities and minors and litigation by guardians. This chapter clarifies the nuances of guardianship litigation by concentrating on aspects of guardianship that are often at the center of litigation through the application of statutes, caselaw, and practice tips. This chapter does not discuss citation actions, which are covered in Chapter 11 of this handbook. This chapter also does not provide a thorough review of the procedures required to open and administer a guardianship but necessarily touches on some of those matters that are relevant to litigation.

II. TYPES OF GUARDIANSHIP

A. [13.2] Adult with a Disability

Article XIa of the Probate Act of 1975 (Probate Act), 755 ILCS 5/11a-1, *et seq.,* provides for guardianships for adults with disabilities. To qualify as a "person with a disability" under §11a-2, the individual must be at least 18 years old. 755 ILCS 5/11a-2. However, disability must be assessed according to statutory definitions and "cannot be inferred merely from old age." *In re Estate of Neprozatis,* 62 Ill.App.3d 563, 378 N.E.2d 1345, 1349, 19 Ill.Dec. 470 (1st Dist. 1978), citing *White v. White,* 28 Ill.App.2d 19, 169 N.E.2d 839, 844 (1st Dist. 1960).

There are several definitions of "disability" under §11a-2. First, "disability" may be defined as a person's inability to manage his or her person or estate due to "mental deterioration or physical incapacity." 755 ILCS 5/11a-2(a). For example, a severe loss in memory can support a finding that an individual has a disability and cannot manage his or her own affairs. *See In re Estate of Malloy,* 96 Ill.App.3d 1020, 422 N.E.2d 76, 83, 52 Ill.Dec. 395 (1st Dist. 1981). However, physical disability or injury without more is insufficient to show that the person "was not fully able to manage his person or estate." *See Udstuen v. Patterson,* 198 Ill.App.3d 67, 555 N.E.2d 750, 751, 144 Ill.Dec. 391 (3d Dist. 1990).

Second, under §11a-2(b), "disability" also may be defined as the inability of a person to manage his or her person or estate due to "mental illness or developmental disability." 755 ILCS 5/11a-2(b). In one guardianship proceeding in which a woman was found disabled based on mental illness and paranoia, the court noted that in order to appoint a plenary guardian, a court must find that the mentally ill adult lacks the "understanding or capacity to make responsible decisions concerning her person and her assets." *In re Estate of Ohlman,* 259 Ill.App.3d 120, 630 N.E.2d 1133, 1137, 197 Ill.Dec. 9 (1st Dist. 1994). Several possible developmental disabilities are listed in §11a-1. An example of a developmental disability common to guardianships is cerebral palsy. *See In re Estate of Steinfeld,* 158 Ill.2d 1, 630 N.E.2d 801, 196 Ill.Dec. 636 (1994).

Third, a person is considered a "person with a disability" under §11a-2(c) if, due to "gambling, idleness, debauchery or excessive use of intoxicants or drugs, [he] so spends or wastes his estate as to expose himself or his family to want or suffering." 755 ILCS 5/11a-2(c).

Finally, §11a-2(d) provides that a person may be considered a "person with a disability" due to fetal alcohol syndrome. 755 ILCS 5/11a-2(d). These last two prongs of the disability definition under §11a-2 have not generated any caselaw in Illinois.

1. [13.3] Guardianship of the Person

The duties of a guardian of the person of an adult with a disability are provided for by §11a-17 of the Probate Act, 755 ILCS 5/11a-17. Because the person with a disability presumably cannot make responsible life decisions, the guardian of the person literally takes custody of both the person with a disability and, if appropriate, his or her dependent children. 755 ILCS 5/11a-17(a). The guardian makes decisions on behalf of the person with a disability and receives compensation for time and expense, typically from the estate of the respondent. 755 ILCS 5/27-1, 5/11a-17(a).

As caretaker of the person with a disability, the guardian of the person has authority to provide "for their support, care, comfort, health, education and maintenance, and professional services as are appropriate." 755 ILCS 5/11a-17(a). The authority to make decisions and provide these services is "exceedingly broad." *In re K.C.,* 323 Ill.App.3d 839, 753 N.E.2d 314, 321, 257 Ill.Dec. 119 (1st Dist. 2001).

However, the legislature and courts have limited this power. Section 11a-17(e) requires that the guardian "conform[ ] as closely as possible to what the ward, if competent, would have done or intended under the circumstances." 755 ILCS 5/11a-17(e). This is a subjective standard, taking into account the person with a disability's specific beliefs and values. Additionally, the court may require the guardian of the person to file periodic reports regarding the status of the person with a disability and living conditions, a summary of activities and services, and any recommendations the guardian may have. 755 ILCS 5/11a-17(b). As a result, "a guardian of the person is under the continuing direction and supervision of the court." *In re Estate of Goffinet,* 318 Ill.App.3d 152, 742 N.E.2d 874, 878, 252 Ill.Dec. 336 (4th Dist. 2001). Thus, courts serve to ensure that the guardian of the person acts in the best interests of the ward. *Id.*

One important power missing from the broad authority of the guardian of the person is the power to make healthcare decisions covered by an existing agency pursuant to the Illinois Power of Attorney Act, 755 ILCS 45/1-1, *et seq.* 755 ILCS 5/11a-17(c). If the guardian is also the person with a disability's agent under a power of attorney, then the guardian may make medical decisions on behalf of the ward. *Id.* However, a guardian who acts as a surrogate under the Health Care Surrogate Act, 755 ILCS 40/1, *et seq.,* has all the decision-making power of a surrogate under that Act, including decisions about life-sustaining treatment. 755 ILCS 5/11a-17(d); *In re Estate of Greenspan,* 137 Ill.2d 1, 558 N.E.2d 1194, 146 Ill.Dec. 860 (1990) (finding that guardian had standing to bring petition to remove life-sustaining treatment on behalf of ward who had been in persistent vegetative state for several years). Finally, the guardian may petition for other types of medical treatments; the guardian of the person may even obtain an abortion or sterilization of the person with a disability if the guardian can show that such a procedure is in the best interests of the ward. 755 ILCS 5/11a-17.1. *See, e.g., In re Estate of D.W.,* 134 Ill.App.3d 788, 481 N.E.2d 355, 89 Ill.Dec. 804 (1st Dist. 1985) (allowing guardian to consent to abortion

for teenager with mental disability); *In re Estate of K.E.J.,* 382 Ill.App.3d 401, 887 N.E.2d 704, 320 Ill.Dec. 560 (1st Dist. 2008) (finding that guardian did not establish that tubal ligation was in best interests of ward).

A guardian of a ward's person and estate has the power to maintain an action for dissolution of marriage commenced by the ward prior to the ward's disability. 755 ILCS 5/11a-17(a-5). In addition, upon petition by the guardian of the ward's person or estate, the court has the power to authorize and direct a guardian of the ward's person or estate to file a petition for dissolution of marriage, legal separation, or declaration of invalidity of marriage, or to consent to the ward's marriage, on behalf of the ward if the court finds by clear and convincing evidence that such relief is in the ward's best interests. 755 ILCS 5/11a-17(a-5), 5/11a-17(a-10). *Karbin v. Karbin,* 2012 IL 112815, 977 N.E.2d 154, 364 Ill.Dec. 665.

2. [13.4] Guardianship of the Estate

The duties of a guardian of the estate of an adult person with a disability are provided for by §11a-18 of the Probate Act, 755 ILCS 5/11a-18. Because the person with a disability cannot make responsible financial decisions or manage financial affairs, the guardian takes control of the ward's assets. 755 ILCS 5/11a-18(a). In controlling the ward's assets, the guardian must invest and manage the assets "frugally" and must use proceeds from the estate to care for the person with a disability and any dependents. *Id.*

The guardian effectively steps into the shoes of the person with a disability, managing the estate with the same authority the ward would have if not under a disability. 755 ILCS 5/11a-18(a-5). Section 11a-18(a-5) includes a noncomprehensive list of the guardian's broad powers, some of which include authority to make gifts, convey future interests in property, enter into contracts, create trusts, manage life insurance and annuities, and modify the ward's will by codicil.

With respect to property subject to the Illinois Power of Attorney Act under an existing agency relationship, the guardian has no decision-making ability unless the guardian is also the agent under that Act. 755 ILCS 5/11a-18(e). This distinction shows the legislature's intentional differentiation between guardians and agents under powers of attorney. The distinction is also illustrated by the limits imposed on guardians of the person with respect to medical decisions covered by an existing agency under the Illinois Power of Attorney Act. See 755 ILCS 5/11a-17(c).

The court has discretion to limit or terminate a standby or short-term guardian's powers or to enter other orders as the court deems necessary to provide for the best interests of the ward. 755 ILCS 5/11a-18(f). "The guardian only acts as the hand of the court and is at all times subject to the court's direction in the manner in which the guardian provides for the care and support of the disabled person." *In re Estate of Wellman,* 174 Ill.2d 335, 673 N.E.2d 272, 278, 220 Ill.Dec. 360 (1996), citing *In re Estate of Nelson,* 250 Ill.App.3d 282, 621 N.E.2d 81, 85, 190 Ill.Dec. 212 (1st Dist. 1993). Such supervision includes annual accounts to show that the guardian managed the person with a disability's assets in such a way that the assets are conserved and protected. *Proehl v. Leadley,* 86 Ill.App.2d 472, 230 N.E.2d 516, 519 (3d Dist. 1967).

B. [13.5] Minor

Article XI of the Probate Act, 755 ILCS 5/11-1, *et seq.,* provides for guardianships for minors. Section 11-1 defines a "minor" as a person who is under 18 years of age. 755 ILCS 5/11-1.

1. [13.6] Guardianship of the Person

As in guardianships of adults with disabilities, the guardian of a minor's person takes custody of the minor and makes decisions for the minor's day-to-day care, such as education, daycare, and residence. 755 ILCS 5/11-13. In each of these areas, the guardian must pursue the minor's best interests. *In re Estate of K.E.J.,* 382 Ill.App.3d 401, 887 N.E.2d 704, 716, 320 Ill.Dec. 560 (1st Dist. 2008) (noting that guardian's right to act in best interests of minor ward may even supersede some constitutional rights).

Because a guardian is appointed by the court, the minor is ultimately the ward of the court due to the public policy that minor children must be carefully guarded and protected. *Scheffki v. Chicago, Milwaukee, St. Paul & Pacific R.R.,* 1 Ill.App.3d 557, 274 N.E.2d 631, 633 (1st Dist. 1971). Thus, the guardian is merely an agent of the court that appoints him or her. *Cobleigh v. Matheny,* 181 Ill.App. 170 (3d Dist. 1913).

Finally, several types of guardians may be appointed for the minor, each with their own characteristics, including a guardian, a standby guardian, and a short-term guardian, depending on the needs of the minor. 755 ILCS 5/11-5, 5/11-5.3, 5/11-5.4.

2. [13.7] Guardianship of the Estate

The guardian of a minor's estate takes control of the management and distribution of a minor's assets because the minor does not have the legal ability to act on his or her own. 755 ILCS 5/11-13(b). The guardian of a minor's estate has broad authority concerning the ward's assets, but must manage them frugally and, above all, for the ultimate benefit of the ward. *Id.*

The relationship between the guardian and the minor is that of a trustee and beneficiary. *In re Estate of Swiecicki,* 106 Ill.2d 111, 477 N.E.2d 488, 490, 87 Ill.Dec. 511 (1985). Thus, the guardian of a minor's estate has a duty to account for the management of the minor's assets. Furthermore, the guardian of the estate may be held liable for mismanagement or fraud perpetrated on the minor. *Id.* Thus, courts have discretion to supervise the guardian of the estate, as well as to limit or terminate the guardianship. 755 ILCS 5/11-13(b) through 5/11-13(e).

III. ISSUES FOR CONSIDERATION PRIOR TO FILING FOR GUARDIANSHIP

A. Adult with a Disability

1. [13.8] Determining Jurisdiction and Proper Venue

Before filing a guardianship petition, there are a number of issues that ought to be considered in order to reduce potential litigation and ensure expediency in the guardianship proceeding.

The probate court will have authority to consider a guardianship petition only if the alleged person with a disability is personally served the petition and summons at least 14 days before the hearing. 755 ILCS 5/11a-10(e); *In re Estate of Steinfeld,* 158 Ill.2d 1, 630 N.E.2d 801, 807, 196 Ill.Dec. 636 (1994). The probate court also will not consider a petition for guardianship if the alleged person with a disability's living relatives have not been properly notified. 755 ILCS 5/11-10(f); *Steinfeld, supra.* See §13.23 below.

Venue is established by first determining whether the alleged person with a disability resides in Illinois. 755 ILCS 5/11a-7. If the alleged person with a disability resides in Illinois, the petition must be filed in his or her county of residence. If the alleged person with a disability is not a resident of Illinois but has real or personal property in the state, then the petition must be filed in the county where the real or personal property is located. *Id.*

For a further discussion regarding multistate venue and jurisdictional issues pertaining to guardianship proceedings in relation to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, 755 ILCS 8/101, *et seq.,* see Kerry R. Peck, *Major Probate Law Change in Illinois: Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act,* 24 CBA Rec., No. 2, 36 (Mar. 2010).

2. [13.9] Have Powers of Attorney Been Executed?

In order to determine whether an alleged person with a disability should be adjudicated disabled and appointed a guardian, the court must be made aware of any agent currently authorized to make decisions on behalf of the alleged person with a disability. If the alleged person with a disability executed a power of attorney for healthcare or property, the agent under those documents is entitled to notice of the petition for appointment of a guardian. 755 ILCS 5/11a-8, 5/11a-10(f). Notice, including the time and date of the hearing, must be given to the agent(s) by mail or through personal service at least 14 days in advance of the hearing. 755 ILCS 5/11a-10(f).

When presented with a facially valid power of attorney for healthcare or property, and absent allegations that the power of attorney is invalid or that the agent is breaching his or her fiduciary duty, there is generally no reason to appoint a guardian. ("Absent court order . . . the guardian [of the estate] will have no power, duty or liability with respect to any property subject to the agency." 755 ILCS 5/11a-18(e). See also 755 ILCS 5/11a-17(c) for guardians of the person.) If, however, the petitioner believes the power or attorney is not valid or that the agent is abusing his

or her authority, then petitioning for guardianship is an appropriate course of action. The court requires that notice be given to the agent so that the agent may appear before the court to explain his or her actions (or lack thereof).

It is also necessary that the agent be informed of the petition because in the rare instances in which the court appoints a guardian but leaves powers of attorney in place, the parties need to understand their respective roles. 755 ILCS 5/11a-17(c), 5/11a-17(d), 5/11a-18(d), 5/11a-18(e). The interaction between agents and guardians is discussed in more detail in §§13.72 and 13.73 below.

3. [13.10] Has Alleged Person with a Disability Previously Designated a Guardian?

While he or she is of sound mind and memory, the alleged person with a disability can designate a person, corporation, or public agency he or she would like to serve as his or her guardian. 755 ILCS 5/11a-6. The person, corporation, or public agency must be qualified to serve as a guardian as described under §11a-5, and the designation must be in writing. There are no execution requirements, and any writing can be proved by "competent evidence." 755 ILCS 5/11a-6. If the designation "is executed and attested in the same manner as a will, it shall have prima facie validity." *Id.*

While the court may appoint the person, corporation, or public entity designated if it is in the best interests of the alleged person with a disability, note that the court retains the discretion to appoint whomever it determines is most qualified regardless of a valid designation made by the alleged person with a disability. *Id.*

If the alleged person with a disability previously designated the petitioner as the one whom he or she would like to serve as his or her guardian, then the designation provides further support for the petitioner's appointment as guardian. If the alleged person with a disability designated someone other than the petitioner and the petitioner is aware of the designation, arguably the petitioner's attorney has a duty to inform the court. Since the person or entity designated likely will be deemed an interested party by the court, it will save the petitioner time and money if he or she not only notifies the court, but also notifies the person or entity previously designated prior to the hearing.

A petitioner who was not previously designated is not necessarily at a severe disadvantage if someone else has been previously designated because the court retains total discretion over the appointment of a guardian and will appoint the most qualified candidate.

4. [13.11] Does Proposed Guardian Meet Statutory Requirements?

The court cannot appoint the petitioner as guardian if he or she does not meet the statutory requirements outlined in §11a-5 of the Probate Act. The proposed guardian must meet the following criteria:

a. He or she is at least 18 years old.

b. He or she is a resident of the United States.

c. He or she is of sound mind.

d. He or she has not been adjudicated a "person with a disability" as defined by the Probate Act. 755 ILCS 5/11a-5.

e. He or she has never been convicted of a felony, unless, after considering "the nature of the offense, the date of offense, and the evidence of the proposed guardian's rehabilitation," the court finds that it is in the person with a disability's best interests to appoint the person convicted of a felony as guardian. *Id.* The court, however, cannot appoint a person convicted of a felony who committed a sexual offense or who caused harm or threat to a minor or an elderly person or person with a disability. *Id.*

B. Minor

1. [13.12] Parent Presumed Willing and Capable To Act

Section 11-5(b) of the Probate Act notes a "presumption that a parent of a minor is willing and able to make and carry out day-to-day child care decisions concerning the minor." 755 ILCS 5/11-5(b). However, this presumption "may be rebutted by a preponderance of the evidence." *Id.*

Previously, under §11-7, which was repealed by P.A. 96-1338 (eff. Jan. 1, 2011), if "both parents of a minor are living and are competent to transact their own business and are fit persons, they are entitled to the custody of the person of the minor and the direction of his education." This was true whether both parents were alive or whether one had died. Further, the parents had equal powers, rights, and duties concerning the minor, and if the parents lived apart, the court for good reason could award the custody and education of the minor to either parent or some other person. However, the legislature's repeal of §11-7 did away with the undefined standard of fitness of a parent, and the language added to §11-5(b) tracks the standing requirement of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq.*

Specifically, as discussed in §§13.52 and 13.53 below, the court lacks jurisdiction to proceed on a petition for the appointment of a guardian for a minor when (a) the minor has a living parent, adoptive parent, or adjudicated parent whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out the daily decisions related to the child's care, subject to the exceptions below; or (b) there is a guardian for the minor appointed by a court of competent jurisdiction. 755 ILCS 5/11-5(b). There are three exceptions pertaining to §11-5(b)(i), as enumerated by the legislature in 2011: the court does have jurisdiction if (a) the parent or parents voluntarily relinquished physical custody of the minor; (b) after receiving notice of the hearing under §11-10.1, the parent or parents fail to object to the appointment at the hearing on the petition; or (c) the parent or parents consent to the appointment as evidenced by a written document that has been notarized and dated, or by a personal appearance and consent in open court. *Id.*

2. [13.13] Previous Designation of Guardian

If a parent is unavailable to act as a guardian for a minor child, a common candidate for guardian of the minor is a person designated by the child's parent through a will or some other

device. 755 ILCS 5/11-5(a-1). The designation may be made by a parent, an adoptive parent, or an adjudicated parent whose parental rights have not been terminated. Such designation is subject to the same requirements as a will, including witnesses and a writing. *Id.* The same designation may be made for a standby guardian. 755 ILCS 5/11-5.3(a).

a. [13.14] Designation of Standby Guardian

A statutory form exists for designating a standby guardian for a minor. 755 ILCS 5/11-5.3(e). This form is not mandatory, but its "fill-in-the-blank" format is easy and helpful for planning purposes. The form includes the designation of a standby guardian, designation of successor standby guardians, signature lines, and a witness attestation clause. Additionally, the form includes definitions and instructions for ensuring the form's validity by filing the document with and approval of the document by the court. *Id.* The statutory form is as follows:

DESIGNATION OF STANDBY GUARDIAN

IT IS IMPORTANT TO READ THE FOLLOWING INSTRUCTIONS:

A standby guardian is someone who has been appointed by the court as the person who will act as guardian of the child when the child's parents or the guardian of the person of the child die or are no longer willing or able to make and carry out day-to-day child care decisions concerning the child. By properly completing this form, a parent or the guardian of the person of the child is naming the person that the parent or the guardian wants to be appointed as the standby guardian of the child or children. Both parents of a child may join together and co-sign this form. Signing the form does not appoint the standby guardian; to be appointed, a petition must be filed in and approved by the court.

1. [*Parent***] [***Guardian***] *and Children.* I, [**insert name of designating parent or guardian**], currently residing at [**insert address of designating parent or guardian**], am [**a parent**] [**the guardian of the person**] of the following child or children (or of a child likely to be born): [**insert name and date of birth of each child, or insert the words "not yet born" to designate a standby guardian for a child likely to be born and the child's expected date of birth**].**

2. *Standby Guardian.* I hereby designate the following person to be appointed as standby guardian for the child or children listed above [insert name and address of person designated**].**

3. *Successor Standby Guardian.* If the person named in item 2 above cannot or will not act as standby guardian, I designate the following person to be appointed as successor standby guardian for the child or children: [insert name and address of person designated**].**

4. *Date and Signature.* This designation is made this [insert day**] day of [**insert month and year**].**

Signed: [designating parent**] [**guardian**]**

5. ***Witnesses.*** **I saw [**the parent**] [**the guardian of the person of the child**] sign this designation or [**the parent**] [**the guardian of the person of the child**] told me that [**he**] [**she**] signed this designation. Then I signed the designation as a witness in the presence of [**the parent**] [**the guardian**]. I am not designated in this instrument to act as a standby guardian for the child or children. [**insert space for names, addresses, and signatures of 2 witnesses**]**

b. [13.15] Appointment of Short-Term Guardian

A statutory form also exists for appointing a short-term guardian for a minor. 755 ILCS 5/11-5.4(f). As with the designation of a standby guardian, this form is not mandatory, but it is also a fill-in-the-blank form that contains instructions and an explanation of a short-term guardian's function. However, unlike the standby guardian form, the short-term guardian form contains choices regarding when the guardianship will become and cease to be effective. Additionally, forms to provide for a short-term guardianship need not be signed by both parents if certain exceptions apply, such as the death or unknown whereabouts of the other parent. *Id.* The statutory form is as follows:

APPOINTMENT OF SHORT-TERM GUARDIAN

IT IS IMPORTANT TO READ THE FOLLOWING INSTRUCTIONS:

By properly completing this form, a parent or the guardian of the person of the child is appointing a guardian of a child of the parent (or a minor ward of the guardian, as the case may be) for a period of up to 365 days. A separate form should be completed for each child. The person appointed as the guardian must sign the form, but need not do so at the same time as the parent or parents or guardian.

This form may not be used to appoint a guardian if there is a guardian already appointed for the child, except that if a guardian of the person of the child has been appointed, that guardian may use this form to appoint a short-term guardian. Both living parents of a child may together appoint a guardian of the child, or the guardian of the person of the child may appoint a guardian of the child, for a period of up to 365 days through the use of this form. If the short-term guardian is appointed by both living parents of the child, the parents need not sign the form at the same time.

1. [*Parent***] [***Guardian***] *and Child.* I, [**insert name of appointing parent or guardian**], currently residing at [**insert address of appointing parent or guardian**], am [**a parent**] [**the guardian of the person**] of the following child (or of a child likely to be born): [**insert name and date of birth of child, or insert the words "not yet born" to appoint a short-term guardian for a child likely to be born and the child's expected date of birth**].**

2. ***Guardian.*** **I hereby appoint the following person as the short-term guardian for the child: [**insert name and address of appointed person**].**

3. ***Effective date.*** **This appointment becomes effective: [**check one if you wish it to be applicable**]**

( ) On the date that I state in writing that I am no longer either willing or able to make and carry out day-to-day child care decisions concerning the child.

( ) On the date that a physician familiar with my condition certifies in writing that I am no longer willing or able to make and carry out day-to-day child care decisions concerning the child.

( ) On the date that I am admitted as an in-patient to a hospital or other healthcare institution.

( ) On the following date: [insert effective date**].**

( ) Other: [insert other effective date**].**

[NOTE: If this item is not completed, the appointment is effective immediately upon the date the form is signed and dated below.**]**

4. ***Termination.*** **This appointment shall terminate 365 days after the effective date, unless it terminates sooner as determined by the event or date I have indicated below: [**check one if you wish it to be applicable**]**

( ) On the date that I state in writing that I am willing and able to make and carry out day-to-day child care decisions concerning the child.

( ) On the date that a physician familiar with my condition certifies in writing that I am willing and able to make and carry out day-to-day child care decisions concerning the child.

( ) On the date that I am discharged from the hospital or other healthcare institution where I was admitted as an in-patient, which established the effective date.

( ) On the date which is [state a number of days, but no more than 365 days**] days after the effective date.**

( ) Other: [insert other effective date**].**

[NOTE: If this item is not completed, the appointment will be effective for a period of 365 days, beginning on the effective date.**]**

5. ***Date and signature of appointing parent or guardian.*** **This appointment is made this [**insert day**] day of [**insert month and year**].**

Signed: [appointing parent**]**

6. ***Witnesses.*** **I saw [**the parent**] [**the guardian of the person of the child**] sign this instrument or I saw [**the parent**] [**the guardian of the person of the child**] direct someone to sign this instrument for [**the parent**] [**the guardian**]. Then I signed this instrument as a witness in the presence of [**the parent**] [**the guardian**]. I am not appointed in this instrument to act as the short-term guardian for the child. [**insert space for names, addresses, and signatures of 2 witnesses**]**

7. ***Acceptance of short-term guardian.*** **I accept this appointment as short-term guardian on this [**insert day**] day of [**insert month and year**].**

Signed: [short-term guardian**]**

8. ***Consent of child's other parent.*** **I, [**insert name of the child's other living parent**], currently residing at [**insert address of child's other living parent**], hereby consent to this appointment on this [**insert day**] day of [**insert month and year**].**

Signed: [consenting parent**]**

[NOTE: The signature of a consenting parent is not necessary if one of the following applies: (a) the child's other parent has died; or (b) the whereabouts of the child's other parent are not known; or (c) the child's other parent is not willing or able to make and carry out day-to-day child care decisions concerning the child; or (d) the child's parents were never married and no court has issued an order establishing parentage.**]**

3. Who May Serve as Guardian

a. [13.16] Generally

Section 11-3 of the Probate Act addresses who may serve as a guardian. First, the guardian must be "capable of providing an active and suitable program of guardianship for the minor." 755 ILCS 5/11-3(a). Next, §11-3(a) sets out minimum requirements for the guardian, including that the guardian (1) is at least 18 years old, (2) is a resident of the United States, (3) is not "of unsound mind," (4) has not been adjudged a person with a disability under Article XIA of the Probate Act, and (5) is not a person convicted of a felony. However, a court may allow a person convicted of a felony to serve as a guardian for the minor if doing so is in the minor's best interests. 755 ILCS 5/11-3(a)(5); *In re Estate of Green,* 359 Ill.App.3d 730, 835 N.E.2d 403, 410, 296 Ill.Dec. 369 (1st Dist. 2005) (allowing convicted felon to serve as minor's guardian).

However, §11-3(a)(5) specifically forbids courts from appointing a guardian who has been convicted of a felony involving harm or a threat to a child, including a felony sexual offense. Similarly, §11-5(d) forbids the appointment of a guardian who has neglected or abused the child within at least the last two years. 755 ILCS 5/11-5(d). To determine whether the child has been neglected or abused by the potential guardian, the child's statements regarding the abuse are admissible in a proceeding to appoint a guardian; however, such statements shall be subject to cross-examination before a court can base a finding of child abuse on the testimony. 755 ILCS 5/11-5(e).

Despite the list of statutory factors, courts will consider "all relevant factors" when appointing a guardian for a minor child. *Green, supra,* 835 N.E.2d at 410. Consequently, courts read §11-3 in conjunction with broad authority allowed by other relevant provisions under Article XI, including §§11-5(a) (requiring the court to appoint a guardian it finds to be in the minor's best interests) and 11-13(e) (allowing the court to "enter such other orders as the court deems necessary to provide for the best interest of the minor"). *Green, supra,* 835 N.E.2d at 408.

Finally, with regard to minors with small estates who reside in a state mental health facility, §11-3(b) allows for the appointment of a guardian from the Department of Human Services or the Department of Children and Family Services. 755 ILCS 5/11-3(b).

b. [13.17] Minor's Opinion

If parents are unavailable, a minor who is at least 14 years old may nominate his or her own guardian, subject to court approval. 755 ILCS 5/11-5(c); *Cobleigh v. Matheny,* 181 Ill.App. 170 (3d Dist. 1913).

If parents are available, however, a child may not "circumvent the superior rights doctrine as embodied in the standing requirement of the Probate Act by nominating a nonparent guardian." *In re Estate of Johnson,* 284 Ill.App.3d 1080, 673 N.E.2d 386, 393, 220 Ill.Dec. 474 (1st Dist. 1996) (holding that if child selects nonparent guardian, nonparent has burden of showing that parents are not willing or able to perform duties of day-to-day child care).

4. Determining Jurisdiction and Proper Venue

a. [13.18] Jurisdiction

Illinois probate courts have broad jurisdictional powers to hear guardianship cases involving minors and to appoint a guardian for a minor. *In re Estate of Green,* 359 Ill.App.3d 730, 835 N.E.2d 403, 407, 296 Ill.Dec. 369 (1st Dist. 2005) ("The administration of decedents' estates is a creature of statute, whereas the administration of minor guardianships is not, as minor guardianships are derived from the common law and, therefore, a trial court inherently is empowered to appoint a guardian independent of any authority given to the courts under the Act."); *In re Estates of Herrod,* 254 Ill.App.3d 1061, 626 N.E.2d 1334, 1337, 193 Ill.Dec. 783 (1st Dist. 1993) ("circuit courts have plenary jurisdiction over the persons and estates of minors which derives from common law and is independent of any authority given by the legislature in the Act").

Nonetheless, Article XI of the Probate Act does impose limitations on the jurisdiction of the probate court. Under §11-5(b), a probate court lacks jurisdiction to hear a guardianship petition for the appointment of a guardian of a minor under two situations: (1) lack of standing of the petitioner due to superior parental rights (subject to exceptions discussed in §13.12 above and §§13.52 and 13.53 below); and (2) the existence of a guardian. 755 ILCS 5/11-5(b).

First, a petitioner will not have standing to bring a guardianship petition if the minor has a living parent "whose parental rights have not been terminated, whose whereabouts are known,

and who is willing and able to make and carry out day-to-day child care decisions concerning the minor." *Id.* However, under the statute, the parents may voluntarily relinquish physical custody of the minor, fail to object to the appointment of a guardian at the hearing on the petition after receiving notice under §11-10.1, or consent to the appointment as evidenced by a written document notarized and dated or by their personal appearance and consent in open court. Thus, the jurisdiction aspect of guardianship proceedings recognizes the "rebuttable presumption" that parents are willing and able to act as guardians for their children. *Id.*

Second, a court will not have jurisdiction if there is already a guardian for the minor appointed by a court of competent jurisdiction. *Id*.

The jurisdiction provisions for standby guardians are virtually identical to those of guardians. 755 ILCS 5/11-5.3(c).

b. [13.19] Venue

Section 11-6 of the Probate Act distinguishes between minors who reside in Illinois and those who reside elsewhere. If the minor is an Illinois resident, the guardianship proceeding will occur "in the court of the county in which he resides." 755 ILCS 5/11-6. However, if the minor is not an Illinois resident, "the proceeding shall be instituted in the court of a county in which his real or personal estate is located." *Id.*

At times, the definition of the term "resident" has been disputed by parties. "While the term 'residence' has no fixed meaning in the law and varies with context and subject matter . . . it has been held that the word is generally understood to mean more than mere physical presence. Intention and permanence of abode along with physical presence are required to establish 'resident' status." *In re Estate of Cohn,* 95 Ill.App.3d 204, 419 N.E.2d 951, 954 – 955, 50 Ill.Dec. 683 (2d Dist. 1981), citing *Rosenshine v. Rosenshine,* 60 Ill.App.3d 514, 377 N.E.2d 132, 135, 17 Ill.Dec. 942 (1st Dist. 1978), and *Garrison v. Garrison,* 107 Ill.App.2d 311, 246 N.E.2d 9, 11 (2d Dist. 1969). Thus, visits with relatives or a stay in a temporary care facility will not change a minor's residence. *Cohn, supra,* 419 N.E.2d at 955 (holding that temporary stay with invalid relatives did not change minor's residence from Cook County to Lake County); *Country Mutual Insurance Co. v. Watson,* 1 Ill.App.3d 667, 274 N.E.2d 136, 138 (2d Dist. 1971) (holding that placement of minor in "temporary care facility" did not change minor's residence).

Finally, jurisdiction heavily depends on venue because if the guardianship proceeding is instituted in the wrong county court, the entire proceeding will be null. *Shine v. Wabash R.R.,* 8 Ill.App.2d 521, 132 N.E.2d 41, 42 – 43 (3d Dist. 1956) (finding that Cook County probate court did not have jurisdiction over Macon County resident).

IV. FILING FOR GUARDIANSHIP

A. Adult with a Disability

1. Filing Requirements

a. [13.20] Petition for Appointment of Guardian for Adult with a Disability

The first step in initiating a guardianship proceeding is filing the petition for appointment of a guardian for the person with a disability. Section 11a-8 of the Probate Act specifies what information needs to be included in this petition:

1. the relationship between the petitioner and the respondent;

2. the name, date of birth, and residence of the respondent (Note that the petition should include both the respondent's permanent residence as well as the name and address of the person or facility where the respondent is residing at the time of the filing of the petition.);

3. the reasons for guardianship;

4. the names and addresses of the respondent's nearest relatives and, if any, the respondent's agent or agents under the Illinois Power of Attorney Act and/or current guardian;

5. the approximate value of the respondent's personal and real estate, including the anticipated gross income and other receipts; and

6. the name, address, and, in the case of an individual, age, relationship to the respondent, and occupation of the proposed guardian. 755 ILCS 5/11a-8.

PRACTICE POINTERS

✓ When stating the reasons a guardian is needed for the alleged person with a disability, the petitioner needs to be sure that the allegations as stated on the petition conform to the statutory definition of a "person with a disability" (755 ILCS 5/11a-2), *i.e.,* mental deterioration, physical incapacity, mental illness, or development disability that renders a person incapable of making personal or financial decisions.

✓ In deciding whether to include a request for the appointment of a guardian of the estate or merely a request for the appointment of a guardian of the person, it is important to note that the court likely will allow a petitioner to drop a request for appointment of a guardian of the estate at the hearing date, but may not later allow the petitioner to simply amend the petition to include such a request due to a lack of jurisdiction as a result of improper notice to both the respondent and those persons entitled to receive notice under 755 ILCS 5/11a-8.

b. [13.21] Notice

Once a petition for appointment of a guardian for a person with a disability is filed, the attorney must next turn his or her focus to ensuring that notice of the upcoming adjudication proceeding is received by the respondent as well as those persons whose names appear on the petition, including the proposed guardian, not less than 14 days before the hearing (*i.e.,* the names and addresses of the respondent's nearest relatives, per §11a-8). 755 ILCS 5/11a-10(e), 5/11a-10(f). Upon the filing of a guardianship petition, the court shall set a date and place for hearing on the merits of the petition within 30 days. 755 ILCS 5/11a-10(a). However, the 30-day requirement in §11a-10 of the Probate Act for scheduling a guardianship hearing is directory and not mandatory. *In re Estate of Doyle,* 362 Ill.App.3d 293, 838 N.E.2d 355, 360 – 361, 297 Ill.Dec. 868 (4th Dist. 2005). Therefore, any order entered at a hearing taking place more than 30 days from the time the petition for adjudication was filed would not be considered void. *Id.*

(1) [13.22] Notice to respondent

Pursuant to §11a-10(e) of the Probate Act, "the respondent shall be *personally* served with a copy of the petition and a summons not less than 14 days before the hearing." [Emphasis added.] 755 ILCS 5/11a-10(e). The summons is to be "printed in large, bold type" and include a "notice of rights of respondent." *Id.* The notice advises the respondent of the date, location, and time of the guardianship hearing as well as informs the respondent of a variety of legal rights, including the right to appear at the hearing, the right to present evidence and cross-examine witnesses, the right to have an independent expert appointed to evaluate the need for a guardian, the right to be represented by counsel, and the right to a jury trial. The required language of the notice is specified in §11a-10(e) as follows:

NOTICE OF RIGHTS OF RESPONDENT

You have been named as a respondent in a guardianship petition asking that you be declared a person with a disability. If the court grants the petition, a guardian will be appointed for you. A copy of the guardianship petition is attached for your convenience.

The date and time of the hearing are: [date and time of hearing**]**

The place where the hearing will occur is: [place of hearing**]**

The Judge's name and phone number are: [name and address of judge**]**

If a guardian is appointed for you, the guardian may be given the right to make all important personal decisions for you, such as where you may live, what medical treatment you may receive, what places you may visit, and who may visit you. A guardian may also be given the right to control and manage your money and other property, including your home, if you own one. You may lose the right to make these decisions for yourself.

You have the following legal rights:

(1) You have the right to be present at the court hearing.

(2) You have the right to be represented by a lawyer, either one that you retain, or one appointed by the Judge.

(3) You have the right to ask for a jury of six persons to hear your case.

(4) You have the right to present evidence to the court and to confront and cross-examine witnesses.

(5) You have the right to ask the Judge to appoint an independent expert to examine you and give an opinion about your need for a guardian.

(6) You have the right to ask that the court hearing be closed to the public.

(7) You have the right to tell the court whom you prefer to have for your guardian.

You do not have to attend the court hearing if you do not want to be there. If you do not attend, the Judge may appoint a guardian if the Judge finds that a guardian would be of benefit to you. The hearing will not be postponed or canceled if you do not attend.

IT IS VERY IMPORTANT THAT YOU ATTEND THE HEARING IF YOU DO NOT WANT A GUARDIAN OR IF YOU WANT SOMEONE OTHER THAN THE PERSON NAMED IN THE GUARDIANSHIP PETITION TO BE YOUR GUARDIAN. IF YOU DO NOT WANT A GUARDIAN OF IF YOU HAVE ANY OTHER PROBLEMS, YOU SHOULD CONTACT AN ATTORNEY OR COME TO COURT AND TELL THE JUDGE.

The rule in Illinois is well established that an alleged person with a disability is required to receive notice before he or she may be adjudicated as such and a guardian appointed. *Eddy v. People ex rel. Eddy,* 15 Ill. 386 (1854). Therefore, a court will not proceed with a guardianship hearing unless the respondent is personally served with both the petition and summons no later than 14 days before the hearing date. Substitute service will not suffice in fulfilling the statutory requirements of personal service of these documents on the respondent. Service of summons and the petition may be made by a private person 18 years of age or over who is not a party to the action. 755 ILCS 5/11a-10(e).

PRACTICE POINTER

✓ While a summons is typically served by the sheriff's office of the county in which the respondent resides, a special process server may be used to effect personal service on the respondent as long as this individual is 18 years of age or over and is not a party to the guardianship proceeding. If service will not be performed by the sheriff's office, an order appointing a special process server needs to be obtained when the petition is filed. While

more costly, the use of a special process server gives the petitioner, and his or her attorney, greater flexibility in serving the respondent, who may be difficult to serve. Regardless of which method is chosen, it is vital to confirm that personal service on the respondent was properly executed and to obtain proof of such service prior to the guardianship hearing.

(2) [13.23] Notice to respondent's relatives

In addition to requiring proper personal service on the respondent of the guardianship petition, summons, and notice of rights, the Probate Act requires that notice of the time and place of the hearing shall be given by mail or in person to those persons whose names appear on the petition and who do not waive notice, including the proposed guardian, not less than 14 days before the hearing. 755 ILCS 5/11a-10(f). In fact, failure of the petitioner to give notice to those relatives entitled to receive notice under §11a-8 is a jurisdictional defect requiring the vacation of an order appointing a guardian. *In re Guardianship of Sodini,* 172 Ill.App.3d 1055, 527 N.E.2d 530, 532 – 533, 123 Ill.Dec. 67 (4th Dist. 1988). However, no such notice requirement applies to cases involving a transferred guardianship. *In re Estate of Debevec,* 195 Ill.App.3d 891, 552 N.E.2d 1043, 1045, 142 Ill.Dec. 302 (5th Dist. 1990).

PRACTICE POINTERS

- ✓ If a contested hearing over who should act as guardian is anticipated, sending notice via certified mail or other means of receipt confirmation is a good rule of thumb to thwart future allegations of improper service as a basis for overturning the appointment of a guardian for the person with a disability. Note that improper service on the respondent's relatives robs the court of its jurisdiction to enter an order appointing a guardian for the respondent. *Sodini, supra.*

- ✓ If the respondent's relatives entitled to receive notice under §11a-10(f) live outside the country, it is important to investigate both Illinois law and foreign law to ensure proper service is effected.

c. [13.24] Report of Physician

All petitions for adjudication of disability and appointment of a guardian should be accompanied by a report of a physician who has examined the respondent within three months of the date of filing the petition. 755 ILCS 5/11a-9(a). The report must bear the name, business address, business telephone number, and signatures of all persons who performed the evaluations on which the report is based. It is important to note that at least one person must be a physician licensed by the State of Illinois, even though the report itself may be prepared by social workers, nurses, or other qualified persons. If the report is not prepared solely by a physician, the report must include a statement of the certification, license, or other credentials that qualify the evaluators who prepared the report. *Id.*

Pursuant to §11a-9(a), all reports of a physician must discuss four relevant issues regarding the respondent's capacity:

1. a description of the respondent's disability and an assessment of how the disability impacts the respondent's ability to make decisions or to function independently;

2. an analysis and the results of evaluations of the respondent's mental and physical condition, including, when appropriate, educational condition, adaptive behavior, and social skills;

3. an opinion as to whether guardianship is needed, the type and scope of guardianship needed, and the reasons for such opinion; and

4. a recommendation as to the most suitable living arrangement and treatment plan for the respondent.

In Cook County, physicians must complete Cook County Circuit Court Form CCP 0211, Report of Physician, available at the Cook County Circuit Court Clerk's website, www.cookcountyclerkofcourt.org. When reviewing a report of a physician, it is important to ensure that the physician offers a clear and definite opinion, including reasons, as to whether the respondent is totally incapable or only partially incapable of making all personal and financial decisions for himself or herself. These "magic words" must be included in order to comply with §11a-9's requirement for both an opinion and the basis for the opinion about the respondent's capabilities.

PRACTICE POINTER

✓ Before filing a petition for the adjudication of disability, you should carefully examine the physician's report to ensure that it fully complies with §11a-9's requirements.

- Does the report include a diagnosis that the respondent suffers from one of the following that renders him or her partially or totally incapable of making personal or financial decisions:
  - mental deterioration;
  - physical incapacity;
  - mental illness; or
  - developmental disability?
- Does the report detail a diagnosis of the respondent's condition and provide reasons why this condition has an effect on the respondent's capabilities?

- Was the evaluation performed within 90 days of filing the petition?

- If the report was not prepared by the physician, or was based on evaluations performed by nonphysicians, does the report include the signatures of these nonphysicians, such as nurses or social workers?

- Does the report include a statement of the certifications, licenses, or other credentials that qualify the evaluators who prepared the report?

- Is the respondent's current mental and physical condition adequately discussed to help support the physician's ultimate conclusion as to the respondent's capacity and recommendation as the most suitable living arrangement?

If no report is submitted with the petition for adjudication of disability, the court "shall order" an evaluation to be performed and a report prepared and filed with the court at least 10 days prior to the hearing. 755 ILCS 5/11a-9(b). The court has the authority to order such an evaluation over the objection of the respondent. *In re Estate of Malloy,* 96 Ill.App.3d 1020, 422 N.E.2d 76, 82 – 83, 52 Ill.Dec. 395 (1st Dist. 1981). However, this authority does not mean that the court is required to compel the respondent to submit to an evaluation by an independent third party in all cases. If the respondent submits a statutorily sufficient report refuting the allegations of disability, the court has the discretion to rely on this report if it believes it to be credible because the "clear purpose of the provision is to ensure that the court adjudicates disability based upon a reliable evaluation of the subject's physical and mental status." *In re Estate of Silverman,* 257 Ill.App.3d 162, 628 N.E.2d 763, 770, 195 Ill.Dec. 299 (1st Dist. 1993).

Pursuant to §11a-9(b-5) of the Probate Act, upon oral or written motion by the respondent or the guardian ad litem (or upon the court's own motion), the court must appoint one or more independent experts to examine the respondent. 755 ILCS 5/11a-9(b-5). The court must then determine a reasonable fee for the expert's services upon the filing of a verified statement of services by the expert to be paid for by the respondent or, if the respondent is unable to pay, to be paid for by the petitioner. No fee, however, can be assessed against the Office of State Guardian. *Id.*

In order to protect the privacy of the respondent, any report prepared pursuant to §11a-9 will not be made a part of public record unless the court directs otherwise. 755 ILCS 5/11a-9(c). However, the report is still available "to the court or an appellate court in which the proceedings are subject to review, to the respondent, the petitioner, the guardian, and their attorneys, to the respondent's guardian ad litem, and to such other persons as the court may direct." *Id.*

PRACTICE POINTER

✓ It is important for all practitioners to avoid inadvertently making the report a part of the public record through the use of the report as an exhibit in subsequent pleadings.

2. Guardian ad Litem and Report

a. [13.25] Purpose of Appointment

After filing a petition for adjudication of disability, the court will set a date for a hearing on the petition and "shall appoint a guardian ad litem to report to the court concerning the respondent's best interests." 755 ILCS 5/11a-10(a). However, if the court determines that the appointment of a guardian ad litem (GAL) is not necessary to protect the respondent or is not necessary to make an informed decision on the petition, the appointment of a GAL is not required. *Id.* In many cases, the court exercises its discretion not to appoint a GAL because it determines that the respondent is aware of the nature of the proceedings brought against him or her and is able to choose counsel to defend his or her interests. *See Rankin v. Rankin,* 322 Ill.App. 90, 54 N.E.2d 58, 59 (3d Dist. 1944). However, when a respondent is known to suffer from mental illness, a GAL is needed to provide the court the information on which it relies to decide if court-appointed counsel for the respondent is necessary, even if such an appointment would be made over the respondent's objections. *In re Estate of Ohlman,* 259 Ill.App.3d 120, 630 N.E.2d 1133, 1139, 197 Ill.Dec. 9 (1st Dist. 1994).

PRACTICE POINTER

✓ Many judges will not appoint a GAL when the underlying petition seeks only the appointment of a guardian of the person (not estate) and when the respondent plans to appear in court. This is frequently done as a practical matter to avoid the generation of fees of a GAL. In Cook County, a GAL is appointed in nearly all estate guardianships, as well as in guardianships of the person if the respondent objects or if issues relating to surgery, forced medication, or involuntary placement are involved. Most other state courts require the appointment of a GAL in all cases except temporary guardianships.

Section 11a-10(a) of the Probate Act requires a GAL to personally interview a respondent and inform him or her both orally and in writing of the contents of the petition for adjudication of disability. The GAL must also inform the respondent of his or her legal rights under §11a-11. During the interview of the respondent, the GAL is charged with eliciting the respondent's position concerning

1. the adjudication of disability;

2. the proposed guardian;

3. any proposed change in residential placement;

4. changes in care that could result from the guardianship; and

5. other areas of inquiry deemed appropriate by the court. 755 ILCS 5/11a-10(a).

At or before the eventual hearing on adjudication of disability, the GAL is required to file a written report with the court detailing his or her interview with the respondent and his or her opinions regarding whether guardianship is needed for the respondent. Furthermore, the GAL must appear at the hearing to testify regarding the issues raised in his or her report. *Id.* The GAL's report is discussed in more detail in §13.27 below.

b. [13.26] Role

A guardian ad litem is appointed to represent the ward's best interests as determined by the GAL, not to advocate for the respondent's "possibly ill-advised desires." *In re Estate of Ohlman,* 259 Ill.App.3d 120, 630 N.E.2d 1133, 1139, 197 Ill.Dec. 9 (1st Dist. 1994), quoting Timothy S. Jost, *The Illinois Guardianship for Disabled Adults Legislation of 1978 and 1979: Protecting the Disabled from Their Zealous Protectors,* 56 Chi.-Kent L.Rev. 1087, 1094 (1980). If the respondent takes a position contrary to the GAL, the court shall appoint counsel for the respondent. 755 ILCS 5/11a-10(b). Court-appointed counsel for a respondent is discussed in §13.29 below.

The GAL is essentially the court's eyes and ears, whose role is to investigate the claims of incapacity alleged against the respondent. Once this investigation is complete, the GAL is charged with reporting to the court what is in the respondent's best interests in terms of guardianship. It is the duty of the court to ensure that, if needed, a GAL is appointed to protect the interests of the alleged incompetent. *Ohlman, supra.*

In analyzing the respondent's best interests, the GAL may consult with experts qualified to work with persons with developmental disabilities, mental illness, physical disabilities, or disabilities due to mental deterioration. 755 ILCS 5/11a-10(a). Further, "[n]otwithstanding any provision in the Mental Health and Developmental Disabilities Confidentiality Act or any other law, a guardian ad litem shall have the right to inspect and copy any medical or mental health record of the respondent which the guardian ad litem deems necessary, provided that the information so disclosed shall not be utilized for any other purpose nor be redisclosed except in connection with the proceedings." *Id*. In fact, a GAL need not be a licensed attorney as long as he or she is one of the qualified experts noted above. *Id.*

c. [13.27] Report

During the guardian ad litem's meeting with the respondent, he or she must inform the respondent, both orally and in writing, of the contents of the guardianship petition and his or her accompanying rights regarding the petition. 755 ILCS 5/11a-10(a). Additionally, the GAL must make an effort to secure the respondent's reaction to the issues presented by the petition for adjudication of disability. After the GAL has completed the interview with the respondent, he or she must file a report with the court at or before the hearing on adjudication of disability. In the report, the GAL must detail

1. his or her observations of the respondent;

2. the respondent's responses to any questions the GAL posed regarding the guardianship proceeding;

3. the GAL's opinion as to the appropriateness of guardianship for the respondent;

4. the opinions of any other professionals with whom the GAL consulted regarding the appropriateness of guardianship for the respondent; and

5. any other material issues discovered by the GAL. *Id.*

d. [13.28] Fee

Section 11a-10(c) of the Probate Act clearly expresses that a court may assess guardian ad litems' fees only against a respondent or his or her estate or, in the event the respondent is unable to pay, against the petitioner. 755 ILCS 5/11a-10(c); *In re Estate of Bishop,* 333 Ill.App.3d 1113, 777 N.E.2d 1059, 1061, 268 Ill.Dec. 136 (2d Dist. 2002). Furthermore, by filing a cross-petition for guardianship and creating issues to which a GAL has to respond, a cross-petitioner becomes potentially responsible to pay the GAL's fee under §11a-10(c). 777 N.E.2d at 1061. However, if the respondent or his or her estate is unable to pay the GAL's fee, no fee shall be assessed against the Office of State Guardian, the public guardian, the elder abuse provider agency, the Department of Human Services Office of the Inspector General, or the Department of Children and Family Services, if one of these agencies is the petitioner. 755 ILCS 5/11a-10(c).

3. Court-Appointed Attorney for Respondent

a. [13.29] Appointment of Counsel for Respondent

The court has the discretion to appoint counsel to defend the respondent in a guardianship proceeding if the court finds that it is in the respondent's best interests to have counsel appointed. 755 ILCS 5/11a-10(b). However, a court must appoint counsel for the respondent if the respondent requests to be represented by counsel or if the respondent takes a position adverse to that of the guardian ad litem. *Id.*

In order to request counsel to defend his or her interests in a guardianship proceeding, the respondent may make such a demand at the hearing itself or by any written or oral request communicated to the court prior to the hearing. *Id.* If a GAL is appointed, it is his or her duty to advise the respondent of his or her right to counsel. 755 ILCS 5/11a-10(a). Even if no GAL is appointed, the summons itself includes a statement concerning the respondent's right to obtain appointed counsel. 755 ILCS 5/11a-10(b).

b. [13.30] Legal Fees

The court may allow counsel for the respondent reasonable compensation pursuant to §11a-10(b) of the Probate Act, 755 ILCS 5/11a-10(b). Furthermore, §11a-10(c) clearly expresses that a court may assess legal fees of court-appointed counsel against only the respondent or his or her estate or, in the event the respondent is unable to pay, against the petitioner. 755 ILCS 5/11a-10(c). However, if the respondent or his or her estate is unable to pay the legal fees, no fees shall be assessed against the Office of State Guardian, the public guardian, the elder abuse provider agency, the Department of Human Services Office of the Inspector General, or the Department of Children and Family Services, if one of these agencies is the petitioner. *Id.*

4. [13.31] Cross-Petitioning for Guardianship

After a petition for adjudication of disability has been filed, and before the hearing on the petition, a cross-petition for guardianship may be filed. Typically, cross-petitions request either that the cross-petitioner be appointed as guardian for the respondent or that a limited guardian be appointed for the respondent. Regardless of the request found in the cross-petition, the same procedural and notice requirements that pertain to a petition for adjudication of disability apply to the cross-petition. However, there is one difference: the respondent does not need to be served with a summons since the court already has jurisdiction over the respondent. Therefore, it is sufficient to serve notice of the cross-petition on the respondent, in addition to providing notice to all of the respondent's relatives entitled to receive service under §11a-8 of the Probate Act, 755 ILCS 5/11a-8.

PRACTICE POINTER

✓ A party typically requests leave to file a cross-petition at the plenary hearing date or files a cross-petition once he or she has received notice of the initial petition. The result is that the filing of a cross-petition will usually delay the originally scheduled hearing to allow for proper service of the cross-petition on the respondent and notice to the respondent's closest relatives entitled to receive notice pursuant to §11a-8. Additionally, as noted in §13.28 above, a cross-petition necessitates further investigation by a guardian ad litem regarding the appropriateness of the requests made in each petition and subjects the cross-petitioner to potential liability to pay legal fees for any GAL or court-appointed counsel if the respondent or his or her estate is unable to afford such fees. *See In re Estate of Bishop,* 333 Ill.App.3d 1113, 777 N.E.2d 1059, 1061, 268 Ill.Dec. 136 (2d Dist. 2002).

5. [13.32] General Time Frame

The following is a basic timetable for filing a petition for adjudication of disability, including some preliminary steps that should be taken prior to filing:

a. The petitioner should obtain a physician's report based on an examination of the respondent within three months before the date of filing the petition. 755 ILCS 5/11a-9(a).

b. The petitioner should draft and file a petition for appointment of a guardian for a person with a disability based on the requirements of §11a-8 of the Probate Act, 755 ILCS 5/11a-8. If an emergency situation exists in which the respondent's financial or personal safety is threatened, the petitioner should file a petition to appoint a temporary guardian contemporaneously with the petition for adjudication of disability.

c. Once the petition has been filed, the court will assign a court date for a hearing on the petition for adjudication of disability. 755 ILCS 5/11a-10(a).

d. The court will also decide whether it is necessary to appoint a guardian ad litem and/or counsel for the respondent. 755 ILCS 5/11a-10.

e. The petitioner is required to have the respondent personally served with a copy of the petition for adjudication of disability and summons no later than 14 days prior to the hearing date. 755 ILCS 5/11a-10(e).

f. The petitioner is required to provide notice by mail or personally to all of the persons entitled to receive notice pursuant to §11a-8 not less than 14 days prior to the hearing date. 755 ILCS 5/11a-10(f).

g. The GAL will file his or her report at or before the hearing on adjudication of disability, also known as the plenary hearing or the plenary return date. 755 ILCS 5/11a-10(a).

h. Cross-petitions may be filed prior to the hearing date, or leave to file a cross-petition may be requested at the hearing date.

B. Minor

1. [13.33] Filing Requirements

A nominated guardian of a minor must meet the requirements under 755 ILCS 5/11-3. See §13.16 above. Furthermore, pursuant to §11-5(b) of the Probate Act, the court in which the petition for guardianship of a minor is filed must have jurisdiction to hear the petition. 755 ILCS 5/11-5(b). See §13.18 above.

Illinois courts generally have preprinted forms that may be obtained from the court clerk's office to use as a guide when drafting a petition seeking the appointment of a guardian for a minor. The Cook County form for appointment of a guardian of a minor, CCP N393, Petition for Guardian of Minor, can be found at the Cook County Circuit Court Clerk's website, www.cookcountyclerkofcourt.org. Whether seeking the appointment of a guardian for the estate only, the person only, or both the estate and person of a minor, §11-8(a) of the Probate Act requires that the petition seeking the appointment of a guardian include

a. the minor's name, birth date, and current residence;

b. the names and addresses of the minor's nearest relatives, in order:

   1. the spouse, if any; and, if none,

   2. the parents, adult brothers and sisters, and short-term guardian, if any; and, if none,

   3. the nearest adult kindred;

c. the name and address of the person having custody of the minor;

d. the approximate value of the minor's personal estate;

e. the approximate value of the minor's annual income;

f. the name, age, address, and occupation of the nominated guardian;

g. information regarding any written instrument designating a proposed nominated guardian along with a copy of the written instrument (*e.g.,* a will admitted to probate); and

h. facts concerning any juvenile, adoption, parentage, dissolution, or guardianship court actions pending concerning the minor or the parents of the minor and whether any guardian is currently acting for the minor.

In addition, if the petition seeks the appointment of a previously appointed standby guardian as guardian of the minor, the petition must also state the facts concerning the standby guardian's previous appointment and the date of death of the minor's parent or parents or the facts concerning the consent of the minor's parent or parents to the appointment of the standby guardian as guardian, or the willingness and ability of the minor's parent or parents to make and carry out day-to-day child-care decisions concerning the minor. 755 ILCS 5/11-8(a).

If a previously appointed short-term guardian is bringing a petition for court-ordered guardianship of a minor, the petition must have a copy of the appointment attached and include the date of the appointment as short-term guardian, the circumstances surrounding the appointment, the date the short-term guardian appointment ends, and the reasons why a court-ordered guardian is also needed for the minor. 755 ILCS 5/11-8(a).

If the minor satisfies the age requirement pursuant to §11-5(c) — *i.e.,* is at least 14 years old at the time the petition is filed — the petition should include the minor's preference of guardian. The court does not have to appoint the minor's nominee. 755 ILCS 5/11-5(c). The court also may proceed to appoint a guardian even if the minor fails to exercise his or her nomination preference. *Id.*

The court also may conduct a background check on the proposed guardian for the minor. Whether there is a specific form that must be completed by the proposed guardian at the time the petition is presented for filing with the court clerk's office should be investigated. The required information should be provided to the clerk's office well in advance of the proposed court date for presentation of the petition so the court has sufficient time to receive the results from the background check on the proposed guardian.

2. [13.34] Notice Requirements When Petitioning for Appointment of Guardian

Pursuant to §11-10.1 of the Probate Act, the person petitioning for guardianship for the minor must give notice to the following individuals at least seven days before the hearing on the petition:

a. the minor, if 14 years of age or older; and

b. all persons listed on the petition for guardian of the minor (*i.e.,* the minor's parents and adult siblings or, if none, then the nearest adult kindred). 755 ILCS 5/11-10.1(a).

For example, in Cook County, the person petitioning for guardianship for the minor must give notice to all of the individuals listed on Exhibit A attached to the petition for appointment of a guardian for the minor. In cases in which a guardian ad litem is appointed, the petitioner must also provide notice to the GAL of any pleading, petition, and/or matter the petitioner plans to present to the court.

PRACTICE POINTER

✓ While the Third District Appellate Court had previously suggested that the requirement in the Probate Act directing that all relatives named in the petition should be given notice is not mandatory in *In re Marriage of Frazier,* 205 Ill.App.3d 621, 563 N.E.2d 1236, 151 Ill.Dec. 130 (3d Dist. 1990); the more recent case *In re Estate of B.R.S.,* 2015 IL App (3d) 150038, ¶18, 34 N.E.3d 677, 393 Ill.Dec. 476, clarified that, although the statute provides that the failure to give proper notice is not jurisdictional, such provision "is not tantamount to a finding that notice is not mandatory," and found it is the petitioner's obligation to provide the names of the minor's nearest kindred and provide proper notice. Accordingly, the petitioner must provide notice to all known relatives.

3. [13.35] Appointment of Guardian ad Litem Pursuant to 755 ILCS 5/11-10.1(b)

The court, in its discretion, may appoint a guardian ad litem pursuant to 755 ILCS 5/11-10.1(b). A court-appointed GAL for a minor is usually, but not always, an attorney appointed by the court. The GAL is required to protect the interests and rights of the minor. *Layton v. Miller,* 25 Ill.App.3d 834, 322 N.E.2d 484 (5th Dist. 1975).

The Fifth District Appellate Court held in *In re Estate of Stark,* 33 Ill.App.3d 626, 342 N.E.2d 234, 236 (5th Dist. 1975), that the appointment of a GAL is statutorily controlled, and nowhere in the statutes is the appointment of a GAL for a minor made mandatory. Furthermore, the First District held in *In re Estate of Storino,* 51 Ill.App.3d 49, 366 N.E.2d 363, 365 n.2, 9 Ill.Dec. 106 (1st Dist. 1977), citing *City of Danville v. Clark,* 63 Ill.2d 408, 348 N.E.2d 844, 845 (1976), that even if the court were required to appoint a GAL, the failure to appoint one would only render the guardianship proceedings voidable.

However, pursuant to 705 ILCS 405/2-17(1), upon the filing of a petition in respect of a minor, the court will appoint a GAL if the petition alleges that the minor is an abused or neglected child or is the victim in a proceeding against a defendant alleged to have committed sexual offenses.

The GAL has a duty to determine the ward's rights and what defense the ward's interest demands. *Laxy v. Laxy,* 3 Ill.App.2d 156, 120 N.E.2d 881 (2d Dist. 1954).

PRACTICE POINTER

✓ The court in a minor's guardianship matter may appoint a GAL when litigation and/or conflicts are likely to arise, such as when

- individuals are cross-petitioning for guardianship of a minor;
- the underlying purpose of the guardianship petition is to allow for the guardian to consent to the adoption of a minor;
- the petition for the appointment of a guardian for the minor resulted from allegations of abuse and/or neglect by the minor's parent(s);
- the minor is a party to a cause of action (*e.g.,* a personal injury lawsuit, an heir of a decedent's estate, a beneficiary of a trust, the minor's parent/custodian is the subject of a guardianship proceeding, etc.); or
- the guardian requests authority to do or refrain from doing something that the court decides, in its discretion, merits further investigation and/or review before making its decision.

This list of reasons a court, in its discretion, may appoint a GAL in a minor's guardianship matter is not exhaustive.

The court, in its discretion, may appoint a GAL at any point during the minor's guardianship estate depending on the circumstances presented before the court. *In re Estate of Viehman,* 47 Ill.App.2d 138, 197 N.E.2d 494, 500 (5th Dist. 1964), citing *Simpson v. Simpson,* 273 Ill. 90, 112 N.E. 276 (1916).

In practice, the court may at any time appoint a GAL for a specific purpose, then discharge the GAL upon the resolution of that specific issue, and then reappoint the GAL (or a different GAL) to address a different issue. For example, when the court is made aware that a guardian of the estate of a minor is alleged to be misappropriating the minor's funds, the court is likely to appoint a GAL to conduct a visit to the minor's home, investigate the allegations, and return to the court with a report on the results of the investigation.

Another instance in which a court may appoint a GAL is when a guardian, under 755 ILCS 5/11-13(b), petitions for authority to execute an estate plan on the minor's behalf. Upon the presentation of an estate guardian's petition for authority to execute an estate plan on behalf of a minor, the judges in Cook County generally appoint a GAL to review the proposed estate plan and provide the court with a recommendation.

Pursuant to 755 ILCS 5/27-4, the GAL is entitled to receive reasonable compensation as may be fixed by the court to be taxed as costs in the proceedings and to be paid in the due course of

administration. It is within the circuit court's sole discretion to determine who must pay the GAL's fee. *In re Estate of Dyniewicz,* 271 Ill.App.3d 616, 648 N.E.2d 1076, 208 Ill.Dec. 154 (1st Dist. 1995).

However, in cases in which the court, in its discretion, determines a GAL's fee should not be paid out of the minor's estate and/or when there is no estate, the court may assess payment of the court-approved fee of a GAL against the guardian of the minor, the petitioner/cross-petitioner, and/or the parties in the minor's estate. *Dyniewicz, supra,* 648 N.E.2d at 1081.

4. [13.36] Cross-Petitioning for Guardianship

The filing and notice requirements for filing a cross-petition for the appointment of a guardian for a minor are the same as the filing and notice requirements for the initial filing of a petition pursuant to 755 ILCS 5/11-10.1.

5. [13.37] General Time Frame

The time frame in which the court appoints a guardian for a minor upon presentation of a petition seeking such appointment depends on the circumstances of the case. For example, the court may grant a petition to appoint a guardian for a minor upon the initial presentation of the petition if there are no objections to the petition, the petitioner was qualified to act as guardian pursuant to 755 ILCS 5/11-3, the petitioner had standing to petition for guardianship for the minor pursuant to 755 ILCS 5/11-5, and the petitioner complied with the filing requirements under 755 ILCS 5/11-8 and notice requirements under 755 ILCS 5/11-10.1. However, it may take multiple court appearances, and possibly a trial, in cases in which there are cross-petitions for guardianship and/or litigation involving the appointment of a guardian for the minor.

V. GUARDIANSHIP HEARING

A. Adult with a Disability

1. [13.38] Introduction

As explained in §13.3 above, the primary purpose of guardianship is to create a legally authorized substitute decision-making arrangement for an individual who lacks capacity to make or communicate responsible decisions on his or her own behalf. Guardianship is to be utilized only when necessary to promote the well-being of the person with a disability, to protect him or her from neglect, exploitation, or abuse, and to encourage the development of his or her maximum self-reliance and independence. 755 ILCS 5/11a-3(b); *In re Estate of Bania,* 130 Ill.App.3d 36, 473 N.E.2d 489, 491, 85 Ill.Dec. 121 (1st Dist. 1984); *In re Estate of Bennett,* 122 Ill.App.3d 756, 461 N.E.2d 667, 671, 78 Ill.Dec. 83 (2d Dist. 1984). As a result, "guardianship shall be ordered only to the extent necessitated by the individual's actual mental, physical and adaptive limitations." 755 ILCS 5/11a-3(b). *Accord Bennett, supra,* 461 N.E.2d at 671.

If the respondent objects to the guardianship proceedings, whether by appearing in court and stating an objection on the record or otherwise indicating his or her objection to the proceedings, the court likely will continue the case and schedule a contested hearing. Once the proceedings become contested (*i.e.,* once the respondent objects or a cross-petition is filed by an interested party), the court may appoint counsel for the respondent if the respondent has not already obtained legal representation. Many times, the court will appoint the guardian ad litem to act as the respondent's counsel. However, if the GAL has taken a position that is contrary to the respondent's wishes or beliefs, the court will appoint independent counsel for the respondent. *See In re Estate of Pine,* 16 Ill.App.2d 584, 149 N.E.2d 787 (1st Dist. 1958) (abst.) (noting generally that there should be no conflicting interests between alleged person with disability and court-appointed GAL).

The respondent has numerous rights at the adjudication hearing, including but not limited to the right to legal representation, the right to demand a trial by jury, the right to present evidence, and the right to examine and cross-examine witnesses, including lay witnesses, independent expert witnesses, and controlled expert witnesses. 755 ILCS 5/11a-11(a). As more fully explained in §13.25 above, the respondent is advised of his or her rights by the court-appointed GAL, if applicable, and by the sheriff or other individual who served the respondent with a copy of the original guardianship petition and summons. 755 ILCS 5/11a-10. The rights of a respondent, outlined above, are true for both contested and uncontested matters. However, these rights may take a more pronounced role in contested litigation, in which the respondent (or the court if it is in the respondent's best interests) is more likely to invoke these rights.

The two primary areas of contested litigation relating to the guardianship of adults with disabilities are (a) whether the respondent is in fact a person with a disability and (b), if the respondent is adjudicated a person with a disability, which individual or institution would be the most appropriate guardian for the respondent. One or both of these issues may be present in contested litigation. For example, the respondent may object to the issue of disability alone but, if adjudicated a person with a disability, may have no objection to the proposed guardian. On the other hand, the respondent may object to both the issue of disability and the proposed guardian. Or the respondent may have no objection to the adjudication of disability or the proposed guardian, but cross-petitions may be pending regarding who should serve as the alleged person with a disability's guardian.

PRACTICE POINTER

✓ The dynamic issues facing practitioners in contested guardianship litigation are factually and legally complex and often bring forward sensitive and personal issues. It is the attorney's responsibility to separate the legal issues from the often complex emotional matters while zealously advocating for the client and still maintaining the integrity of the alleged person with a disability and the parties involved.

2. [13.39] Generally

At the contested guardianship hearing, the respondent is entitled to be "represented by counsel, to demand a jury of 6 persons, to present evidence, and to confront and cross-examine all

witnesses." 755 ILCS 5/11a-11(a). However, the failure of a trial judge to follow statutory requirements, such as the respondent's presence at the hearing and that medical examinations be ordered, does not render an order appointing a guardian void ab initio. *In re Estate of Steinfeld,* 233 Ill.App.3d 715, 599 N.E.2d 1026, 1030, 175 Ill.Dec. 12 (1st Dist. 1992), *aff'd in part, rev'd in part,* 158 Ill.2d 1, *cert. denied,* 115 S.Ct. 59 (1994). Instead, the failure to follow statutory procedures can only render the order voidable. *Id.*

The general rules of evidence and the rules of civil procedure apply to the adjudication hearing. *See generally In re Estate of Galvin,* 112 Ill.App.3d 677, 445 N.E.2d 1223, 68 Ill.Dec. 370 (1st Dist. 1983).

A majority of guardianship hearings are uncontested. If no objections are made by the respondent and the guardian ad litem agrees that guardianship is necessary to protect the interests of the alleged person with a disability, the petitioner usually is not required to call and examine witnesses at the hearing to establish its burden of proof. Instead, the court will adjudge the respondent a person with a disability and appoint a guardian based on the report of the GAL, the allegations of the petitioner, and the content of the physician's report, which is usually read into the record by the court.

At the contested hearing, the petitioner must establish that the respondent is a person with a disability by clear and convincing evidence. 755 ILCS 5/11a-3(a). In practice, this requires calling lay witnesses and expert witnesses at trial to testify as to the respondent's ability to manage his or her personal and/or financial affairs. Often, this includes calling as witnesses the medical practitioner who completed the physician's report (in Cook County, Form CCP 0211, Report of Physician, available on the Cook County Circuit Court Clerk's website, www.cookcountyclerkofcourt.org), the GAL, social workers, care managers, case managers, friends, and family members of the respondent. Thus, unlike an uncontested hearing, in which the preparer of the physician's report is excused from testifying unless cause is shown (755 ILCS 5/11a-11(d)), at the contested hearing the preparer of the report is often an essential or key witness.

At trial, the attorney for the petitioner should elicit testimony from the preparer of the physician's report that addresses the content of the report, including the factual and medical basis supporting the physician's opinions. The main areas of testimony that must be addressed by the physician include the first three items listed on Form CCP 0211:

a. a description of the nature and type of the respondent's disability, including an assessment of how the disability impacts the ability of the respondent to make decisions or to function independently;

b. an analysis and the results of evaluations of the respondent's mental and physical condition and, if appropriate, a description of the respondent's educational condition, adaptive behavior, and social skills; and

c. an opinion as to whether the respondent is totally or only partially incapable of making personal and financial decisions.

PRACTICE POINTERS

- ✓ The physician should provide testimony as to the exact diagnosis of the respondent including the effect that such a diagnosis has on the respondent's cognitive functioning. At trial, the petitioner's counsel should elicit testimony from the physician as to the respondent's prognosis or the permanency that the diagnosis has on the respondent's cognitive functioning and the likelihood that the respondent's diagnosis will improve over time. A word of caution, however: A careful practitioner will have spoken to the physician regarding this issue prior to trial and should know the answer that the physician will provide. Any surprises regarding the respondent's ability to improve over time, such as in the case of a head injury, can be used by the respondent's attorney on cross-examination.

- ✓ If the physician concludes that the respondent is only partially incapable of making personal and/or financial decisions, the physician also must provide testimony as to which types of decisions the respondent can or cannot make. Lay witness testimony can substantiate the physician's opinion.

- ✓ Before stating his or her opinion as to the respondent's level of incompetency at trial, the physician should clearly establish and testify as to the date(s) he or she evaluated the respondent, the length of time spent during the evaluation(s), whether he or she reviewed any medical records prior to the evaluation(s), whether he or she relied on the opinions of other medical professionals before formulating his or her opinion, and the types of questions that were asked of the respondent at the evaluation.

- ✓ A careful practitioner will have the proposed guardian testify as to his or her proposed care plan for the alleged person with a disability, the appropriateness of which will then be supported by additional expert testimony of a social worker, care manager, or physician.

- ✓ On cross-examination, the respondent or his or her counsel can attack the credibility of the physician in a variety of ways. In practice, a physician is often partially discredited before a jury or the trier of fact by forcing the physician to disclose the amount of fees he or she has earned for his or her testimony and review of medical records. Other areas of questioning can impact credibility such as calling attention to the short amount of time the physician spent evaluating the respondent, the physician's limited history with the respondent, or the amount of time that has passed between the physician's evaluation of the respondent and his or her testimony at trial. There are myriad other ways that specific testimony can be attacked. Unfortunately, many such ways arise only when presented with specific facts in a given case. Regardless, the physician's testimony is very important when disability is at issue, and the cross-examination of the physician is generally one of the longest of all witnesses at the trial.

At the hearing, the court must also inquire as to

> **(1) the nature and extent of respondent's general intellectual and physical functioning; (2) the extent of the impairment of his adaptive behavior if he is a person with a developmental disability, or the nature and severity of his mental illness if he is a person with mental illness; (3) the understanding and capacity of the respondent to make and communicate responsible decisions concerning his person; (4) the capacity of the respondent to manage his estate and his financial affairs; (5) the appropriateness of proposed and alternate living arrangements; (6) the impact of the disability upon the respondent's functioning in the basic activities of daily living and the important decisions faced by the respondent or normally faced by adult members of the respondent's community; and (7) any other area of inquiry deemed appropriate by the court.** 755 ILCS 5/11a-11(e).

As indicated above, the physician who prepared the physician's report can provide expert testimony as to these questions. Additional expert witnesses include the respondent's social worker, case managers, and other individuals with specific areas of expertise. Lay witnesses also should be called to testify as to events or circumstances that support the respondent's partial or complete ability/inability to manage his or her personal and financial affairs.

By statute, at trial the court may admit into evidence an authenticated transcript taken in a judicial proceeding concerning the respondent under the Mental Health and Developmental Disabilities Code (MHDDC), 405 ILCS 5/1-100, *et seq.* 755 ILCS 5/11a-11(f). Additional documents are admissible in proceedings for the appointment of a guardian for a beneficiary of the Veterans Administration (now the Department of Veterans Affairs) who has a disability. 755 ILCS 5/11a-11(g).

a. [13.40] Open vs. Closed Hearing

Unlike other types of contested hearings that are generally open to the public, in contested guardianship litigation, the hearing may be closed to the public upon the request of the respondent, the guardian ad litem, or the attorney representing the respondent. 755 ILCS 5/11a-11(a).

b. [13.41] Respondent's Attendance

The respondent is statutorily required to be present at the guardianship hearing, absent a showing to the court that the respondent refuses to be present or will suffer harm if required to attend the hearing. 755 ILCS 5/11a-11(a). In fact, the contested guardianship hearing may be held "at such convenient place as the court directs, including at a facility in which the respondent resides," thus further demonstrating the importance of the respondent's role in the proceedings and the gravity of the adjudication process. 755 ILCS 5/11a-10(d). In practice, however, the respondent's appearance often is excused at the hearing due to circumstances that should be stated on the record.

c. [13.42] Evidentiary Standard — Clear and Convincing Evidence

The petitioner in a guardianship proceeding must demonstrate the respondent's disability by clear and convincing evidence before the court will adjudicate the respondent a person with a disability and appoint a guardian to act on his or her behalf. 755 ILCS 5/11a-3(a). After the conclusion of the hearing in a jury trial, the jury must be read instructions regarding the burden of proof based on both the definition of a "person with a disability" and the standards for appointing a guardian. *See generally In re Estate of Mackey,* 85 Ill.App.3d 235, 406 N.E.2d 226, 40 Ill.Dec. 525 (3d Dist. 1980).

3. Determining Whether Respondent Is in Fact a Person with a Disability

a. [13.43] Standard

As noted in §13.38 above, the first issue to be addressed at the contested hearing is whether the respondent is in fact a person with a disability. Sections 11a-2 and 11a-3 of the Probate Act set forth the standards for determining whether a guardian may be appointed for an alleged person with a disability. 755 ILCS 5/11a-2, 5/11a-3; *In re Estate of Hickman,* 208 Ill.App.3d 265, 566 N.E.2d 881, 888, 153 Ill.Dec. 31 (4th Dist. 1991).

The Probate Act defines a "person with a disability" as

> **a person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental illness or developmental disability is not fully able to manage his person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his estate as to expose himself or his family to want or suffering, or (d) is diagnosed with fetal alcohol syndrome or fetal alcohol effects.** 755 ILCS 5/11a-2.

In Illinois, in order to establish the incompetency of an alleged person with a disability, the evidence at the hearing must show the person's incapability of managing his or her person or estate. *In re Estate of McPeak,* 53 Ill.App.3d 133, 368 N.E.2d 957, 959, 11 Ill.Dec. 349 (5th Dist. 1977). Simply establishing that the alleged person with a disability suffers from certain disabilities is insufficient to support a determination of incompetency. *Id.* Moreover, mental incompetency cannot be inferred merely by old age alone. *In re Estate of Neprozatis,* 62 Ill.App.3d 563, 378 N.E.2d 1345, 1349, 19 Ill.Dec. 470 (1st Dist. 1978). Persons of mature age are presumed to be sane. *Id.; McCormick v. Blaine,* 345 Ill. 461, 178 N.E. 195, 200 (1931). Instead, the evidence at the hearing must support the determination of incompetency and show the person's incapability of managing his or her person or estate. *McPeak, supra,* 368 N.E.2d at 960.

Moreover, even though "a person may be disabled in the statutory sense . . . a guardian is not permissible or appropriate if that person is capable of making and communicating responsible decisions concerning the care of her person." *Hickman, supra,* 566 N.E.2d at 888, citing *In re*

Estate of Galvin, 112 Ill.App.3d 677, 445 N.E.2d 1223, 1225, 68 Ill.Dec. 370 (1st Dist. 1983), and *In re Estate of Mackey,* 85 Ill.App.3d 235, 406 N.E.2d 226, 229, 40 Ill.Dec. 525 (3d Dist. 1980). Thus, a person who is physically incapable of taking care of himself or herself but who could direct others to manage his or her personal care would not necessarily require the appointment of a guardian of his person. *Mackey, supra.* An adjudication of disability is a uniquely factual determination that is to be made by the trial court and should not be disturbed on review unless the trial court's findings are against the manifest weight of the evidence. *Hickman, supra,* 566 N.E.2d at 888, citing *In re Estate of Barr,* 142 Ill.App.3d 428, 491 N.E.2d 1241, 1245, 96 Ill.Dec. 781 (1st Dist. 1986), and *Galvin, supra,* 445 N.E.2d at 1225 – 1226.

b. Analyzing Alleged Person with a Disability's Competence

(1) [13.44] Guardianship of the person

Pursuant to the Probate Act, if the court adjudicates an individual to be a person with a disability, the court may appoint a guardian of the person upon a showing of clear and convincing evidence that due to the disability the individual "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person." 755 ILCS 5/11a-3(a).

For purposes of the appointment of a guardian of the person, "[t]he capability to manage one's person does not resolve itself upon the question of whether the individual can accomplish tasks without assistance but rather whether that individual has the capability to take care and intelligently direct that all his needs are met through whatever device is reasonably available under the circumstances." *In re Estate of McPeak,* 53 Ill.App.3d 133, 368 N.E.2d 957, 960, 11 Ill.Dec. 349 (5th Dist. 1977).

At the guardianship hearing, the petitioner can question the respondent and call other witnesses to demonstrate the respondent's ability or inability to "make or communicate responsible decisions concerning the care of his person." 755 ILCS 5/11a-3(a). Areas of inquiry at the hearing may include the respondent's (a) ability to manage tasks of daily living on his or her own behalf such as eating, dressing, bathing, etc.; (b) orientation as to time, person, and place; (c) ability to manage his or her healthcare such as following up with physician visits, taking daily medication, and ensuring adequate nutrition; and (d) physical limitations that may impair the respondent's ability to access resources, such as being a wheelchair user or vision or hearing impaired.

PRACTICE POINTER

✓ A practitioner who represents the respondent in a contested guardianship proceeding in which disability is at issue should consider carefully whether the respondent should testify on his or her own behalf at trial, especially in the case of a jury trial. The testimony of the alleged person with a disability almost always has a great impact on the trier of fact. However, in the experience of the authors, that impact is usually a negative one for the respondent. The testimony of the alleged person with a disability generally demonstrates to the trier of fact only that the person is deficient in some way(s).

Regardless of how well the respondent initially presents himself or herself to others, a decent cross-examination will generally demonstrate that the respondent is deficient in some way. Thus, if in doubt, it is generally best not to put the respondent on the stand. Of course, if disability is not at issue and the only issue is who should be appointed guardian, then it generally makes sense to put the respondent on the stand if he or she prefers one nominee over the other.

(2) [13.45] Guardianship of the estate

The court may appoint a guardian of the estate upon a showing by clear and convincing evidence that, because of the individual's disability, "he is unable to manage his estate or financial affairs." 755 ILCS 5/11a-3(a).

For purposes of the appointment of a guardian of the estate, an individual's competency must be determined by his or her ability to transact ordinary business and to understand the nature of the business and the effect of what the person is doing. *In re Estate of Joutsen,* 100 Ill.App.3d 376, 426 N.E.2d 942, 55 Ill.Dec. 617 (1st Dist. 1981).

At the hearing for the appointment of a guardian of the estate, the parties will call witnesses and present evidence demonstrating the respondent's ability or inability to "manage his estate or financial affairs." 755 ILCS 5/11a-3(a). Areas of inquiry at the hearing may include, but by no means are limited to, (a) the respondent's understanding of his or her personal wealth and the nature of his or her assets, (b) the complexity of the assets involved, (c) the respondent's knowledge regarding his or her monthly income and how such income has been spent in the past, and (d) the necessity of accessing public resources to assist with the respondent's care and his or her general appreciation for this issue.

4. [13.46] Determining Who Should Be Appointed as Guardian

In practice, much litigation ensues over who should serve as the guardian of the alleged person with a disability. Family members, caretakers, and friends of the respondent often disagree as to who should serve as guardian and file cross-petitions proposing different individuals.

Ultimately, the selection of the guardian is in the discretion of the court. 755 ILCS 5/11a-12(d). After the court determines that the respondent is a person with a disability and therefore requires the appointment of a guardian, the selection of the appropriate proposed guardian is in the discretion of the court. In making this determination, the court is required to give due consideration to the respondent's preference as well as the qualifications of the proposed guardian before making an appointment. *Id.; In re Estate of Johnson,* 303 Ill.App.3d 696, 708 N.E.2d 466, 472, 236 Ill.Dec. 880 (1st Dist. 1999). However, the paramount concern in the selection of a guardian is the best interests and well-being of the person with a disability, regardless of that person's choice. 755 ILCS 5/11a-12(d); *In re Estate of Bania,* 130 Ill.App.3d 36, 473 N.E.2d 489, 492, 85 Ill.Dec. 121 (1st Dist. 1984); *In re Estate of Vicic,* 79 Ill.App.3d 383, 398 N.E.2d 420, 421, 34 Ill.Dec. 785 (3d Dist. 1979); *In re Estate of Bennett,* 122 Ill.App.3d 756, 461 N.E.2d 667, 671, 78 Ill.Dec. 83 (2d Dist. 1984); *Johnson, supra.*

Unlike petitions for the appointment of administrators in decedents' estates, in the appointment of a guardian there is no statutorily prescribed preference that the courts are required to follow. *See In re Conservatorship of Browne,* 54 Ill.App.3d 556, 370 N.E.2d 148, 150, 12 Ill.Dec. 525 (3d Dist. 1977) (noting that rigid statutory preferences for awarding letters of administration do not apply to appointment of guardians). Generally, courts will consider the following factors when determining who should act as the guardian: (a) the kinship relationship between the person with a disability and the party considered for appointment; (b) conduct by the respondent prior to being adjudicated a person with a disability that manifests trust or confidence in the proposed guardian; (c) prior actions by the proposed guardian that indicate concern for the well-being of the respondent; (d) the ability of the proposed guardian to manage the respondent's estate; and (e) the extent to which the proposed guardian is committed to discharging responsibilities that might conflict with his or her duties as guardian. 370 N.E.2d at 150 – 151.

Generally speaking, there is a presumption that relatives of the respondent are more concerned than others regarding the respondent's well-being, and as a result their preference as to the selection of a guardian should be considered by the court. However, if the evidence demonstrates that a relative seeking to be appointed guardian of the respondent has been relatively unconcerned with the respondent's well-being, such preference should be given less weight by the trier of fact. *Id.* The court also may consider such factors as past actions and conduct of the proposed guardians, business experience, ages, and family situations. *In re Schmidt,* 298 Ill.App.3d 682, 699 N.E.2d 1123, 1128, 232 Ill.Dec. 938 (2d Dist. 1998).

PRACTICE POINTER

✓ As noted above, family members and friends often disagree about who should act as the guardian of the person with a disability. The task at trial simply may be presenting evidence to distinguish between the proposed guardians and convincing the trier of fact of one's superiority to meet the respondent's needs, whether personal, fiscal, or both. Due to the financial and emotional expense of proceeding through a full-blown contested hearing, many parties attempt to settle matters by agreeing to the appointment of financial institutions, geriatric care managers, county public guardians, the Office of State Guardian, or any other neutral party as guardian rather than the individuals proposed by the initial cross-petitions in a contested action.

5. [13.47] Respondent's Right to Counsel

As stated in §13.39 above, the respondent is entitled to an attorney at the guardianship hearing. 755 ILCS 5/11a-10(b). The court may in its discretion appoint counsel for the respondent if it finds that doing so is in the best interests of the respondent. Moreover, the court is required to appoint counsel for the respondent upon the respondent's request or if the respondent takes a position that is adverse to that expressed by the guardian ad litem. The court has discretion to allow counsel for the respondent reasonable compensation. *Id.* In fact, if the respondent is unable to pay the fees of independent counsel or of the GAL, "the court may enter an order for the petitioner to pay all such fees or such amounts as the respondent or the respondent's estate may be unable to pay." 755 ILCS 5/11a-10(c).

The respondent must be advised of his or her right to obtain independent counsel by the GAL and by the sheriff or other individual serving the respondent with a copy of the petition and summons not less than 14 days before the court hearing. 755 ILCS 5/11a-10(e).

6. [13.48] Respondent's Right to Jury Trial

As stated in §13.39 above, the respondent has a statutory right to "demand a jury of 6 persons." 755 ILCS 5/11a-11(a). Again, the respondent must be advised of his or her right to demand a jury trial by the guardian ad litem (if applicable) and by the sheriff or any other individual serving the respondent with a copy of the original petition and summons. 755 ILCS 5/11a-10(e).

7. [13.49] Examination of Witnesses and Independent Experts

As discussed in §13.39 above, the respondent is entitled to "present evidence" and to "confront and cross-examine all witnesses." 755 ILCS 5/11a-11(a). At the hearing, the parties will present the testimony of expert and nonexpert witnesses to establish the ability or inability of the alleged person with a disability to make personal and/or financial decisions on his or her own behalf. Physicians are better qualified to testify as to a diseased condition than lay witnesses and to state the effects of the diseased condition on the respondent's functioning. *Sharkey v. Sisson,* 310 Ill. 98, 141 N.E. 427 (1923). In fact, an expert can provide testimony as to the length of time a mental disorder has likely existed to a degree of reasonable medical certainty, and such testimony is entitled to due weight and consideration by the trier of fact. *Oak Park Trust & Savings Bank v. Fisher,* 82 Ill.App.2d 251, 225 N.E.2d 377 (1st Dist. 1967).

Nonexpert witnesses are generally allowed to provide an opinion as to the respondent's ability to transact ordinary business. *Neely v. Shephard,* 190 Ill. 637, 60 N.E. 922 (1901) (noting that nonexpert witnesses were entitled to provide opinions as to respondent's ability to transact ordinary business as testimony demonstrated they were well acquainted with respondent, and their opinions appeared to be founded on facts as to respondent's condition); *People ex rel. Payne v. Payne,* 161 Ill.App. 640 (3d Dist. 1911). The issue of whether a nonexpert witness has sufficient knowledge to express an opinion as to the respondent's mental capacity is to be determined by the court. *Graham v. Deuterman,* 244 Ill. 124, 91 N.E. 61, 62 (1910); *In re Dombrowski's Estate,* 321 Ill.App. 300, 53 N.E.2d 18 (1st Dist. 1944) (abst.). A lay witness may state facts from which the jury may form an opinion concerning the mental condition of the respondent and then give his or her own opinion, which the jury should take for what it is worth. *Dombrowski, supra.* Interestingly, however, the court affords the testimony of physicians no greater weight than that of lay witnesses as to the issue of mental capacity. *Sharkey, supra,* 141 N.E. at 433.

The respondent also is entitled to request an examination by an independent expert physician. 755 ILCS 5/11a-9(b-5). This can be done by oral or written motion of the respondent or the guardian ad litem or on the court's own motion. *Id.*

PRACTICE POINTER

- ✓ The respondent and his or her attorney should exercise caution before invoking this right, as the independent expert could agree that the respondent is in need of help of some kind, thereby strengthening the petitioner's case.

- ✓ If the respondent produces a medical report, or other affidavit of a physician, that meets the statutory requirements of 755 ILCS 5/11a-9(a) and avers that no guardian is necessary, the respondent may be successful in summarily defeating the guardianship petition and/or a petitioner's request for an independent medical evaluation of the respondent. *See In re Estate of Hanley,* 2013 IL App (3d) 110264, 995 N.E.2d 596, 374 Ill.Dec. 457; *Williams v. Estate of Cole,* 393 Ill.App.3d 771, 914 N.E.2d 234, 333 Ill.Dec. 27 (1st Dist. 2009); *In re Estate of Silverman,* 257 Ill.App.3d 162, 628 N.E.2d 763, 195 Ill.Dec. 299 (1st Dist. 1993).

8. Adjudication and Entry of Orders

a. [13.50] Order Appointing Guardian

At the conclusion of the hearing, if the trier of fact determines that the respondent is capable of handling his personal and/or financial affairs ("[i]f basis for the appointment of a guardian as specified in Section 11a-3 is not found"), the guardianship petition will be dismissed. 755 ILCS 5/11a-12(a).

If the trier of fact determines that the respondent is a person with a disability and lacks some but not all of the capacity required to manage his or her personal and/or financial affairs, and if the court finds that guardianship is necessary for the protection of the respondent's person, estate, or both, "the court shall appoint a limited guardian of the respondent's person or estate or both." 755 ILCS 5/11a-12(b). The court is required to "enter a written order stating the factual basis for its findings and specifying the duties and powers of the guardian and the legal disabilities to which the respondent is subject." *Id.*

If the trier of fact determines that the respondent is a person with a disability and totally without capacity as specified in §11a-3 of the Probate Act, and also finds that limited guardianship will not provide sufficient protection for the respondent's person, estate, or both, "the court shall appoint a plenary guardian for the respondent's person or estate or both." 755 ILCS 5/11a-12(c). Again, the court is required to "enter a written order stating the factual basis for its findings." *Id.*

When a court adjudges a respondent a person with a disability, the court shall direct the circuit court clerk to notify the Department of State Police, Firearm Owner's Identification (FOID) Office, in a form and manner prescribed by the Department of State Police, and shall forward a copy of the court order to the Department no later than seven days after the entry of the order. 755 ILCS 5/11a-24.

PRACTICE POINTER

✓ The parties may attempt to settle a guardianship dispute before trial by agreeing to the appointment of a limited guardian of the respondent's person or estate or both. Practically speaking, however, the appointment of a limited guardian can pose problems in the future. For example, for a respondent with a diagnosis of progressive dementia, the duties and powers of the guardian and the legal disabilities that must be included in the limited guardian order will change over time based on the very nature of the respondent's disability. In addition, the duties and powers of the limited guardian must be specifically laid out in the order to distinguish between the authority of the limited guardian and the powers retained by the respondent. As a result, the practitioner may be forced to go into court on multiple occasions to modify the terms of the limited guardianship as the respondent's disability progresses.

b. [13.51] Notice of Right To Seek Modifications

At the conclusion of the hearing, if the respondent is adjudicated a person with a disability and a guardian is appointed on his or her behalf, "the court shall inform the ward of his right under Section 11a-20 to petition for termination of adjudication of disability, revocation of the letters of guardianship of the estate or person, or both, or modification of the duties of the guardian and shall give the ward a written statement explaining this right and the procedures for petitioning the court." 755 ILCS 5/11a-19.

PRACTICE POINTER

✓ In Cook County, it is the petitioner's responsibility to provide the court with a form notifying the respondent of his or her rights to modify the terms of the guardianship and to provide the court with the proper address of the respondent so it can be delivered to the respondent in a timely manner if he or she is not present at the hearing.

B. Minor

1. [13.52] Standard of Review

Pursuant to 755 ILCS 5/11-5(a), the court may appoint a guardian of the estate only, a guardian of the person only, or a guardian of both the estate and person as the court finds to be in the best interests of the minor. The paramount concern of the court is to first protect the minor. *In re Estate of Suggs,* 149 Ill.App.3d 793, 501 N.E.2d 307, 310, 103 Ill.Dec. 286 (1st Dist. 1986).

The First District Appellate Court held that the probate court has broad discretion in determining whether to appoint a guardian and must make the appointment "in light of all the relevant facts)" with the guiding standard being what is in the best interests of the minor. *In re Estate of Green,* 359 Ill.App.3d 730, 835 N.E.2d 403, 407, 296 Ill.Dec. 369 (1st Dist. 2005), quoting *Stevenson v. Hawthorne Elementary School, East St. Louis School District No. 189,* 144

Ill.2d 294, 579 N.E.2d 852, 855, 162 Ill.Dec. 38 (1991). However, a trial court's discretion is not unlimited and will be overturned if the reviewing court finds that the court abused its discretion. *Green, supra.*

When considering a petition for the appointment of a guardian of a minor, the court is not required to follow the standards set forth in the Illinois Marriage and Dissolution of Marriage Act. *In re Petition of Schomer,* 89 Ill.App.3d 92, 411 N.E.2d 554, 558, 44 Ill.Dec. 432 (3d Dist. 1980). However, the court may consider, when relevant, the factors set forth in the IMDMA as they correspond to the best interests of the child. *Id.; In re Guardianship of A.G.G.,* 406 Ill.App.3d 389, 948 N.E.2d 81, 84 – 85, 350 Ill.Dec. 12 (5th Dist. 2011). For example, in *Suggs, supra,* upon the filing of the minor's aunt's petition for guardianship, the minor's maternal grandmother objected to the appointment and subsequently filed her own cross-petition. The First District held that, with all other factors considered by the court balancing evenly, the factor that became determinative was the parent's wishes as expressed in his will.

However, the Second District Appellate Court in *In re Marriage of Russell,* 169 Ill.App.3d 97, 523 N.E.2d 193, 119 Ill.Dec. 725 (2d Dist. 1988), affirmed the trial court's decision that it was in the best interests of the minor to appoint the minor's maternal grandparents over the minor's uncle as guardian despite the fact that the minor's parents' expressed their preference for the appointment of the minor's uncle in their will.

Moreover, effective January 1, 2011, the Probate Act's provision for the revocation of a minor's guardianship lists factors for determining best interests, including interaction with the parent, the ability of the parent to provide a nurturing environment, and the stability of the parties. *A.G.G., supra;* 755 ILCS 5/11-14.1(b). Specifically, the amended statute states that the court shall consider all relevant factors, including:

> **(1) The interaction and interrelationship of the minor with the parent and members of the parent's household.**
>
> **(2) The ability of the parent to provide a safe, nurturing environment for the minor.**
>
> **(3) The relative stability of the parties and the minor.**
>
> **(4) The minor's adjustment to his or her home, school, and community, including the length of time that the minor has lived with the parent and the guardian.**
>
> **(5) The nature and extent of visitation between the parent and the minor and the guardian's ability and willingness to facilitate visitation.** 755 ILCS 5/11-14.1(b).

These factors are similar to those proscribed by the IMDMA and are not exclusive.

Pursuant to §11-5(d), the court shall not appoint a person to be guardian for a minor when the court has determined that the person caused or substantially contributed to the minor becoming a neglected or abused minor as defined in the Juvenile Court Act of 1987 unless the court finds that the appointment is in the minor's best interests and it has been at least two years since the last proven incident of neglect or abuse. 755 ILCS 5/11-5(d).

2. [13.53] Standard of Review When Minor's Parents Are Living

Pursuant to §11-5(b) of the Probate Act, the court lacks jurisdiction to proceed on a petition for the appointment of a guardian for a minor when the minor has a living parent whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out the daily decisions related to the child's care. 755 ILCS 5/11-5(b). Furthermore, when the minor's parents are living, there exists a rebuttable presumption that a parent of the minor is willing and able to make and carry out daily decisions concerning the care of the child. *Id.*

However, the court retains jurisdiction to proceed on the petition if (a) the parent or parents voluntary relinquished physical custody of the minor; (b) after receiving notice of the hearing under 755 ILCS 5/11-10.1, the parent or parents fail to object to the appointment at the hearing on the petition; or (c) the parent or parents consent to the appointment as evidenced by a written document that has been notarized and dated or by a personal appearance and consent in open court. 755 ILCS 5/11-5(b). This section of the statute mirrors the Illinois Marriage and Dissolution of Marriage Act standard for standing, and guardianship practitioners may thus review caselaw interpreting the relevant IMDMA provisions for further guidance. See 750 ILCS 5/101, *et seq*.

In cases in which the minor's parents are living, the petitioner must rebut the statutory presumption that the parents are "willing and able to make and carry out day-to-day child[-]care decisions concerning the minor." *In re Custody of T.W.,* 365 Ill.App.3d 1075, 851 N.E.2d 881, 885, 303 Ill.Dec. 694 (5th Dist. 2006), quoting *In re R.L.S.,* 218 Ill.2d 428, 844 N.E.2d 22, 28, 300 Ill.Dec. 350 (2006). This presumption may be rebutted by a preponderance of the evidence. 755 ILCS 5/11-5(b).

In *R.L.S., supra,* 844 N.E.2d at 31, the Illinois Supreme Court held that allowing a nonparent to proceed to a hearing on the merits of the guardianship petition over the wishes of a parent when it has been established that the parent is unwilling or unable to carry out daily child-care decisions demonstrates that the Probate Act respects the superior rights of parents "while also insuring to protect the health, safety, and welfare of children." *Id.* The court further noted that the term "able" in the Probate Act's rebuttable presumption that a parent of a minor is willing and able to make and carry out day-to-day child-care decisions concerning the minor means possessed of needed powers or resources to accomplish an objective, and not something akin to intelligence, knowledge, skill, or competence. 844 N.E.2d at 31 n.3.

The question of whether a parent meets the willing-and-able standard is a separate test from the best-interests-of-the-minor standard. *In re Guardianship of A.G.G.,* 406 Ill.App.3d 389, 948 N.E.2d 81, 85, 350 Ill.Dec. 12 (5th Dist. 2011). Thus, whether the petitioner has standing must be determined, and if, upon an evidentiary hearing, the court determines that the petitioner rebutted the presumption that the parent of the minor is willing and able, the court may proceed on the petition using the best-interests standard to determine if guardianship should be awarded. See 948 N.E.2d at 85 – 86. In fact, the First District has interpreted the *R.L.S.* decision to mean that Illinois courts are "effectively prohibited from denying standing to a nonparent seeking guardianship over a minor, even if that minor was in the physical custody of his biological parent,

so long as that petitioner could establish that the parent is not 'willing and able to make and carry out day-to-day child care decisions concerning the minor.' " *In re Guardianship of Tatyanna T.,* 2012 IL App (1st) 112957, ¶24, 976 N.E.2d 431, 364 Ill.Dec. 153. Note that from a procedural standpoint, the court in *A.G.G.* indicated that it need not address whether it is possible for the separate issues of standing and best interests to be considered at a consolidated proceeding. 948 N.E.2d at 86. For a review by an appellate court of the trial court's factual findings and application of law regarding an evidentiary hearing on standing pursuant to §11-5(b), *see In re Guardianship of K.R.J.,* 405 Ill.App.3d 527, 942 N.E.2d 598, 347 Ill.Dec. 395 (4th Dist. 2010).

Another case to consider with regard to standing, quite apropos in light of the evolving dynamics of the modern family, is *In re T.P.S.,* 2011 IL App (5th) 100617, 954 N.E.2d 673, 352 Ill.Dec. 590. In *T.P.S.,* one partner of a long-term, same-sex relationship gave birth to the couple's two children, who were conceived by artificial insemination. The couple jointly petitioned the court for coguardianship of each child, and both petitions were granted. However, the non-birthing partner did not adopt the children. The couple subsequently terminated their relationship, and the birth mother petitioned the court to terminate her ex-partner's appointment as coguardian, alleging that petitioner was the biological mother of both children, that the partners no longer resided at the same address, and that it was not in the best interests of the children for her ex-partner to continue to serve as coguardian. The petitioner further alleged that she had superior rights over third parties, including her ex-partner, under the "superior rights" doctrine. *Id*. The trial court, although it expressed its disagreement with the law as interpreted, acknowledged that no Illinois law gave the respondent standing to object to the birth mother's petition to terminate her coguardianship. Thus, the trial court was bound to terminate the guardianship.

On appeal, the Fifth District reversed and remanded on the basis that the trial court did not apply the correct standard to determine one's standing to oppose a petition to terminate guardianship. 2011 IL App (5th) 100617 at ¶¶13 – 19. The court explained the 2011 amendment to §11-14.1, which now provides, in pertinent part:

> **Upon the filing of a petition by a minor's living, adoptive, or adjudicated parent whose parental rights have not been terminated, the court shall discharge the guardian and terminate the guardianship if the parent establishes, by a preponderance of the evidence, that a material change in the circumstances of the minor or the parent has occurred since the entry of the order appointing the guardian; unless the guardian establishes, by clear and convincing evidence, that termination of the guardianship would not be in the best interests of the minor.** 755 ILCS 5/11-14.1(b).

The court stated that "[i]t is clear, then, that both the courts of this state and its legislature contemplate a role for an appointed guardian in proceedings to terminate a guardianship." 2011 IL App (5th) 100617 at ¶17. Since the lower court found it appropriate to appoint the respondent as the children's guardian, she retained a "cognizable interest in [the children's] welfare." *Id*. Further, as the court submitted, the rules still provide adequate protection to a legal parent of his or her parental rights, as other nonparent or nonguardian third parties lack standing to object. *Id*.

Moreover, the guardian in opposition to the termination "must still prove by clear and convincing evidence that a continuation of the guardianship is in the children's best interests." 2011 IL App (5th) 100617 at ¶18.

Thus, parents can rely on a statute, and not solely caselaw, in seeking termination of their child's guardianship. And, as listed in §13.52 above, the court shall use all relevant factors to determine the minor's best interests, including, without limitation, (a) the interaction and interrelationship of the minor with the parent and members of the parent's household; (b) the ability of the parent to provide a safe, nurturing environment for the minor; (c) the relative stability of the parties and the minor; (d) the minor's adjustment to his or her home, school, and community, including the length of time that the minor has lived with the parent and the guardian; and (e) the nature and extent of visitation between the parent and the minor and the guardian's ability and willingness to facilitate visitation. 755 ILCS 5/11-14.1(b).

Finally, in light of the changes discussed above to the minor guardianship statutes, §11-7, regarding parental rights to custody and the fitness of a parent to act as guardian, an undefined standard, was repealed by P.A. 96-1338, §10 (eff. Jan. 1, 2011). See also Margaret C. Benson, *Introducing the New and Improved Minor Guardianship Statute,* 98 Ill.B.J. 628 (2010).

3. [13.54] Considerations When Seeking Appointment of Standby Guardian as Guardian

Pursuant to 755 ILCS 5/11-5(b-1), if the court finds that the appointment of a guardian is in the minor's best interests, and if a standby guardian previously has been appointed for the minor under §11-5.3 of the Probate Act, the court shall appoint the standby guardian as guardian of the minor's estate, person, or both. However, the court does not have to appoint the standby guardian if the court finds on good cause shown that the appointment of the standby guardian as guardian is no longer in the best interests of the child. 755 ILCS 5/11-5(b-1).

4. [13.55] Considerations When Seeking Appointment of Guardian for Minor Who Is at Least 14 Years of Age

In cases in which the minor is at least 14 years old, pursuant to 755 ILCS 5/11-5(c), the minor may nominate a guardian subject to the court's approval. However, the court, in its discretion, may determine it is not in the minor's best interests to appoint the minor's nominated guardian. The court may, in its discretion, appoint a guardian when the minor, who is at least 14 years old, fails to nominate a guardian even after receiving notice of the proceedings. *Id.*

5. [13.56] Role of Court-Appointed Guardian ad Litem in Matters Involving Minor's Estate

The court, in its discretion, may appoint a guardian ad litem at any point during the minor's guardianship estate depending on the circumstances presented before the court. *In re Estate of Viehman,* 47 Ill.App.2d 138, 197 N.E.2d 494, 500 (5th Dist. 1964), citing *Simpson v. Simpson,* 273 Ill. 90, 112 N.E. 276 (1916).

The GAL should exercise the same care and judgment that reasonable and prudent people exercise, request that the court decide all questions that may arise, take the court's advice, and act under the court's direction in the steps necessary to preserve and secure the rights of the minor. *Roth v. Roth,* 52 Ill.App.3d 220, 367 N.E.2d 442, 447, 10 Ill.Dec. 54 (1st Dist. 1977), citing *Stunz v. Stunz,* 131 Ill. 210, 23 N.E. 407, 409 (1890).

The Second District Appellate Court has held that the minor is bound by the decisions made by the GAL on the minor's behalf when the GAL completes his or her legal duties by being at all relevant hearings and reviewing all pleadings prior to the court's ruling on them. *In re Estate of Nuyen,* 111 Ill.App.3d 216, 443 N.E.2d 1099, 66 Ill.Dec. 936 (2d Dist. 1982).

6. [13.57] Appointment of Guardian

Section 11-13 of the Probate Act directs that the court must first appoint the guardian of a minor before the proposed guardian may make decisions regarding the minor. 755 ILCS 5/11-13. When the court appoints a guardian to manage the minor's estate, the guardian must be bonded pursuant to §12-2. *Id*.

VI. POST-ADJUDICATION AND POST-APPOINTMENT

A. Adult with a Disability

1. [13.58] Decision-Making Standard To Be Applied by Guardians of the Person and the Estate

Before discussing the decision-making standards of guardians of the estate and person, it is important to note that it is the court that functions in the central role, overseeing and controlling all aspects of the management and protection of the person with a disability's estate. The court controls the ward's person and estate and directs the guardian's care, management, and investment of the estate.

a. [13.59] Guardian of the Person

The law sets up a dual standard for guardians of the person to apply in making decisions for their wards. The first and preferred standard is the substituted-judgment standard, under which the guardian attempts to discern what the ward would have done if competent. If there is evidence to demonstrate the course of action that the ward would have taken if competent, then those wishes take precedence over any best-interests analysis. *In re C.E.,* 161 Ill.2d 200, 641 N.E.2d 345, 204 Ill.Dec. 121 (1994). However, if the guardian is unable to determine such wishes "after reasonable efforts to discern them," then the guardian should instead act to further the ward's best interests. 755 ILCS 5/11a-17(e).

Under either standard, when the issue presented relates to a life-or-death matter, or other exceptional civil matters such as sterilization or refusal of medical care, courts have required clear and convincing evidence before granting a petition for sterilization or refusal of medical treatment for the ward.

(1) [13.60] Substituted-judgment standard

When they can discern what the ward would have wished if competent, guardians substitute that judgment for their own:

> **Decisions made by a guardian on behalf of a ward shall be made in accordance with the following standards for decision making. Decisions made by a guardian on behalf of a ward may be made by conforming as closely as possible to what the ward, if competent, would have done or intended under the circumstances, taking into account evidence that includes, but is not limited to, the ward's personal, philosophical, religious and moral beliefs, and ethical values relative to the decision to be made by the guardian. Where possible, the guardian shall determine how the ward would have made a decision based on the ward's previously expressed preferences, and make decisions in accordance with the preferences of the ward.** 755 ILCS 5/11a-17(e).

Though a guardian's duty compels him or her to act in a ward's best interests, such a standard is secondary to a ward's wish to exercise common-law, statutory, or constitutional rights, which may sometimes influence or even override a guardian's own perception of best interests. *In re Estate of Greenspan,* 137 Ill.2d 1, 558 N.E.2d 1194, 1201, 146 Ill.Dec. 860 (1990), citing *In re Estate of Brooks,* 32 Ill.2d 361, 205 N.E.2d 435 (1965) (conservator could not compel arguably incompetent ward to accept blood transfusion she had steadfastly refused on First Amendment grounds while competent), and *In re Gardner,* 121 Ill.App.3d 7, 459 N.E.2d 17, 76 Ill.Dec. 608 (4th Dist. 1984) (given statutory due-process rights of involuntary commitment respondents, court had no power to order guardian to apply, and guardian had no power to apply, for admission of nonconsenting ward to mental health facility as voluntary patient).

In the context of refusal of medical treatment, the application of the substituted-judgment standard requires the surrogate decision-maker to establish, as accurately as possible, what the ward would decide if competent, which must be based on clear and convincing evidence of the ward's intent, derived either from the ward's explicit expressions of intent or from knowledge of the patient's personal value system. *In re C.E.,* 161 Ill.2d 200, 641 N.E.2d 345, 204 Ill.Dec. 121 (1994). For example, if it is shown that the ward would have refused certain medical treatment, the ward's imputed choice will not be vitiated by a best-interests guardianship standard, which would otherwise elevate "other parties' assessments of the meaning and value of life — or, at least, their assessments of what a reasonable individual would choose — over the affected individual's own common law right to refuse medical treatment." *Greenspan, supra,* 558 N.E.2d at 1202.

It is important to note that the "substituted judgment" statutory language refers to the preferences of the ward that were "previously expressed" (*i.e.,* before the ward became incompetent). 755 ILCS 5/11a-17(e). The ward's current desire, even if clearly and consistently expressed over the course of the proceedings, does not automatically trump all other considerations. *In re Estate of K.E.J.,* 382 Ill.App.3d 401, 887 N.E.2d 704, 320 Ill.Dec. 560 (1st Dist. 2008).

When it cannot be shown that the ward, if competent, would have wished for or, conversely, would have opposed a certain action (whether a medical procedure or otherwise), the analysis then turns to what is in the ward's best interests. See §13.61 below.

(2) [13.61] Best-interests standard

Section 11a-17(e) of the Probate Act provides:

> **If the ward's wishes are unknown and remain unknown after reasonable efforts to discern them, the decision shall be made on the basis of the ward's best interests as determined by the guardian. In determining the ward's best interests, the guardian shall weigh the reason for and nature of the proposed action, the benefit or necessity of the action, the possible risks and other consequences of the proposed action, and any available alternatives and their risks, consequences and benefits, and shall take into account any other information, including the views of family and friends, that the guardian believes the ward would have considered if able to act for herself or himself.** 755 ILCS 5/11a-17(e).

Depending on the issue at bar, the scope of relevant information and weight could vary.

b. [13.62] Guardian of the Estate

The appointment of a guardian creates a fiduciary relationship between the guardian and the ward. The estate becomes a trust fund for the ward's support. The guardian acts only as the hand of the court and is at all times subject to the court's direction in the manner in which the guardian provides for the care and support of the person with a disability. *In re Estate of Wellman,* 174 Ill.2d 335, 673 N.E.2d 272, 220 Ill.Dec. 360 (1996).

The guardian need not obtain a court order to expend money for the necessaries of a ward. However, the court may disapprove, set aside, modify, or approve the guardian's expenditures. Thus, the guardian usually petitions the court for permission to make large expenditures or acts at his or her own risk. *In re Estate of Berger,* 166 Ill.App.3d 1045, 520 N.E.2d 690, 117 Ill.Dec. 339 (1st Dist. 1987). *See also In re Estate of O'Hare,* 2015 IL App (2d) 140073, 34 N.E.3d 1126, 393 Ill.Dec. 598.

The guardian must act with the degree of diligence that an ordinarily prudent person would use in conducting his or her own affairs. As guardian, he or she is a fiduciary and is held to the highest standard of fair dealing. *Berger, supra,* 520 N.E.2d at 697.

The guardian of the estate must act in the ward's best interests. Through petitioning the court, the court may authorize the guardian to exercise any or all powers over the estate and business affairs of the ward that the ward could exercise if competent. The guardian shall apply the income and principal of the estate as far as necessary for the comfort and suitable support and education of the ward, his or her minor and adult dependent children, and persons related by blood or marriage who are dependent on or entitled to support from him or her, or for any other purpose

that the court deems to be for the best interests of the ward. When appropriate, the court may also grant authority to the guardian in ascertaining and carrying out the ward's wishes with respect to estate planning and gifts to charities, relatives, and friends. See 755 ILCS 5/11a-18(a-5).

2. Guardian of the Person's Duties, Limitations, and Liabilities

a. Duties

(1) [13.63] Generally

The Probate Act defines the guardian of the person's duties as follows:

> **[T]he guardian of the person shall have custody of the ward and the ward's minor and adult dependent children and shall procure for them and shall make provision for their support, care, comfort, health, education and maintenance, and professional services as are appropriate. . . . The guardian shall assist the ward in the development of maximum self-reliance and independence. The guardian of the person may petition the court for an order directing the guardian of the estate to pay an amount periodically for the provision of the services specified by the court order.** 755 ILCS 5/11a-17(a).

If the court directs, the guardian of the person shall file a report discussing information relevant to the ward's well-being and continued need for guardianship, including

> **(1) the current mental, physical, and social condition of the ward and the ward's minor and adult dependent children; (2) their present living arrangement, and a description and the address of every residence where they lived during the reporting period and the length of stay at each place; (3) a summary of the medical, educational, vocational, and other professional services given to them; (4) a resume of the guardian's visits with and activities on behalf of the ward and the ward's minor and adult dependent children; (5) a recommendation as to the need for continued guardianship; and (6) any other information requested by the court or useful in the opinion of the guardian.** 755 ILCS 5/11a-17(b).

The practical effect of §11a-17(a) is that the plenary guardian of the person, under the direction of the court, makes all decisions and exercises all legal rights on behalf of the ward that fall within the guardian's express statutory authority. *In re K.C.,* 323 Ill.App.3d 839, 753 N.E.2d 314, 257 Ill.Dec. 119 (1st Dist. 2001). In addition to the express authority provided in the statute, the Illinois Supreme Court has recognized implied authority as well. *See In re Marriage of Burgess,* 189 Ill.2d 270, 725 N.E.2d 1266, 244 Ill.Dec. 379 (2000).

The types of decisions that Illinois courts have found to be impliedly supported by §11a-17 have been of an intensely personal nature and have related to the most intimate issues of the ward's family and health. *K.C., supra,* 753 N.E.2d at 322 (plenary guardian of person is necessary party to proceedings related to ward's parental rights). Other instances of implied authority include whether to withdraw artificial nutrition and hydration, potentially resulting in the death of

the ward (*In re Estate of Longeway,* 133 Ill.2d 33, 549 N.E.2d 292, 139 Ill.Dec. 780 (1989); *In re Estate of Greenspan,* 137 Ill.2d 1, 558 N.E.2d 1194, 146 Ill.Dec. 860 (1990)), whether to consent to the adult ward's own adoption (*In re Adoption of Savory,* 102 Ill.App.3d 276, 430 N.E.2d 301, 58 Ill.Dec. 359 (3d Dist. 1981)), and whether to consent to an abortion on behalf of the ward (*In re Estate of D.W.,* 134 Ill.App.3d 788, 481 N.E.2d 355, 89 Ill.Dec. 804 (1st Dist. 1985)).

"Where courts have required an express grant of statutory authority, on the other hand, that requirement has been based on policy reasons and has been 'premised on the personal nature of the decision [at issue].' " *K.C., supra,* 753 N.E.2d at 322, quoting *Burgess, supra,* 725 N.E.2d at 1269 – 1270. "For example, although a guardian must have express authority under section 11a-17 in order to *institute* dissolution of marriage proceedings on a ward's behalf (*In re Marriage of Drews,* 115 Ill.2d 201, 205, 104 Ill.Dec. 782, 503 N.E.2d 339 (1986)), the *Burgess* court held that the implied authority of the plenary guardian under section 11a-17 was sufficient to allow the guardian to *maintain* dissolution proceedings that had already been filed by the ward prior to the adjudication of the ward's disability." [Emphasis in original.] *K.C., supra,* 753 N.E.2d at 322 – 323. The implied authority of a guardian to maintain dissolution proceedings, as articulated in *Burgess,* became express authority when the Illinois legislature amended §11a-17 in 2009 by adding subsection (a-5). Under subsection (a-5), "[i]f the ward filed a petition for dissolution of marriage under the Illinois Marriage and Dissolution of Marriage Act before the ward was adjudicated a person with a disability under this Article, the guardian of the ward's person and estate may maintain that action for dissolution of marriage on behalf of the ward." 755 ILCS 5/11a-17(a-5).

The Illinois Supreme Court then took another step on this issue in holding that the application of implied authority should equally apply to a guardian's ability to petition for divorce on behalf of the ward, as demonstrated in *Karbin v. Karbin,* 2012 IL 112815, 977 N.E.2d 154, 364 Ill. Dec. 665. In *Karbin,* the husband filed a petition for dissolution of marriage from his disabled wife. The wife's plenary guardian filed a counterpetition. The husband subsequently dismissed his initial petition, but the wife's guardian proceeded with the divorce on her counterpetition. The husband moved to dismiss the counterpetition based on Illinois Supreme Court precedent that barred a person with a disability from initiating a dissolution of marriage. The wife's guardian argued that such precedent was outdated and should be deemed inapplicable when it can be shown that the dissolution of the marriage is in the best interests of the person with a disability. The Illinois Supreme Court agreed, holding that there is

> **no compelling reason to treat a guardian's decision to seek court permission to institute a dissolution action on behalf of a ward any differently from the multitude of other innately personal decisions which may be made by guardians on behalf of their wards, including undergoing involuntary sterilization or ending life-support measures. All of these decisions made by guardians without knowing a ward's wishes are just as personal — if not more so — than the decision to seek a divorce. All also may implicate the ward's moral and religious beliefs. The provisions of our Probate Act cannot be so arbitrary as to empower a plenary guardian to make decisions with respect to all these matters except for the decision to end a marriage. Either the guardian can act in the best interests of the ward for all personal matters, or for none at all.** 2012 IL 112815 at ¶49.

The Illinois legislature, in agreement with the Illinois Supreme Court, subsequently codified the decision in *Karbin* in 2014, adding the following two sentences to the end of subsection (a-5):

> **Upon petition by the guardian of the ward's person or estate, the court may authorize and direct a guardian of the ward's person or estate to file a petition for dissolution of marriage or to file a petition for legal separation or declaration of invalidity of marriage under the Illinois Marriage and Dissolution of Marriage Act on behalf of the ward if the court finds by clear and convincing evidence that the relief sought is in the ward's best interests. In making its determination, the court shall consider the standards set forth in subsection (e) of this Section.** 755 ILCS 5/11a-17(a-5).

Finally, subject to other applicable law, the guardian of the person can seek to have a marriage annulled. *In re Marriage of Davis,* 217 Ill.App.3d 273, 576 N.E.2d 972, 160 Ill.Dec. 18 (5th Dist. 1991).

The guardian of the estate, however, is generally charged with appearing on the ward's behalf in all legal proceedings. 755 ILCS 5/11a-18(c).

(2) [13.64] Residential placement

Except for duly appointed public guardians and the Office of State Guardian, no guardian shall have the power, unless specified by court order, to place a ward in a residential facility. 755 ILCS 5/11a-14.1.

The court may order the guardian to make residential placement in the least restrictive environment appropriate for the ward's needs, in a manner that maximizes the ward's self-reliance, and in view of medical requirements. *See In re Guardianship of Austin,* 245 Ill.App.3d 1042, 615 N.E.2d 411, 185 Ill.Dec. 852 (4th Dist. 1993).

Section 11a-14.1 provides that

> **[**i**]n making residential placement decisions, the guardian shall make decisions in conformity with the preferences of the ward unless the guardian is reasonably certain that the decisions will result in substantial harm to the ward or to the ward's estate. When the preferences of the ward cannot be ascertained or where they will result in substantial harm to the ward or to the ward's estate, the guardian shall make decisions with respect to the ward's placement which are in the best interests of the ward. The guardian shall not remove the ward from his or her home or separate the ward from family and friends unless such removal is necessary to prevent substantial harm to the ward or to the ward's estate.** 755 ILCS 5/11a-14.1.

The guardian "shall have a duty to investigate the availability of reasonable residential alternatives" and "shall monitor the placement of the ward on an on-going basis to ensure its continued appropriateness, and shall pursue appropriate alternatives as needed." *Id.*

(3) [13.65] Involuntary commitment

A trial court may not grant a guardian the power to admit a nonconsenting ward to a mental health facility for treatment as a voluntary patient. *In re Guardianship of Muellner,* 335 Ill.App.3d 1079, 782 N.E.2d 799, 270 Ill.Dec. 240 (4th Dist. 2002). This rule was codified by an amendment to §11a-17(a), effective January 1, 2010, which states that a guardian of the person may not admit a ward to a mental health facility except at the ward's request and unless the ward has the capacity to consent to such admission, as outlined in Article IV of the Mental Health and Developmental Disabilities Code. 755 ILCS 5/11a-17(a). Article IV of the MHDDC provides that a person adjudicated a person with a disability may be admitted to a mental health facility as a voluntary recipient upon the filing of an application with the facility director and only if the facility director determines and documents that the person is clinically suitable for admission as a voluntary recipient and has the capacity to consent to voluntary admission. 405 ILCS 5/3-400(a). Only the person seeking admission, or any interested person over the age of 18 at the person's request, may execute the application for admission. 405 ILCS 5/3-401(a). Further, §3-200(a) of the MHDDC, 405 ILCS 5/3-200(a), provides that "[a] person may be admitted as an inpatient to a mental health facility for treatment of mental illness only as provided in" Chapter III of the MHDDC, 405 ILCS 5/3-100, *et seq.* To grant such a power to the guardian would contravene the exclusivity provided in §3-200 of the MHDDC. See the MHDDC for further information on involuntary commitment.

b. [13.66] Liability

The guardian of the person has a fiduciary relationship with the ward. *See In re Estate of Basich,* 79 Ill.App.3d 997, 398 N.E.2d 1182, 35 Ill.Dec. 232 (1st Dist. 1979). As a fiduciary, the guardian is required to exercise that measure of care and diligence in the performance of required duties that an ordinarily prudent person would use in conducting his or her own affairs. In this exercise of care, the guardian is held to the highest standard of fair dealing and diligence, and the guardian's behavior will be closely scrutinized by the courts to ensure adherence to these high standards. *In re Estate of Berger,* 166 Ill.App.3d 1045, 520 N.E.2d 690, 697, 117 Ill.Dec. 339 (1st Dist. 1987).

If the guardian acts with due care and in accordance with the law, the guardian will not be subject to criminal prosecution or any claim based on his or her lack of authority or failure to act. 755 ILCS 5/11a-23(d). Furthermore, the guardian of the person shall not be liable for breach merely because he or she may benefit from the act, has individual or conflicting interests in relation to the care and affairs of the ward, or acts in a different manner with respect to the guardian's own care or interests. *Id.*

Breach of that fiduciary duty, such as using the position to unduly influence the ward for personal gain or lack of care in exercising guardian duties, may result in civil or criminal prosecution.

3. Guardian of the Estate's Duties, Limitations, and Liabilities

a. [13.67] Duties

The paramount duty of the guardian of the estate is to conserve and protect the assets of the incompetent person and to see that the assets and income therefrom are properly applied to the use, enjoyment, and benefit of the incompetent. *In re Estate of Berger,* 166 Ill.App.3d 1045, 520 N.E.2d 690, 697, 117 Ill.Dec. 339 (1st Dist. 1987).

To the extent specified in the order establishing the guardianship, the guardian of the estate shall have the care, management, and investment of the estate, shall manage the estate frugally, and shall apply the income and principal of the estate as far as necessary for the comfort and suitable support and education of the ward, his or her minor and adult dependent children, and persons related by blood or marriage who are dependent on or entitled to support from him or her, or for any other purpose that the court deems to be for the best interests of the ward. In addition, the court may approve the making on behalf of the ward of such agreements as the court determines to be for the ward's best interests. 755 ILCS 5/11a-18(a).

(1) [13.68] Inventory and accounts

Within 60 days after his or her appointment by issuance of letters, the guardian of the estate must file a verified inventory of all estate property that has come to his or her knowledge and of any cause of action on which he or she has a right to sue. 755 ILCS 5/14-1. If any real or personal estate comes to the knowledge of the guardian after filing an inventory, he or she shall file a supplemental inventory within 60 days of learning of the additional property. *Id.*

The representative of a ward's estate also must file a verified account within 30 days after the anniversary of his or her appointment and within 30 days of the termination of his or her office, or such further time as the court allows. 755 ILCS 5/24-11. The account must state the receipts and disbursements of the guardian since the last accounting and all property that is on hand and must be accompanied by such evidence as the court requires. *Id.* Although the Probate Act does not designate a particular form for an accounting, the guardian does not have carte blanche to submit any format whatsoever. *In re Estate of Moore,* 189 Ill.App.3d 920, 545 N.E.2d 816, 818, 137 Ill.Dec. 163 (2d Dist. 1989). When the descriptions of the transactions in a report are insufficient to support any conclusion respecting their necessity or reasonableness, the representative has failed to discharge his or her duty adequately. *Id.* Local county rules, such as Cook County Circuit Court Rule 12.13, provide more detailed information regarding the form and detail needed for the account.

The guardian must present the verified account to the court for approval, and notice of the account should be given to all interested parties. Although a guardian of the estate need not obtain a court order to expend money for the ward, the court may disapprove, set aside, modify, or approve the representative's account. Thus, the guardian should petition the court for permission to make expenditures; otherwise, the guardian performs the acts at his or her own risk. *In re Estate of Berger,* 166 Ill.App.3d 1045, 520 N.E.2d 690, 697, 117 Ill.Dec. 339 (1st Dist. 1987). Furthermore, if objections are filed to the account, it is the guardian's burden to prove that the items entered on the account are just and proper. *Id.*

Proceedings to settle accounts are not adversarial suits between parties. Instead, they are ex parte investigations as to the manner in which the guardian has discharged his or her duties in the management of the ward's estate. 520 N.E.2d at 703.

If notice of the hearing on any account except the final account of a representative is served at least ten days before the hearing on the account and the court appoints a guardian ad litem to represent the ward at the hearing, in the absence of fraud, accident, or mistake, the account as approved is binding on the ward. 755 ILCS 5/24-11(b). Notice of the hearing on any final account of a representative must be given to the ward if he or she is living and to such other persons and in such manner as the court directs. *Id.* However, acts of the guardian that transcend his or her statutory authority cannot be approved or ratified by the probate court. *Berger, supra,* 520 N.E.2d at 703.

The court's approval of the annual accounts in the ex parte proceedings are only prima facie evidence of the proper management of the estate, and, notwithstanding the absence of objection, exception, or appeal made at that time, such proceedings are open to subsequent correction or challenge. Upon restoration, an incompetent may have all prior accounts investigated by the court. He or she is entitled to have the entire administration of the guardian investigated. Significantly, a petition to reopen an estate requires that the petitioner act with due diligence in presenting his or her claim to the court. However, the due diligence requirements of the statute have been relaxed when unconscionable behavior is shown on the part of the estate representative. *Id.*

(2) [13.69] Filing and settling lawsuits, including personal injury

The guardian of the estate of a ward shall appear for and represent the ward in all legal proceedings unless another person is appointed for that purpose as guardian or next friend. 755 ILCS 5/11a-18(c). Although the statutory language in §11a-18(c) provides that the guardian of the estate shall appear for and represent the ward in "all legal proceedings," courts have limited its meaning to legal proceedings that are likely to affect the ward's financial affairs or estate. See also the discussion in §13.63 above regarding the guardian of the person's duties and responsibilities.

PRACTICE POINTER

✓ The guardian should seek court authority to commence, prosecute, or defend any suit on behalf of the ward. After appointment, all suits and proceedings on behalf of the ward should be brought by the guardian in his or her capacity as guardian, not in the name of the person with a disability. The guardian of the estate may settle any lawsuit involving the ward, but the probate court must first approve settlement as in the best interests of the ward.

(3) [13.70] Estate planning

The court may authorize inter vivos transfers of gifts and otherwise develop an estate plan in any manner approved by the court in keeping with the ward's wishes as far as they can be

ascertained. See 755 ILCS 5/11a-18(a-5). The court must consider the permanence of the ward's disabling condition and the natural objects of the ward's bounty. In ascertaining and carrying out the ward's wishes, the court may consider, but shall not be limited to, minimization of state or federal income, estate, or inheritance taxes and providing gifts to charities, relatives, and friends that would be likely recipients of donations from the ward. The ward's wishes, as best they can be ascertained, shall be carried out, whether or not tax savings are involved. *Id.*

Estate planning actions may include but are not limited to

- making gifts of income or principal, or both, of the estate, either outright or in trust;
- conveying, releasing, or disclaiming contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety;
- releasing or disclaiming powers as trustee, personal representative, custodian for minors, or guardian;
- exercising, releasing, or disclaiming powers as donee of a power of appointment;
- entering into contracts;
- creating for the benefit of the ward or others revocable or irrevocable trusts of the ward's property that may extend beyond his or her disability or life;
- exercising options to purchase or exchange securities or other property;
- exercising the rights to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any one or more of the following:
    - life insurance policies, plans, or benefits;
    - annuity policies, plans, or benefits;
    - mutual fund and other dividend investment plans; and
    - retirement, profit-sharing, and employee welfare plans and benefits;
- exercising the right to claim or disclaim an elective share in the estate of the ward's deceased spouse and to renounce any interest by testate or intestate succession or by inter vivos transfer;

- changing the ward's residence or domicile; and

- modifying by means of codicil or trust amendment the terms of the ward's will or any revocable trust created by the ward, as the court may consider advisable in light of changes in applicable tax laws.

In addition, because an estate guardian is generally empowered to act in the ward's best interests, to the extent it can determine the ward's best interests, it can deviate from intestacy and develop an estate plan even for a ward who never had testamentary capacity. *Estate of Howell v. Howell,* 2015 IL App (1st) 133247, 36 N.E.3d 293, 394 Ill.Dec. 360. The *Howell* court stated:

> [R]**eading the relevant sections of the Probate Act together, the preferred approach to estate planning is to follow the ward's subjective wishes, to the extent those wishes can be ascertained, but the overriding principal is to act in the ward's objective "best interests." This two step approach to a disabled ward's care is well established. Under what is known as "substituted judgment," a surrogate decision maker will attempt to determine and show the court, with as much accuracy as possible, what decision the ward would make if he were competent to do so.** 2015 IL App (1st) 133247 at ¶22.

In the petition seeking court approval to undertake the foregoing actions, the guardian must briefly outline the action, the results expected thereby, and the tax savings, if any, expected to accrue. The guardian shall also indicate in the petition that any planned disposition is consistent with the intentions of the ward insofar as they can be ascertained, and if the ward's intentions cannot be ascertained, the ward will be presumed to favor reduction in the incidents of various forms of taxation and the partial distribution of his or her estate as provided in this subsection. The guardian shall not, however, be required to include as a beneficiary or fiduciary any person whom he or she has reason to believe would be excluded by the ward. *Id.*

b. [13.71] Liability

The guardian of the estate must act with the degree of diligence that an ordinarily prudent person would use in conducting his or her own affairs. The representative is a fiduciary and is held to the highest standard of fair dealing and diligence, and his or her behavior will be closely scrutinized by the courts to ensure adherence to these high standards. *In re Estate of Berger,* 166 Ill.App.3d 1045, 520 N.E.2d 690, 697, 117 Ill.Dec. 339 (1st Dist. 1987). The guardian of the estate will be liable for neglecting his or her responsibilities or otherwise breaching his or her fiduciary duties.

The guardian of the estate is required to maintain a bond for an amount not less than double the value of the personal estate if individuals act as sureties and not less than one and one-half times the value of the personal estate if a surety company acts as surety. 755 ILCS 5/12-5. The guardian and the surety on the bond are liable to any person aggrieved by the mismanagement of the estate committed to the guardian's care. 755 ILCS 5/24-18. Such person may institute and maintain an action against the guardian and surety for all money and property that have come into the guardian's possession and are withheld or may have been wasted or misapplied. *Id.; Berger, supra,* 520 N.E.2d at 697 – 698.

If the guardian acts with due care and in accordance with the law, the guardian will not be subject to criminal prosecution or any claim based on his or her lack of authority or failure to act. 755 ILCS 5/11a-23(d). Furthermore, the guardian shall not be liable for breach merely because he or she may benefit from the act, has individual or conflicting interests in relation to the care and affairs of the ward, or acts in a different manner with respect to the guardian's own care or interests. *Id.*

The guardian is liable for waste, fraud, and embezzlement. A guardian is bound to use ordinary prudence in managing his or her ward's estate and is liable for losses incurred through culpable indifference and negligence. A guardian should not be surcharged, however, for matters as to which there is no fault or liability or no loss or damage is suffered by the estate or beneficiaries.

In fulfilling his or her fiduciary duty, the representative must inform the court fully of all material facts within his or her knowledge. Failure to do so constitutes breach of this duty. *Berger, supra,* 520 N.E.2d at 703. A guardian may also be liable for breach by failing to file an annual estate accounting. *In re Estate of Dyniewicz,* 271 Ill.App.3d 616, 648 N.E.2d 1076, 208 Ill.Dec. 154 (1st Dist. 1995). Finally, a guardian can also be liable for making poor investment decisions. *In re Estate of Lieberman,* 391 Ill.App.3d 882, 909 N.E.2d 915, 330 Ill.Dec. 893 (2d Dist. 2009) (finding that guardian can be liable for breach of fiduciary duty for investing large amount of estate's assets into short-term investment fund with return rate of only one percent).

4. Interaction Between Guardian of the Estate and/or Person and a Power of Attorney for Healthcare and/or Property

a. [13.72] Guardian of the Estate

The guardian of the estate has no power, duty, or liability with respect to any property subject to agency under the Illinois Power of Attorney Act, absent some court order pursuant to that Act. This means that the person with a disability's power of attorney preempts the court from appointing a guardian to act as to matters covered by the agency. However, the validity of the power of attorney can be challenged in the guardianship proceeding.

b. [13.73] Guardian of the Person

The guardian of the person has no power, duty, or liability with respect to any personal or healthcare matters subject to agency under the Illinois Power of Attorney Act, absent some court order pursuant to that Act. This means that the person with a disability's power of attorney preempts the court from appointing a guardian to act as to those matters covered by the agency. However, the validity of the power of attorney can be challenged in the guardianship proceeding.

B. Minor

1. [13.74] Decision-Making Standard To Be Applied by Guardians of the Person and the Estate

The guardian of a minor must consider what is in the minor's best interests when making a decision regarding the minor. *Curran v. Bosze,* 141 Ill.2d 473, 566 N.E.2d 1319, 153 Ill.Dec. 213 (1990). For example, in considering whether a guardian should apply the doctrine of substituted judgment or the best-interests standard when making a decision for a minor, the Illinois Supreme Court in *Curran* held that the guardian must consider what is in the minor's best interests when making a decision regarding whether to donate bone marrow to a sibling of a three-and-one-half-year-old minor, holding in part:

> **Under the doctrine of substituted judgment, a guardian of a formerly competent, now incompetent, person may look to the person's life history, in all of its diverse complexity, to ascertain the intentions and attitudes which the incompetent person once held. There must be clear and convincing evidence that the formerly competent, now incompetent, person had expressed his or her intentions and attitudes with regard to the termination of artificial nutrition and hydration before a guardian may be authorized to exercise, on behalf of the incompetent person, the right of the incompetent person to terminate artificial sustenance.**
>
> *** * ***
>
> **The doctrine of substituted judgment requires clear and convincing proof of the incompetent person's intent before a court may authorize a surrogate to substitute his or her judgment for that of the incompetent. Any lesser standard would "undermin[e] the foundation of self-determination and inviolability of the person upon which the right to refuse medical treatment stands." [***In re Estate of Longeway,* 133 Ill.2d 33, 549 N.E.2d 292, 299, 139 Ill.Dec. 780 (1989).**] A guardian attempting to prove what a 3½-year-old child would or would not do in a given set of circumstances at a given time in the distant future would have to rely on speculation and conjecture.**
>
> **Neither justice nor reality is served by ordering a 3½-year-old child to submit to a bone marrow harvesting procedure for the benefit of another by a purported application of the doctrine of substituted judgment. Since it is not possible to discover that which does not exist, specifically, whether the 3½-year-old twins would consent or refuse to consent to the proposed bone marrow harvesting procedure if they were competent, the doctrine of substituted judgment is not relevant and may not be applied in this case.** 566 N.E.2d at 1325 – 1326.

A guardian must observe that care in performance of his or her duties that a good and conscientious businessperson exercises in his or her own affairs under similar circumstances. *Reinhold v. Lingbeek,* 321 Ill.App. 119, 52 N.E.2d 294 (2d Dist. 1943). A guardian must discharge the duties of his or her office with as much fidelity and care as prudent persons ordinarily bestow on their own affairs. *Holeman v. Blue,* 10 Ill.App. 130 (2d Dist. 1881).

2. [13.75] Duties of Guardian of the Person

Pursuant to §11-13(a) of the Probate Act, the guardian of the person of a minor

> **shall have the custody, nurture and tuition and shall provide education of the ward and of his children, but the ward's spouse may not be deprived of the custody and education of the spouse's children, without consent of the spouse, unless the court finds that the spouse is not a fit and competent person to have such custody and education. If the ward's estate is insufficient to provide for the ward's education and the guardian of his person fails to provide education, the court may award the custody of the ward to some other person for the purpose of providing education. If a person makes a settlement upon or provision for the support or education of a ward and if either parent of the ward is dead, the court may make such order for the visitation of the ward by the person making the settlement or provision as the court deems proper. The guardian of the minor shall inform the court of the minor's current address by certified mail, hand delivery, or other method in accordance with court rules within 30 days of any change of residence.** 755 ILCS 5/11-13(a).

In practice, the guardian of the person is required to file a report to the court on an annual basis detailing the current condition of the minor at that time. For example, in Cook County the guardian of the person of the minor must annually present a report titled "Annual Report" (Cook County Form CCP 0008B), detailing the minor's current educational needs, activities, and medical care needs and any other relevant information regarding the minor's personal care and needs. Counsel may obtain this form from the clerk in the minor's courtroom.

3. [13.76] Duties of Guardian of the Estate

Pursuant to §11-13(b) of the Probate Act, the guardian of the estate of a minor shall

> **have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward, his children, and persons related by blood or marriage who are dependent upon or entitled to support from him, or for any other purpose which the court deems to be for the best interests of the ward, and the court may approve the making on behalf of the ward of such agreements as the court determines to be for the ward's best interests. The representative may make disbursement of his ward's funds and estate directly to the ward or other distributee or in such other manner and in such amounts as the court directs. If the estate of a ward is derived in whole or in part from payments of compensation, adjusted compensation, pension, insurance or other similar benefits made directly to the estate by the Veterans Administration, notice of the application for leave to invest or expend the ward's funds or estate, together with a copy of the petition and proposed order, shall be given to the Veterans' Administration Regional Office in this State at least 7 days before the hearing on the application. The court, upon petition of a guardian of the estate of a minor, may permit the**

> **guardian to make a will or create a revocable or irrevocable trust for the minor that the court considers appropriate in light of changes in applicable tax laws that allow for minimization of State or federal income, estate, or inheritance taxes; however, the will or trust must make distributions only to the persons who would be entitled to distributions if the minor were to die intestate and the will or trust must make distributions to those persons in the same amounts to which they would be entitled if the minor were to die intestate.** 755 ILCS 5/11-13(b).

The Illinois Supreme Court in *Swiecicki v. Swiecicki,* 255 Ill.App.3d 1037, 627 N.E.2d 774, 194 Ill.Dec. 437 (5th Dist. 1994), held that the court, not the guardian, has control or dominion over a ward's estate. The guardian of an estate is not vested with title to a minor's estate but is charged only with its care and management. 627 N.E.2d at 777, citing *In re Estate of Hardaway,* 26 Ill.App.2d 493, 168 N.E.2d 796 (1st Dist. 1960).

The guardian cannot make disbursements from the minor's estate without approval of the court. *Swiecicki, supra*.

The guardian has a duty to invest the ward's funds. 755 ILCS 5/21-2(a). However, the guardian's authority to invest a minor's funds are limited to those investments that comply with the requirements detailed in §§21-2.01 through 21-2.15 of the Probate Act. 755 ILCS 5/21-2(c).

Pursuant to §11-13(c), at the court's direction, the guardian of the estate of a minor may perform the contracts of his or her ward that were legally subsisting at the time of the commencement of the guardianship. The court may authorize the guardian to execute and deliver any bill of sale, deed, or other instrument. 755 ILCS 5/11-13(c).

The guardian of a minor is also allowed to remove the minor from Illinois with the court's approval "whenever such approval is in the best interests of such child or children." 755 ILCS 5/11-13(f).

The estate guardian also must obtain court approval in managing the minor's real property. The authority of a guardian over real estate owned by the ward is limited to leasing, maintaining, and repairing the property under the direction of the probate court. *Heisen v. Heisen,* 145 Ill. 658, 34 N.E. 597, 599 (1893), citing *Field v. Herrick,* 5 Ill.App. 57 (1st Dist. 1879).

a. [13.77] Duty To File Annual Accountings

The guardian of a minor's estate has a duty to file annual accountings with the court detailing any and all actions related to the management of the minor's assets such as all disbursements, income, receipts, and transactions that have occurred during the time period of said accounting. 755 ILCS 5/24-11. Upon the appointment of a guardian of the estate for a minor in Cook County, the court will enter an order setting a court date for the presentation of an accounting not less than 14 months from the date the guardian is appointed. (NOTE: In Cook County, a 14-month date is required by practice.)

PRACTICE POINTER

✓ One should check the local circuit court rules for any additional information and/or requirements of the guardianship court. For example, Cook County Circuit Court Rule 12.13 imposes specific formatting and procedural requirements for a guardian's annual accounting. Also in Cook County, notice of annual accountings must be given to all interested parties at least 10 days before the hearing. Cook County Circuit Court Rule 12.13(a)(vii).

b. [13.78] Authority To File and Settle Lawsuits

Pursuant to §11-13(d) of the Probate Act, the estate guardian for a minor shall appear for and represent the ward in all legal proceedings unless another person is appointed for that purpose as representative or next friend. 755 ILCS 5/11-13(d). This does not impair the power of any court to appoint a representative or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute, or defend any proceeding on his or her behalf. Any proceeding on behalf of a minor may be commenced and prosecuted by his or her next friend without any previous authority or appointment by the court if the next friend enters bond for costs and files it in the court where the proceeding is pending. Without impairing the power of the court in any respect, if the representative of the estate of a minor and another person as next friend shall appear for and represent the minor in a legal proceeding in which the compensation of the attorney or attorneys representing the guardian and next friend is solely determined under a contingent-fee arrangement, the guardian of the estate of the minor shall not participate in or have any duty to review the prosecution of the action, to participate in or review the appropriateness of any settlement of the action, or to participate in or review any determination of the appropriateness of any fees awarded to the attorney or attorneys employed in the prosecution of the action. *Id.*

A guardian may appear, prosecute, and defend for his or her ward in all legal suits and proceedings, but it must be in the ward's name, not in the name of the guardian personally. *Muller v. Benner,* 69 Ill. 108 (1873).

A minor's parent does not have authority to settle a cause of action on the minor's behalf as such power requires leave of court by the minor's guardian. *Mastroianni v. Curtis,* 78 Ill.App.3d 97, 397 N.E.2d 56, 59, 33 Ill.Dec. 723 (1st Dist. 1979). The guardianship court must approve any settlement agreement of a cause of action involving a minor. It is important to note that the court's authority to approve a proposed settlement on the minor's behalf is limited to cases in which the evidence presented demonstrates that the settlement is in the minor's best interests. *Id.*

4. [13.79] Visitation Pursuant to 755 ILCS 5/11-7.1

According to §11-7.1(a) of the Probate Act, when both natural or adoptive parents of a minor are deceased, visitation rights shall be granted to the grandparents of the minor who are the parents of the minor's legal parents unless it is shown that such visitation would be detrimental to

the best interests and welfare of the minor. It is within the court's discretion to grant reasonable visitation rights to any other relative of the minor or other person having an interest in the welfare of the child. 755 ILCS 5/11-7.1(a).

Furthermore, according to §11-7.1(a), the court shall not grant visitation privileges to any person who otherwise might have visitation privileges under this section when the minor has been adopted subsequent to the death of both his or her legal parents except when such adoption is by a close relative. A "close relative" is defined to include, but is not limited to, "a grandparent, aunt, uncle, first cousin, or adult brother or sister." *Id.*

When such adoption is by a close relative, the court shall not grant visitation privileges under this section unless the petitioner alleges and proves that he or she has been unreasonably denied visitation with the child. The court may grant reasonable visitation privileges upon finding that such visitation would be in the best interests of the child. When a court denies visitation to the minor's grandparents, the order denying visitation rights is a final order for purposes of appeal and must be in writing, detailing the reasons for denial. *Id.*

Upon a motion to modify the visitation schedule under §610.5 of the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/610.5, the court shall revoke visitation rights previously granted to an individual who, although otherwise entitled to visitation rights, has been convicted of first-degree murder of the parent, grandparent, great-grandparent, or sibling of the minor. Until an order is entered pursuant to this subsection, no person shall visit, with the minor present, a person who has been convicted of first-degree murder of the parent, grandparent, great-grandparent, or sibling of the minor without the consent of the minor's parent, other than a parent convicted of first-degree murder, or legal guardian. 755 ILCS 5/11-7.1(b).

In deciding whether to authorize visitation with the minor under §11-7.1, the court must decide, on a case-by-case basis, what is in the minor's best interests given the evidence presented before it. *LeHew v. Mellyn,* 131 Ill.App.3d 314, 475 N.E.2d 913, 86 Ill.Dec. 534 (1st Dist. 1985).

VII. VARIATIONS ON GUARDIANSHIP

A. Temporary Guardianship

1. [13.80] Purpose of Temporary Guardianship Petition and Standard Applied by Court

Temporary guardianship petitions typically are used to address emergency situations in order to protect the alleged person with a disability's safety, either personally or financially. Prior to the appointment of a plenary guardian, a person may seek to be appointed as temporary guardian of an alleged person with a disability pursuant to §11a-4 of the Probate Act. In determining whether a temporary guardian is appropriate under the circumstances, the court must review the temporary guardianship petition to see if the petition clearly states why an appointment is necessary for "the immediate welfare and protection of the alleged person with a disability or his or her estate." 755 ILCS 5/11a-4(a).

The court's primary focus in deciding whether to appoint a temporary guardian is determining if the immediate welfare and protection of the alleged person with a disability and his or her estate is at risk. Any interests of the petitioner, care provider, or any other party shall not outweigh the interests of the alleged person with a disability. *Id.*

PRACTICE POINTER

✓ Because temporary guardianship petitions are granted in emergency situations, it is important both to clearly identify the cause of the emergency and to detail how the current situation jeopardizes the alleged person with a disability's financial or personal well-being.

In most courts, the petition for appointment of a temporary guardian is required to be filed contemporaneously with or subsequently to a plenary or limited guardianship petition. See Cook County Circuit Court Rule 12.6(a). However, in other courts a temporary guardianship petition may be filed, and relief granted, with no further action required of the petitioner. Although orders may be entered ex parte, or without notice to the alleged person with a disability, many courts insist on the appointment of a guardian ad litem in temporary guardianship situations. Furthermore, Cook County courts prefer to have service of notice on the alleged person with a disability prior to appointing a temporary guardian.

2. [13.81] Notice Requirements for Temporary Guardianship Petition

Notice of the temporary guardianship petition shall be subject to the conditions prescribed by the courts. 755 ILCS 5/11a-4(a). For instance, in Cook County, unless waived by the court, notice of the time and place of the hearing on the temporary guardianship petition shall be given not less than three days before the hearing, either by mail or in person, to the respondent and those persons entitled to receive notice of the petition for adjudication of disability under §11a-8. Cook County Circuit Court Rule 12.6(b). The courts do not require the same notice required under §11a-10 since that "would undermine the clear purpose of the provisions regarding temporary guardians, which is to attend to the *immediate* needs of the alleged disabled person." [Emphasis in original.] *In re Estate of Hasse,* 327 Ill.App.3d 1057, 764 N.E.2d 1279, 1281, 262 Ill.Dec. 162 (2d Dist. 2002).

3. [13.82] Temporary Guardian's Powers

Previously, pursuant to §11a-4(a) of the Probate Act, a temporary guardian had "all of the" powers and duties of a guardian of the person or of the estate that are specifically enumerated by court order. 755 ILCS 5/11a-4(a). P.A. 99-70 (eff. Jan. 1, 2016), modified §11a-4(a) to reflect the limited nature of a temporary guardian, who shall have only "the limited" powers and duties of a guardian of the person or of the estate that are specifically enumerated by court order. 755 ILCS 5/11a-4(a). Once appointed, a temporary guardian may make all personal and financial decisions a plenary guardian is authorized to make, as long as such powers are listed in the order appointing the temporary guardian.

PRACTICE POINTER

✓ Because a temporary guardian is authorized to have the limited powers and duties available to a plenary guardian as listed in the appointing order, it is imperative to carefully detail any and all powers sought in the temporary petition. It is also important to note that §11a-4(a) requires the order to state the "actual harm" that creates the need for a temporary guardian.

4. [13.83] Termination and Revocation of Temporary Guardianship

Temporary guardianship appointments are just that, temporary. However, when there has not been an adjudication of disability, a temporary guardianship can be extended up to 120 days from the date the temporary guardian was originally appointed. 755 ILCS 5/11a-4(b)(2). To grant such an extension, the court must find that it is in the best interests of the alleged person with a disability to extend the temporary guardianship so as to protect the alleged person with a disability from any potential abuse, neglect, self-neglect, exploitation, or other harm. *Id.* In cases in which there has been an adjudication of disability, an extension will be granted only (a) pending the disposition on appeal of an adjudication of disability; (b) pending the completion of a citation proceeding; (c) pending the appointment of a successor guardian in a case in which the former guardian has resigned, has become incapacitated, or is deceased; or (d) when the guardian's powers have been suspended pursuant to a court order. 755 ILCS 5/11a-4(b)(1). The statute does not limit the length of a temporary guardianship under these circumstances.

Under any circumstance, the ward retains the right to petition the court to revoke the appointment of the temporary guardian at any time. 755 ILCS 5/11a-4(b)(2). According to Cook County Circuit Court Rule 12.6(c), unless waived by the court, notice of the time and place of the hearing on a petition to revoke the appointment of a temporary guardian shall be given not less than three days prior to the hearing either by mail or in person to the temporary guardian, the petitioner listed on the temporary guardianship petition, and those entitled to receive notice on the petition for adjudication of disability per 755 ILCS 5/11a-8.

B. [13.84] Limited Guardianship

While the appointment of a limited guardian under Article XIa of the Probate Act shall not constitute a finding of legal incompetence, an order appointing a limited guardian of either the person or the estate does admit that the respondent fails to possess the full capacity to make personal decisions or to handle an estate. See 755 ILCS 5/11a-14. Guardianship is to be used in order to promote self-reliance and independence and should be used only to the extent necessary to ensure the respondent's well-being and to protect the respondent from neglect, exploitation, or abuse. *In re Estate of Bennett,* 122 Ill.App.3d 756, 461 N.E.2d 667, 671, 78 Ill.Dec. 83 (2d Dist. 1984).

However, limited guardianships are infrequently used due to the difficulty involved in having a physician clearly identify what the respondent is and is not capable of handling for himself or herself. Moreover, the court must then decide what rights the respondent is capable of retaining

and specify the respondent's limited capabilities in a court order. Finally, compliance by third parties with such detailed orders can create practical problems in permitting the respondent and his or her limited guardian to carry out a variety of financial or personal activities. The respondent, the limited guardian, and the third party all need to be in agreement about how the terms of the order apply to a given circumstance in order to determine who has the right to make a decision regarding the respondent's personal care or finances.

While limited guardianship petitions are not often used, it is important to note that they can be used very effectively in settlement negotiations with a respondent who objects to having a guardian appointed. The perceived stigma of being adjudicated a person with a disability is not attached to an order appointing a limited guardian because, by the clear words of the statue itself, "[t]he appointment of a limited guardian under this Article shall not constitute a finding of legal incompetence." 755 ILCS 5/11a-14(c).

VIII. REMOVAL OF GUARDIAN

A. Adult with a Disability

1. [13.85] Grounds for Removal

On the petition of any "interested person" or on the court's own motion, the court may remove a representative for any of several listed causes. 755 ILCS 5/23-2. The listed grounds for removal are the following:

a. The representative is acting under false pretenses.

b. The representative is adjudged a person subject to involuntary admission under the Mental Health and Developmental Disabilities Code or is adjudged a person with a disability.

c. The representative is convicted of a felony.

d. The representative wastes or mismanages the estate.

e. The representative conducts himself or herself in such a manner as to endanger any coguardian or co-representative or the surety on his or her bond.

f. The representative fails to give sufficient bond or security, counter-security, or a new bond after being ordered by the court to do so.

g. The representative fails to file an inventory or accounting after being ordered by the court to do so.

h. The representative conceals himself or herself so that process cannot be served on or notice given to him or her.

i. The representative becomes incapable of or unsuitable for the discharge of his or her duties.

j. There is other good cause. *Id.*

Because §§23-2 and 23-3 of the Probate Act were drafted to apply to the administration of decedents' estates, however, the listed causes are often inapplicable to guardianship proceedings. As a result, "other good cause" is often the most suitable ground for a petition for removal of a guardian. "Other good cause" includes neglect and deprivation, inability of the guardian, and malfeasance, such as a felony conviction. *In re Estate of Brown,* 103 Ill.App.3d 470, 431 N.E.2d 457, 459, 59 Ill.Dec. 172 (5th Dist. 1982); *In re Estate of Austwick,* 275 Ill.App.3d 665, 656 N.E.2d 773, 778, 212 Ill.Dec. 176 (1st Dist. 1995). In some circumstances, Illinois courts will recognize good cause to remove a guardian even when the guardian has acted properly and competently. *See In re Estate of Debevec,* 195 Ill.App.3d 891, 552 N.E.2d 1043, 1045, 142 Ill.Dec. 302 (5th Dist. 1990) (removing public guardian under §23-2(a)(10) so that ward's sister could serve as guardian instead).

PRACTICE POINTER

✓ Because no Illinois caselaw strictly defines the meaning of "other good cause" under §23-2, a showing of harm to the ward or the failure of the guardian to fulfill his or her duties should suffice as grounds for removal of the guardian.

2. [13.86] Removal Process

As noted in §13.85 above, the removal process for a guardian begins either when an "interested person" files a petition or on the court's own motion. 755 ILCS 5/23-2. When the court intends to initiate removal proceedings, it should appoint a guardian ad litem to file a petition for the issuance of a citation. By appointing a GAL, the court can avoid the awkward task of taking direct action on the ward's behalf.

Whether a petitioner is an "interested person" is a common issue in removal litigation. The Probate Act defines an "interested person" as one who has or represents a financial interest, property right, or fiduciary status at the time of reference that may be affected by the action, power, or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award, and the representative. 755 ILCS 5/1-2.11. This definition, however, was drafted more for the context of decedent's estates than for guardianship proceedings, leaving some confusion about who is an "interested person" with standing to file a petition for removal of a guardian.

The Illinois courts have attempted to clarify this confusion by noting that, in the context of a removal proceeding, an "interested person" is "any person . . . 'interested' in the removal of a representative, including a guardian of the person." *Pape v. Byrd,* 145 Ill.2d 13, 582 N.E.2d 164, 171, 163 Ill.Dec. 898 (1991). Although this standard is vague, Illinois courts seem to interpret the term "interested person" quite broadly in removal proceedings. *See also In re Jennings,* 32

Ill.App.3d 857, 336 N.E.2d 786, 788 (2d Dist. 1975) (holding that grandmother had standing to seek termination of guardianship of her grandchildren).

After the filing of a petition for removal of a guardian, the court must order a citation to issue directing the respondent (*i.e.,* the guardian) to show cause why he or she should not be removed for the cause stated in the citation. 755 ILCS 5/23-3(a). The citation must be served on the respondent not less than ten days before the return date designated in the citation and must be served and returned in the same manner as a summons in a civil case. *Id.* The purpose of the citation is to notify the guardian about the alleged reasons for removal and to give him or her an opportunity to defend at a hearing. *In re Estate of Austwick,* 275 Ill.App.3d 665, 656 N.E.2d 773, 777, 212 Ill.Dec. 176 (1st Dist. 1995).

If the court initiates a removal proceeding on its own and fails to obtain service on the respondent, or if the petitioner files an affidavit with the clerk of the court stating that the respondent resides or has gone out of the state, is concealed within the state, or on due inquiry cannot be found and also states the last known post office address of the respondent, the clerk must provide notice to the respondent. 755 ILCS 5/23-3(b). This notice must state the alleged cause of removal, the place of the removal hearing, the name of the ward, the number of the case, and the name of the person to whom notice is directed. The notice must further direct the respondent to show cause why he or she should not be removed. The clerk must then serve this notice not less than 15 days before the return date designated in the notice to the respondent's last known address and to the respondent's attorney of record. *Id.* As a result, failure to personally serve the respondent is not necessarily fatal to the petition for removal.

The next step in a removal proceeding is for the citation respondent to file a responsive pleading to the petition for removal. Any responsive pleading must be filed on or before the return date designated in the citation or the notice provided by the clerk of court, or within any other time permitted by the court. 755 ILCS 5/23-3(c).

At the hearing on the petition for removal of the guardian, the petitioner must introduce evidence establishing that there are reasonable grounds for removal. *In re Estate of Kirk,* 242 Ill.App.3d 68, 611 N.E.2d 537, 540, 183 Ill.Dec. 274 (2d Dist. 1993). If the petitioner establishes a prima facie case by demonstrating reasonable grounds for removal, the burden shifts to the respondent to prove his or her fitness to retain office. *Id.*

Finally, the court has the power to assess the costs of the proceeding against a guardian who is removed for any of the causes listed in §23-2. Unlike custody proceedings, the court does not need to make factual findings in support of its decision in a removal proceeding. *In re Petition of Schomer,* 89 Ill.App.3d 92, 411 N.E.2d 554, 558, 44 Ill.Dec. 432 (3d Dist. 1980).

3. [13.87] Emergency Situations and Temporary Guardianship

Should a situation arise in which the conduct of the guardian presents an immediate threat to the health and welfare of the ward, a petitioner may seek the appointment of a temporary guardian. 755 ILCS 5/11a-4. In such circumstances, although the guardian's conduct may

endanger the ward, the court may not immediately remove the guardian, as the guardian is entitled to notice and an opportunity to show cause why he or she should not be removed. 755 ILCS 5/23-3.

As long as a petitioner has initiated a removal proceeding, however, that petitioner may move for the appointment of a temporary guardian. 755 ILCS 5/11a-4 (pending completion of a citation proceeding brought pursuant to §23-3, the court may appoint a temporary guardian, upon showing of necessity, for immediate protection of the ward).

Illinois courts will appoint a temporary guardian if the petitioner shows that such an appointment is necessary to protect the immediate health and welfare of the ward. For practical purposes, given the immediate need for action to protect the well-being of the ward in such situations, the court may immediately appoint a temporary guardian. Section 11a-4 implies that once the court appoints a temporary guardian, the powers of the plenary guardian are temporarily suspended until the conclusion of the removal hearing. In any event, the term of the temporary guardianship expires 60 days from the date of appointment. *Id.*

B. Minor

1. [13.88] Terminating or Limiting Authority of Standby or Short-Term Guardian

As with removal of guardians in the context of adults with disabilities (see §§13.85 – 13.87 above), any interested person may seek termination or limitation of the authority of a standby or short-term guardian of a minor. 755 ILCS 5/11-13(e). For the sake of efficiency, the petitioner may, but need not, combine his or her petition to terminate or limit the authority of a standby or short-term guardian with a petition for plenary guardianship of the minor.

Section 11-13(e) is very flexible in allowing the court to terminate or limit the authority of a standby or short-term guardian or to enter any other order it deems in the best interests of the minor. *See In re Estate of Green,* 359 Ill.App.3d 730, 835 N.E.2d 403, 410, 296 Ill.Dec. 369 (1st Dist. 2005).

Litigation under §11-13(e) is extremely rare, with no reported cases in Illinois. Nonetheless, the same issues involved with removal of a plenary guardian in a proceeding involving an adult with a disability apply to termination or limitation of the authority of a short-term or standby guardian of a minor. As in the context of guardianship of adults with disabilities, a potential source for litigation under §11-13(e) is whether the petitioner has standing as an "interested person." As noted in §13.86 above, the Illinois courts have established a relaxed standard to determine who is an "interested person" in the context of guardianship proceedings, to include "any person . . . 'interested' in the removal of a representative, including a guardian of the person." *Pape v. Byrd,* 145 Ill.2d 13, 582 N.E.2d 164, 171, 163 Ill.Dec. 898 (1991).

Effective July 30, 2015, the Illinois legislature added certain procedural requirements that a practitioner must follow after obtaining an order for removal of the guardian of a minor pursuant to 755 ILCS 5/11-13(f):

> **Any order for removal, including one incorporated into the guardianship order, must include the date of the removal, the reason for removal, and the proposed residential and mailing address of the minor after removal. A copy of the order must be provided to any parent whose location is known, within 3 days of entry, either by personal delivery or by certified mail, return receipt requested.**

PRACTICE POINTER

✓ As with removal of guardians of adults with disabilities, because no Illinois law applies a clear standard for terminating or limiting the authority of a standby or short-term guardian of a minor, a showing of harm to the ward or the failure of the guardian to fulfill his or her duties should suffice as grounds for removal of the guardian.

2. [13.89] Minor's Reaching Age of Majority

Under §11-14.1 of the Probate Act, once a minor reaches the age of majority, all letters of office are revoked as to that minor, and the guardianship over that minor terminates. 755 ILCS 5/11-14.1(a). However, the letters of office and the guardianship remain valid as to any other minors included in the same letters of office or guardianship order. *Id.*

3. [13.90] Discharging the Guardian in Favor of the Parent

Section 11-14.1 of the Probate Act was amended in 2010 to provide the mechanism by which a parent can seek to have the guardianship of his or her minor child terminated. Under §11-14.1(b), a minor's living, adoptive, or adjudicated parent, whose parental rights have not been terminated, can petition the court to discharge the guardian and terminate the guardianship. 755 ILCS 5/11-14.1(b). The parent must prove, by a preponderance of the evidence, that a material change in the circumstances of the minor or the parent has occurred since the entry of the order appointing the guardian. If the parent is successful in doing so, the court may terminate the guardianship unless the guardian establishes, by clear and convincing evidence, that termination of the guardianship would not be in the best interests of the minor. In determining the minor's best interests, the court may consider the following factors: (a) the interaction and interrelationship of the minor with the parent and members of the parent's household; (b) the ability of the parent to provide a safe, nurturing environment for the minor; (c) the relative stability of the parties and the minor; (d) the minor's adjustment to his or her home, school, and community, including the length of time that the minor has lived with the parent and the guardian; and (e) the nature and extent of visitation between the parent and the minor and the guardian's ability and willingness to facilitate visitation. *Id.*

IX. RESTORATION OF PERSON WITH A DISABILITY OR MODIFICATION OF GUARDIANSHIP

A. [13.91] Standard

As a preliminary note, litigation over restoration of a person with a disability is relatively rare. As a result, there are few modern cases that elaborate on §11a-20 of the Probate Act. 755 ILCS 5/11a-20. Section 11a-20 controls the restoration of a person with a disability, modification of a guardianship order, and revocation of letters of office. The sole test in determining whether to restore a ward is whether the ward has sufficient mental capacity to transact ordinary business and to take care of and manage his or her own property. *Leefers v. People,* 123 Ill.App. 634 (3d Dist. 1906). Under §11a-20, upon the filing of a petition by or on behalf of the ward, or on the court's own motion, the court may revoke the letters of guardianship of the estate, person, or both, or modify the duties of the guardian, if the ward's capacity to perform the tasks necessary for the care of his or her person and the management of his or her estate are demonstrated by clear and convincing evidence. 755 ILCS 5/11a-20(a).

PRACTICE POINTER

✓ Notwithstanding this high standard, a physician's report or testimony is not a prerequisite to obtaining relief under §11a-20. Nonetheless, attorneys should consider whether such a report would be helpful under the circumstances, as the opinion of a physician can be persuasive evidence of the capacity of the ward.

B. [13.92] Restoration Process

The procedural requirements for restoration or modification are less restrictive than those in a removal proceeding. For example, under §11a-20 of the Probate Act, the ward or any other person acting on the ward's behalf may request restoration of a person with a disability or modification of a guardianship by any means, including an informal letter, a telephone call, or a personal visit to the judge. 755 ILCS 5/11a-20(b). Regardless of the method used, once the request has been made, the court may appoint a guardian ad litem to investigate and report to the court concerning the allegations contained in the request. If the ward wishes to terminate, revoke, or modify the guardianship order, the court may direct the GAL to prepare a petition on behalf of the ward. *Id.*

However, should the guardian or ward bring a petition for restoration, §11a-20(b-5) (eff. Jan. 1, 2013) details the bases on which a court may take action. 755 ILCS 5/11a-20(b-5). Section 11a-20(b-5) established, upon the filing of a verified petition by the guardian of the person with a disability or the person with a disability, the minimum requirements for a court to terminate guardianship, revoke letters, or modify the duties of the guardian. Following such a petition, the court may revoke or modify if (1) a report by a physician pursuant to §11a-9 states the person with a disability is no longer in need of a guardianship or the type of guardianship should be modified, (2) the person with a disability no longer wishes to be under the guardianship or desires that the type and scope of guardianship be modified, and (3) the guardian of the person with a

disability states that the change sought is in the best interests of the person with a disability. If all three criteria are satisfied, the court may, but is not required to, terminate, revoke, or modify, unless it has been demonstrated by clear and convincing evidence that the ward is incapable of performing the tasks necessary for the care of his or her own person or management of the estate. *Id*.

The petitioner must provide notice of the hearing on the petition to the ward, unless the ward is the petitioner, and to each guardian to whom letters of guardianship have been issued and not revoked, not less than 14 days before the designated hearing date. 755 ILCS 5/11a-20(c).

When the ward files a petition under §11a-20, the respondent has discretion over whether to file an answer, and the respondent may choose not to contest the ward's petition if he or she believes the ward has recovered. *In re Estate of Bornac,* 48 Ill.App.3d 417, 362 N.E.2d 1116, 1118, 6 Ill.Dec. 294 (3d Dist. 1977). Accordingly, failure by the respondent to file an answer to the petition does not constitute an admission of the allegations contained in the petition. Nonetheless, when the respondent does oppose the petition, a written answer should be filed. *Id.*

C. [13.93] Hearing

At the hearing for any petition filed under §11a-20 of the Probate Act, the ward is entitled to be represented by counsel, to demand a jury of six persons, to present evidence, and to cross-examine all witnesses. 755 ILCS 5/11a-21(a). Under §11a-21(a), the court may, within its discretion, appoint counsel for the ward if the court deems doing so is in the ward's best interests. However, the court must appoint counsel upon the request of the ward or if the respondent takes an adverse position to that of the guardian ad litem. *Id.* If the ward cannot afford to pay the fee of appointed counsel or the GAL, the court must order the state to pay the fees. 755 ILCS 5/11a-21(b).

Guardianship proceedings are not, strictly speaking, adversarial, and the sole issue before the court in a restoration proceeding is the best interests of the ward. *In re Estate of Wellman,* 174 Ill.2d 335, 673 N.E.2d 272, 278, 220 Ill.Dec. 360 (1996); *In re Estate of Michalak,* 404 Ill.App.3d 75, 934 N.E.2d 697, 343 Ill.Dec. 373 (1st Dist. 2010). In fact, if the guardian is satisfied that the ward has regained capacity, the guardian must "place no obstacles in the way" of restoration. *Mathews v. Sargent,* 175 Ill.App. 287, 289 (2d Dist. 1912).

A restored ward becomes reinvested with all the rights he or she lost when adjudicated a person with a disability. *Wellman, supra,* 673 N.E.2d at 277. In other words, once a court enters an order restoring a ward, the ward is deemed competent and capable of representing his or her own interests. As a result, once the court has ordered restoration of the ward, the guardian no longer has standing to represent the interests of the former ward in court. *Id.* (noting that guardian lacks standing to appeal order of restoration). Furthermore, a restored ward has the right to ask the court to order the guardian to deliver all of the ward's property in the guardian's possession and to account for the assets in the guardianship estate. *Id.*

Finally, most issues related to a petition filed under §11a-20 become moot upon the death of the ward. 673 N.E.2d at 280 – 281.

X. FEES AND COMPENSATION IN ADULTS WITH DISABILITIES' AND MINORS' ESTATES

A. Attorneys' Fees

1. [13.94] Generally

"[T]he attorney for a representative is entitled to reasonable compensation for her legal services when they are rendered in the interest of or to benefit the estate." *In re Estate of Shull,* 295 Ill.App.3d 687, 693 N.E.2d 489, 491 – 492, 230 Ill.Dec. 360 (4th Dist. 1998), citing 755 ILCS 5/27-2. *See also In re Estate of Bitoy,* 395 Ill.App.3d 262, 917 N.E.2d 74, 85 – 86, 334 Ill.Dec. 477 (1st Dist. 2009). Guardians and temporary guardians are considered "representatives" under the Probate Act. 755 ILCS 5/1-2.15. What is reasonable is highly case specific, and the trial court retains broad discretion in determining what constitutes "reasonable." *Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 706, 15 Ill.Dec. 916 (1st Dist. 1978). Traditionally, courts look at the following factors when determining whether the fees sought are reasonable:

a. the work involved;

b. the size of the estate;

c. the skill shown by the work;

d. the time expended;

e. the success of the efforts involved; and

f. the good faith and efficiency with which the work was completed. *Shull, supra,* 693 N.E.2d at 492.

However, in *In re Estate of K.E.J.,* 382 Ill.App.3d 401, 887 N.E.2d 704, 725, 320 Ill.Dec. 560 (1st Dist. 2008), the First District applied a new cost-benefit analysis to determine attorneys' fees that wholly ignores the aforementioned factors. In *K.E.J.,* the court held that expending $111,000 seeking a tubal ligation for a mentally impaired minor was excessive use of estate funds since the ward was relatively young and the payment would reduce the estate to only $114,000 in liquid funds. 887 N.E.2d at 726.

The court held that it must balance the fees requested with the guardian's fiduciary duty to "responsibly manage the [ward's] estate." 887 N.E.2d at 724. Simply because a guardian acts in good faith in doing what he or she feels is in the ward's best interests does not give him or her "*carte blanche* to spend whatever [he or] she might wish for the purported benefit of [his or] her ward." 887 N.E.2d at 725. The court noted that even if something is shown by clear and convincing evidence to be in the best interests of the ward, it "is not necessarily a wise use of limited resources." *Id.*

"A cost-benefit analysis must be undertaken to determine whether the expected gain from bringing the case to court outweighs the expected cost — and as a case drags on, and more and more fees are incurred, the chances become less of that expected gain being high enough to justify mounting legal expenses." *Id.* The First District held that the lower court abused its discretion because it fell "short of the vigilance required in ensuring that a ward's estate is responsibly spent." 887 N.E.2d at 726. It remanded the case so that the lower court could conduct a cost-benefit analysis of the facts as described above. *Id. See Estate of Howell v. Howell,* 2015 IL App (1st) 133247, ¶41, 36 N.E.3d 293, 394 Ill.Dec. 360 (when determining reasonableness of legal fees, court is to weigh whether cost of litigation is proportionate to benefits gained).

An attorney who withdraws from representing a representative must file a petition for fees and costs within 30 days after the withdrawal is approved by the court. 755 ILCS 5/27-2(b). The attorney may file a motion for an extension of time for the filing of a petition for fees and costs, and the court may grant additional time for the filing of that petition. *Id.*

PRACTICE POINTERS

- ✓ Given the two different formulas currently applied by the district courts, it is advisable that attorneys plead both standards in their fee petitions in order to firmly establish the benefit the estate realized and the legitimacy of the fees the estate incurred to ensure that benefit. It is also advisable to ask the court to make findings in compliance with both standards in any orders entered approving attorneys' fees.

- ✓ Finally, even if your client does not prevail in a guardianship hearing, you still may be able to be paid from the estate provided that the estate benefited from your representation. *In re Estate of Byrd,* 227 Ill.App.3d 632, 592 N.E.2d 259, 265, 169 Ill.Dec. 772 (1st Dist. 1992); *Shull, supra,* 694 N.E.2d at 493. An attorney who represents an unsuccessful cross-petitioner in a guardianship proceeding may be deemed a "representative" and, therefore, entitled to attorneys' fees if the court finds that his or her representation in some way benefited the estate. *Byrd, supra,* 592 N.E.2d at 265; *Shull, supra,* 694 N.E.2d at 493.

2. [13.95] Fees for Respondent's Attorney

The court may appoint an attorney to represent the respondent if the court believes it is in the respondent's best interests and "shall" appoint counsel if the respondent requests that the court appoint an attorney to represent him or her or the guardian ad litem and the respondent take adverse positions on the petition for guardianship. 755 ILCS 5/11a-10(b).

In any of the aforementioned situations, if the respondent cannot afford to pay the appointed attorneys' fees, the court may order the petitioner to pay the fees or part thereof. 755 ILCS 5/11a-10(c). However, the appointed attorneys' fees cannot be assessed against the Office of State Guardian, an elder abuse provider agency, or the Department of Human Services Office of the Inspector General. *Id.* Finally, §27-4 of the Probate Act states that a guardian ad litem "is entitled to such reasonable compensation as may be fixed by the court to be taxed as costs in the proceedings and paid in due course of administration." 755 ILCS 5/27-4.

If the respondent can afford to pay the appointed attorneys' fees or if he or she independently selected an attorney, then the court applies the analysis discussed in §13.94 above when determining the fees.

PRACTICE POINTER

✓ If a respondent hires you to represent him or her in a guardianship matter and your assessment of your client is that he or she is less than fully competent, it is advisable that you seek to become his or her "court-appointed attorney." If the respondent is eventually adjudicated a person with a disability, the estate may be unwilling to pay you, arguing that the respondent did not have the requisite capacity to contract for or supervise your services. If you become "court-appointed," however, then obtaining full payment for your services becomes much more likely.

B. [13.96] Guardian ad Litem's Fee

The guardian ad litem's fee is discussed in multiple sections of the Probate Act. Section 11a-10(a) states that the GAL is allowed "reasonable compensation." 755 ILCS 5/11a-10(a). Moreover, if the respondent cannot afford to pay the GAL's fee, the court can order the petitioner to pay all or part of the fee. 755 ILCS 5/11a-10(c). However, the GAL's fee cannot be assessed against the Office of State Guardian, an elder abuse provider agency, or the Department of Human Services Office of the Inspector General. *Id.* Finally, §27-4 states that a GAL "is entitled to such reasonable compensation as may be fixed by the court to be taxed as costs in the proceedings and paid in due course of administration." 755 ILCS 5/27-4.

There is a split among the districts as to how these sections are applied. For example, the Third District held that since the respondent was not adjudicated disabled and, thus, there was no estate to administer, the respondent should not be required to pay the GAL's fee, stating that when §27-4 is "strictly construed, [it] does not provide for the payment of guardian ad litem fees prior to administration of the respondent's estate." *In re Prior,* 116 Ill.App.3d 666, 452 N.E.2d 676, 678, 72 Ill.Dec. 423 (3d Dist. 1983). The Second District, in contrast, held, based on §11a-10(a), that the respondent is required to pay the GAL's fee whether or not the respondent is ultimately adjudicated disabled since the "GAL is acting on behalf of the respondent." *In re Serafin,* 272 Ill.App.3d 239, 649 N.E.2d 972, 976, 208 Ill.Dec. 612 (2d Dist. 1995).

Despite the inconsistent holdings of the two districts, the *Prior* holding is far more anomalous. Determining the amount of fees to which the GAL is entitled and who is required to pay those fees is ultimately in the court's discretion. In general, courts do whatever they can to ensure that the GAL gets paid, frequently requiring the petitioner to pay the fee pursuant to §11a-10a.

C. [13.97] Independent Experts' Fees

Typically, the respondent is required to pay any independent experts' fees, but if the respondent cannot afford to do so, it is in the court's discretion to order the petitioner to pay the entire fees or part thereof. 755 ILCS 5/11a-9(b-5). Independent experts' fees cannot be assessed against the Office of State Guardian, however. *Id.*

D. [13.98] Guardian's Compensation

"A representative is entitled to reasonable compensation for his services." 755 ILCS 5/27-1. Guardians and temporary guardians are considered "representatives" under the Probate Act. 755 ILCS 5/1-2.15. The determination of what constitutes "reasonable" is within the court's sound discretion. *In re Conservatorship of McHarry,* 26 Ill.App.3d 268, 325 N.E.2d 131, 133 (4th Dist. 1975). In making its determination, the court is not bound by the testimony presented, but may consider its own understanding and knowledge as to the value of the services provided to the ward and estate. *Id.* Additionally, the Illinois Supreme Court has held that guardians can be compensated for services that relate only to the emotional needs of the person with a disability. *In re Estate of Donnelly,* 98 Ill.2d 24, 455 N.E.2d 88, 92, 74 Ill.Dec. 58 (1983).

Since a guardian maintains a fiduciary relationship with the ward, he or she "owes a duty of good faith to the estate and will not be allowed compensation for neglect or dereliction of duty." *In re Estate of Dyniewicz,* 271 Ill.App.3d 616, 648 N.E.2d 1076, 1082, 208 Ill.Dec. 154 (1st Dist. 1995). For example, failing to file the annual accounting or disregarding court orders may constitute a breach of the guardian's fiduciary duty and could result in the denial of compensation. *Id.*

The court considers the following factors when determining whether guardians' fees are appropriate:

1. the size of the estate;

2. the work done and the skill with which it was performed;

3. the time required;

4. the advantages gained or sought by the services; and

5. good faith, diligence, and reasonable prudence. *Estate of Rumoro v. Leoni,* 90 Ill.App.3d 383, 413 N.E.2d 70, 74, 45 Ill.Dec. 737 (1st Dist. 1980).

XI. ORDERS OF PROTECTION — WHEN APPROPRIATE TO SEEK

A. [13.99] Adult with a Disability

The Illinois Domestic Violence Act of 1986 (IDVA), 750 ILCS 60/101, *et seq.,* can be utilized in a guardianship proceeding to obtain an order of protection from the court to prevent

abuse, neglect, or exploitation of an elderly individual or a "high risk" adult with disabilities. 755 ILCS 5/11a-10.1. Pursuant to §11a-10.1 of the Probate Act, "[t]he Illinois Domestic Violence Act of 1986 shall govern the issuance, enforcement and recording of orders of protection" issued under the section. *Id.* If the order of protection is issued in conjunction with a guardianship proceeding, the petition must allege that "a person who is a party to or the subject of the proceeding has been abused by or has abused a family or household member or has been neglected or exploited as defined in the Illinois Domestic Violence Act of 1986, as amended." *Id.*

The broad remedies that may be ordered by the court pursuant to the IDVA make it a useful tool in a guardianship proceeding to protect an alleged or adjudicated person with a disability from abuse, neglect, and exploitation. The remedies under the IDVA include, but are not limited to, (1) prohibition of abuse, neglect, or exploitation; (2) prohibition of the respondent's harassment, interference with personal liberty, intimidation, physical abuse, or willful deprivation, neglect, or exploitation; (3) exclusive possession of the residence; (4) a presumption in favor of the petitioner when balancing the hardships resulting from exclusive possession of the residence; (5) a "stay away order" directing the respondent to stay away from the petitioner and any other individual protected by the order of protection; (6) requiring the respondent to undergo court-ordered counseling; (7) an order requiring the respondent to appear in court; (8) possession of personal property; (9) protection of property; (10) payment of losses; (11) prohibition of entry; (12) payment for shelter services; and (13) relevant injunctive relief. 750 ILCS 60/214(b).

In order to be considered a "high-risk adult with disabilities," it is not necessary that the person be adjudicated a person with a disability in connection with the guardianship court proceedings. 755 ILCS 5/11a-10.1. It is only necessary that the adult have a clearly identified disability and be considered unable to adequately protect himself or herself. If the subject of the order of protection is a high-risk adult with disabilities, §11a-10.1 of the Probate Act authorizes the court to "appoint a temporary substitute guardian." *Id.* The guardianship court is required to appoint a temporary substitute guardian if the appointed guardian is named as the respondent in the petition for an order of protection. *Id.*

B. [13.100] Minor

Section 11-9 of the Probate Act also incorporates the protections of the Illinois Domestic Violence Act of 1986 into a proceeding involving a minor. 755 ILCS 5/11-9. In addition to the remedies outlined in §13.99 above, an order of protection in a minor's estate can include the following additional remedies: (1) granting the petitioner the physical care and possession of the minor child; (2) awarding temporary decision-making responsibility to the petitioner; (3) determining the parenting time, if any, of the respondent; (4) prohibiting the respondent from removing the minor child from the state or from concealing the minor child within the state; (5) ordering the respondent to appear in court alone or with a minor child to prevent abuse, neglect, removal, or concealment of the child, to return the child to the custody of the petitioner, or to permit any court-ordered interview or examination of the child or respondent; (6) ordering the respondent to pay temporary support for the petitioner or any child in his or her possession if the respondent has a legal obligation to pay support; and (7) relevant injunctive relief. 750 ILCS 60/214(b).

14 Charitable Litigation

JOHN T. BROOKS
JAMES R. HELLIGE
Foley & Lardner LLP
FLOYD D. PERKINS
Nixon Peabody LLP
Chicago

I. THE AUTHORITY OF THE ATTORNEY GENERAL OVER CHARITABLE ENTITIES AND ASSETS

A. [14.1] Common-Law Authority of the Attorney General

In Illinois, the authority of the Attorney General derives from powers conferred by statute and those that exist at common law. *See People v. Crawford Distributing Co.,* 53 Ill.2d 332, 291 N.E.2d 648, 656 (1972); *People ex rel. Elliott v. Covelli,* 415 Ill. 79, 112 N.E.2d 156, 158 (1953). Pursuant to the Illinois Constitution, the Attorney General's common-law powers are those founded on English common law and are not subject to diminution by statute. *See People ex rel. Scott v. Briceland,* 65 Ill.2d 485, 359 N.E.2d 149, 156 – 157, 3 Ill.Dec. 739 (1976); *Fergus v. Russel,* 270 Ill. 304, 110 N.E. 130, 145 (1915); ILL.CONST. art. V, §15. Illinois has adopted English common law as the rule of decision. 5 ILCS 50/1. Illinois courts, in applying the common law, have interpreted the authority of the Attorney General and have determined he or she is the sole officer who may conduct litigation in which the people of the state are the real party in interest. *Scachitti v. UBS Financial Services,* 215 Ill.2d 484, 831 N.E.2d 544, 294 Ill.Dec. 594 (2005).

The people of the State of Illinois are collectively the cestui que trust, or ultimate beneficiaries, of public charities. *See In re Estate of Tomlinson,* 65 Ill.2d 382, 359 N.E.2d 109, 3 Ill.Dec. 699 (1976). Under the common law, the Attorney General is the protector of the public interest. The common-law powers of the Attorney General to safeguard charitable assets from fraud or diminution are well settled. *See Kerner v. Thompson,* 365 Ill. 149, 6 N.E.2d 131 (1936) (obtained surcharge in accounting for waste and unaccounted-for charitable funds); *Stowell v. Prentiss,* 323 Ill. 309, 154 N.E. 120 (1926) (compelled compliance with specific trust purposes); *Carlstrom v. Frackelton,* 263 Ill.App. 250 (3d Dist. 1931) (removed trustee for failure to act); *In re Estate of Muhammad,* 165 Ill.App.3d 890, 520 N.E.2d 795, 117 Ill.Dec. 444 (1st Dist. 1987) (enforced represented and intended charitable use through constructive trust on assets); *Tomlinson, supra* (modified ambiguity in charitable entity misidentification in instrument through doctrine of cy pres).

B. [14.2] Common-Law Remedies

The remedies available in actions brought by the Attorney General in charitable trust matters involve the full panoply of equitable remedies, including the application of the doctrines of cy pres and equitable deviation. *See In re Estate of Tomlinson,* 65 Ill.2d 382, 359 N.E.2d 109, 3 Ill.Dec. 699 (1976). These equitable remedies can be applied to enjoin and compel modifications and governance of trust provisions. The remedies include but are not limited to the following: removal of a trustee; injunction; imposition of a constructive trust; surcharge; and an accounting. See IV Austin Wakeman Scott, THE LAW OF TRUSTS §392 (4th ed. 1989). The remedy of an accounting is available in almost every action regarding a charitable trust as the right to such is based on either the existence of a fiduciary relationship or a claim of fraud. *People ex rel. Hartigan v. Candy Club,* 149 Ill.App.3d 498, 501 N.E.2d 188, 103 Ill.Dec. 167 (1st Dist. 1986); *People ex rel. Scott v. Police Hall of Fame, Inc.,* 60 Ill.App.3d 331, 376 N.E.2d 665, 17 Ill.Dec. 519 (1st Dist. 1978). *See also Mayr v. Nelson Chesman & Co.,* 195 Ill.App. 587 (1st Dist. 1915).

The Attorney General also has standing to examine and contest executors', trustees', and attorneys' fees if paid directly or indirectly by a charitable trust. *In re Estate of Weeks,* 409 Ill.App.3d 1101, 950 N.E.2d 280, 351 Ill.Dec. 124 (4th Dist. 2011).

C. [14.3] Standing

The Attorney General has the power under the common law to take necessary action to ensure that gifts to charity are applied properly according to the terms and the nature of the gift. See George Gleason Bogert et al., THE LAW OF TRUSTS AND TRUSTEES §411 (3d ed. 2005). The Attorney General has standing as a proper party in many matters in which charitable assets are at issue. This is true even when a fiduciary is present and the named taker of a gift. Generally, the Attorney General may join any action in which a construction or interest regarding a charitable asset is at issue. He or she is the proper representative of the public interest in any and all actions concerning the enforcement or administration of a charitable trust. *See In re Estate of Laas,* 171 Ill.App.3d 916, 525 N.E.2d 1089, 121 Ill.Dec. 782 (1st Dist. 1988). The Attorney General has standing and authority on behalf of the people to initiate a will contest to protect legatee interests of charitable purposes found in a prior will. *In re Estate of Stern,* 240 Ill.App.3d 834, 608 N.E.2d 534, 181 Ill.Dec. 461 (1st Dist. 1992). In *In re Estate of Tomlinson,* 65 Ill.2d 382, 359 N.E.2d 109, 3 Ill.Dec. 699 (1976), the Illinois Supreme Court permitted the Attorney General to intervene and join the litigation to protect the public interest in a charitable bequest at the appellate proceeding level. In *In re Estate of Barth,* 339 Ill.App.3d 651, 792 N.E.2d 315, 275 Ill.Dec. 84 (1st Dist. 2003), the Attorney General was allowed to intervene and join with a charitable entity to bring a petition under 735 ILCS 5/2-1401 to vacate a judgment alleged to be improper.

D. [14.4] Necessary Party

In many instances, the Attorney General initiates the action or is named as a party and is involved in the matter as a proper party. However, on occasion, matters concerning charitable assets are at issue in an action, and the Attorney General is not a party. The litigants then must decide whether they should notify or name the Attorney General. Often, fiduciaries prefer to include the Attorney General as a party to bind the Attorney General and to eliminate concern that the actions of the fiduciary will be challenged at a later date.

Another important consideration is whether the Attorney General is a necessary party. Illinois courts have regularly held that when charitable assets are at issue, "[i]n a suit . . . where the validity or the enforcement of a charitable trust may come into question the Attorney General *should* be made a party defendant." [Emphasis added.] *In re Estate of Stern,* 240 Ill.App.3d 834, 608 N.E.2d 534, 536, 181 Ill.Dec. 461 (1st Dist. 1992), quoting *In re Estate of Tomlinson,* 65 Ill.2d 382, 359 N.E.2d 109, 111, 3 Ill.Dec. 699 (1976). Contingent charitable interests for an unnamed charity can require the Attorney General to be named as a party to protect those interests. *See In re Estate of Laas,* 171 Ill.App.3d 916, 525 N.E.2d 1089, 121 Ill.Dec. 782 (1st Dist. 1988).

However, there are circumstances in which the Attorney General is only a proper party and will be bound in privity by the actions of a named charity relative to a specific litigated decision

concerning a gift made to the charity. *See People ex rel. Burris v. Progressive Land Developers, Inc.,* 151 Ill.2d 285, 602 N.E.2d 820, 176 Ill.Dec. 874 (1992). Joining the Attorney General as a party to an action protects fiduciaries of charitable trusts because their actions are then fully disclosed. Therefore, to protect a fiduciary, notifying and joining the Attorney General is highly recommended whenever an action involves controversy over ownership of charitable assets. The Attorney General's Charitable Trust Bureau is highly experienced in these matters and generally thoughtful in reaching resolutions. See www.illinoisattorneygeneral.gov/charities/index.html.

E. [14.5] The Charitable Trust Act

The Charitable Trust Act, 760 ILCS 55/1, *et seq.,* supplements the Attorney General's common-law powers by establishing accounting provisions, codified duties, and statutory remedies for violations of the Act. The Act requires most charitable organizations and trustees to register and to file annual financial reports with the Attorney General. In addition, the Act codifies certain fiduciary duties and establishes statutory relief for violations of the Act, including fines, removal from office, punitive damages, and injunctive relief. When filing an action, the Attorney General generally will mix and bring counts for violations of both the Act and the common law.

The Charitable Trust Act requires "trustees" of a "charitable trust" to register the trust and file annual accountings of trust activities. 760 ILCS 55/5, 55/7. The Act defines "trustee" much more broadly than the common law; the Act's definition includes "any person . . . corporation, not-for-profit corporation, estate representative, or other legal entity holding property for . . . any charitable purpose; or any chief operating officer [or] director . . . of a corporation . . . holding property for a charitable purpose." 760 ILCS 55/3. This definition includes probate estate representatives and trustees of irrevocable testamentary trusts as well as officers and directors of charitable not-for-profit corporations, and the Act subjects these fiduciaries to the several duties and remedies set forth in the Act.

Section 15 of the Charitable Trust Act establishes duties for charitable trustees, including avoiding conflicts of interest, wasting of assets, incurring penalties, and unnecessary taxes. It requires that the trust be used for stated restricted purposes, if any, that proper books and records be maintained, and that annual reports be filed. 760 ILCS 55/15. Section 16 of the Act establishes remedies for intentional breaches of duty and misuse of charitable assets, including the right to seek removal from office as trustee, officer, or director:

> **Upon an application to . . . the circuit court in which the Attorney General alleges that a charitable trust needs to be protected or the trustees of a charitable organization or trust have engaged in a breach of fiduciary duty toward the organization, and injunctive relief and removal of the trustees is sought, the Court shall exercise its discretion as the equities require and may, as part of the injunctive relief, and after a hearing where the trustees shall have an opportunity to be heard, appoint temporarily or permanently a receiver or additional trustees to protect and operate the organization and may temporarily, or as ultimate relief for breach of duty or to protect the trust, permanently remove any charitable organization's trustees, corporate officers, directors and members from office and appoint replacements to protect the public interest.** 760 ILCS 55/16(b).

If a trustee intentionally misuses a charitable trust for his or her own self-interest in an amount in excess of $1,000 within a five-year period, a fine of $50,000 can be imposed, as well as punitive damages and criminal penalties. 760 ILCS 55/17.

These sections authorize broad remedies for intentional abuse of a charitable trust, including the removal and replacement of trustees, including directors and officers of charitable not-for-profit corporations in an action alleging a need to protect the charitable corpus, or if there is a threat to the charitable trust. The Charitable Trust Act allows temporary restraining orders and the appointment of receivers. These provisions supplement the provisions and remedies available at common law and those found in the Probate Act of 1975, 755 ILCS 5/1-1, *et seq*., in certain circumstances with extraordinary equitable relief. Thus, the provisions of the Charitable Trust Act should be carefully considered when a trust or an estate containing charitable gifts is involved in a controversy or at issue in a matter that will impact the charitable gifts or when the conduct of the fiduciaries is at issue.

The Charitable Trust Act is often supplemented by additional registration, reporting, and compliance requirements found in the Solicitation for Charity Act, 225 ILCS 460/0.01, *et seq.,* which adds CPA audits, professional fundraiser reporting requirements, additional registrations, and proscribed compliance in certain circumstances in which solicitation of charitable funds as defined in that Act are involved. Many organizations and trusts are subject to both Acts.

Issues regarding registration and annual filings often can be resolved by open communication with the Attorney General's Charitable Trust Bureau. See www.illinoisattorneygeneral.gov/charities/index.html. Special provisions regarding annual report filings for probate matters and trust matters in litigation are also available. As noted in §14.4 above, when special circumstances or issues are present that will affect the disposition of a charitable trust or gift, it is recommended that counsel contact the Charitable Trust Bureau early in the process to learn and consider the Attorney General's position.

F. [14.6] Charitable Trust Actions by the Attorney General

The Attorney General may elect to bring a variety of actions to compel compliance with registration and reporting under the Charitable Trust Act and Solicitation for Charity Act. The range of actions brought by the Attorney General in protecting the public interest in charitable assets can be a combination of common-law and codified remedies. In *People ex rel. Madigan v. Manor,* 2013 IL App (1st) 113132, ¶58, the court held that it was a breach of fiduciary duty to not maintain the registration and file the required annual reports. The court in *Manor* noted the requirements of the Charitable Trust Act to register and make annual reports, and addressing the consequences of failing to make annual reports and maintain registration, the court affirmed summary judgment for $2 million against individual operators on funds not accounted for. 2013 IL App (1st) 113132 at ¶75.

The Attorney General protects charitable assets wherever they exist and regularly engages in litigating matters concerning

1. registration and compliance enforcement;
2. failure to account and/or meet reporting requirements;
3. failure to conform a trust to meet restrictions placed by the donor on a gift;
4. imprudent investments;
5. self-interested investments or self-interested use of the trust;
6. excessive compensation;
7. inadequate accounting;
8. misrepresentations and fraud in solicitations or use of funds;
9. will and trust construction;
10. will and trust contests;
11. reviews concerning the sale of facilities and dissolution of operations (*i.e.,* hospitals);
12. defalcations of trust funds;
13. challenges to fees and expenses;
14. application of the doctrines of cy pres and equitable deviation; and
15. actions for constructive fraud and breach of fiduciary duty.

G. [14.7] Charitable Purpose

The Illinois courts have applied a broad meaning to the definition of "charity" and have found the involvement of the Attorney General proper in all gifts that benefit the public interest. In *People ex rel. Scott v. George F. Harding Museum,* 58 Ill.App.3d 408, 374 N.E.2d 756, 761, 15 Ill.Dec. 973 (1st Dist. 1978), the court, quoting *School of Domestic Arts & Science v. Carr,* 322 Ill. 562, 153 N.E. 669, 671 (1926), defined "charity" as follows:

> **"A charity, in a legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works**

> **or otherwise lessening the bur[d]ens of government." In Congregational Sunday School and Publishing Society v. Board of Review, 290 Ill. 108, 125 N.E. 7, it was said that charity, in a legal sense, is not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification, which embraces the improvement and promotion of the happiness of man. A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man.**

In *People ex rel. Hartigan v. National Anti-Drug Coalition,* 124 Ill.App.3d 269, 464 N.E.2d 690, 694, 79 Ill.Dec. 786 (1st Dist. 1984), the court defined "charity" as "includ[ing] almost anything that tends to promote the improvement, well doing and well being of social man."

Courts have held the following purposes to be charitable: aid for the poor and needy fund of the religious organization Nation of Islam (*In re Estate of Muhammad,* 165 Ill.App.3d 890, 520 N.E.2d 795, 799 – 800, 117 Ill.Dec. 444 (1st Dist. 1987)); support of a church or for dissemination of religious doctrine (*People ex rel. Smith v. Braucher,* 258 Ill. 604, 101 N.E. 944, 945 (1913)); endowment of a school or promotion of education (*Board of Education of City of Rockford v. City of Rockford,* 372 Ill. 442, 24 N.E.2d 366, 370 (1939)); endowment of a public library (*Village of Hinsdale v. Chicago City Missionary Soc.,* 375 Ill. 220, 30 N.E.2d 657, 663 (1940)); a scholarship fund for needy students (*Morgan v. National Trust Bank of Charleston,* 331 Ill. 182, 162 N.E. 888, 891 (1928)); promotion of health and combating disease (*In re Estate of Tomlinson,* 65 Ill.2d 382, 359 N.E.2d 109, 112, 3 Ill.Dec. 699 (1976)); endowment of a home for orphans or foundlings (*First Nat. Bank of Chicago v. Elliott,* 406 Ill. 44, 92 N.E.2d 66, 73 (1950)); a public museum (*Scott, supra,* 374 N.E.2d at 761 – 762); public open space or parkland (*Stowell v. Prentiss,* 323 Ill. 309, 154 N.E. 120, 123 (1926)); advocacy regarding issues of public importance (*Garrison v. Little,* 75 Ill.App. 402, 414 – 416 (2d Dist. 1897)); and gifts to municipal bodies or for governmental purposes (*Dickenson v. City of Anna,* 310 Ill. 222, 141 N.E. 754, 757 (1923)). See RESTATEMENT (SECOND) OF TRUSTS §§368 – 375 (1959).

In *Provena Covenant Medical Center v. Department of Revenue,* 236 Ill.2d 368, 925 N.E.2d 1131, 1139, 339 Ill.Dec. 10 (2010), the Illinois Supreme Court considered the Department of Revenue's denial of real estate tax exemption for a Provena hospital on a department finding that tax exemption required a showing by a not-for-profit hospital of significant free care, or "charity care," as well as other community benefits and charitable ownership. Tax exemption for charitable purposes is governed by statute and the Illinois Constitution and requires proving sufficient and exclusively charitable ownership and exclusive charitable use of the property. Real estate tax exemption involves a separate body of caselaw that is governed by the court's decision in *Methodist Old Peoples Home v. Korzen,* 39 Ill.2d 149, 233 N.E.2d 537, 541 – 542 (1968), in which the court set forth criteria and identified the distinctive characteristics of a charitable institution:

> **[I]t has no capital, capital stock or shareholders, earns no profits or dividends, but rather derives its funds mainly from public and private charity and [h]olds them in trust for the . . . purposes expressed in its charter . . . dispenses charity to all who need and apply for it, does not provide gain or profit in a private sense to any person connected with it, and does not appear to place obstacles . . . in the way of those who need and would avail themselves of the charitable benefits it dispenses.**

In *Methodist,* the court also tied the definition to the *Crerar v. Williams,* 145 Ill. 625, 34 N.E. 467 (1893), definition, stating that in applying these criteria, they defined charity as "a gift to be applied . . . for the benefit of an indefinite number of persons, persuading them to an educational or religious conviction, for their general welfare — or in some way reducing the burdens of government." 233 N.E.2d at 541.

Given the foregoing, when there is a question about the requirements of registration or joinder of the Attorney General in a matter involving charitable interests and assets or definition, it is generally prudent and often required to notify the Attorney General and/or join the Attorney General as a party.

II. IDENTIFICATION OF THE CHARITY

A. [14.8] In General

Care in identifying the charitable entity to which a charitable gift is to be made is critical when the document is being drafted. Just as individuals must be identified with care and specificity, so too should charitable entities. Failure to use the correct name can lead to challenges involving costly litigation and sometimes a lost gift. Contacting or reviewing materials about a charity to be named in a will or trust prior to finalization assures the name is correct and the organization has the tax status assumed. Further, the possibilities of mergers, terminations, or organization changes should be considered in framing the provisions of the document, including naming a successor charitable recipient, providing for desired restricted use, and generally providing for alternative gifts when a prior gift becomes impractical or impossible to the entity named. Unartful language can lead to unintended consequences.

Just as gifts to individuals are drafted to resolve whether descendants, heirs, or others are alternative takers if a named individual has passed at the time of gift maturity, so too should gift terms to a charity be drafted with alternative takers named in case the charity changes purposes or ceases to exist. Consider the following hypotheticals:

Name with no purpose or status included. Consider a gift to "St. Mary's Hospital" when, after the making of the trust, St. Mary's is sold to a for-profit buyer that continues to operate the hospital under the name St. Mary's, but on a for-profit basis. The St. Mary's corporate entity continues as a wind-down foundation. Is the gift payable to the for-profit St. Mary's running the bricks-and-mortar hospital the settlor intended to support? Is the gift subject to cy pres for a charitable hospital nearby? Does the gift go to the wind-down foundation — the same corporate entity? Does the gift fail and by reversion pass to the heirs of the settlor?

Or consider a gift to the "Smith Animal Shelter," when this entity has terminated operations and closed by the time the will is probated. Is there a lapse, or is it subject to cy pres? What about a gift to "Father James at St. Mary's Church"? Is it a charitable gift to the church, or is it a personal gift to Father James? Consider a gift to the "Smith School to train theologians," when the school has shifted to business courses. Or what about a gift to the "Diabetes Association," when a dozen entities in the metro area fit that name?

Name and wrong or changed purpose. Consider a gift to "St. Mary's Hospital to support medical research," when St. Mary's has sold all hospital operations and ceased being a hospital but maintained the same corporate identity, also changing its name and providing charitable assisted-living facilities. Is the gift subject to cy pres to another hospital or to a medical research facility? Does the gift go to the assisted-living facility? Or consider a gift to "Jones College, Anytown, Illinois," when Jones College is now in a different location 200 miles away.

In resolving the above situations, clearly the parties would look to the other terms of the instrument and the circumstances of the settlor at the time of execution of the document to provide guidance. But rules of trust construction might prevent considerations of extrinsic evidence. The outcome in each of the above hypotheticals is subject to subjective analysis, based on what might be allowed in evidence to supplement the facts, and the results may vary based on the trier of fact's views and not necessarily on what the settlor intended.

In addition to assuring that the name is properly entered on the document, it is important, in order to avoid unintended consequences and to effect the true intent of the settlor, to consider the various potential changes that might affect the charitable entity being named and to insert alternative gifts that provide clear direction from the settlor in the event a change in the status of a named charitable entity occurs. Also, if the charitable gift is given to an entity for a particular charitable use, consideration should be given to setting forth the use in the instrument and further stating a general charitable intent that, irrespective of the entity at the time of vesting, the gift should be given and restricted in use for the designated purpose.

The court's holding in *Citizens National Bank of Paris v. Kids Hope United, Inc.,* 235 Ill.2d 565, 922 N.E.2d 1093, 337 Ill.Dec. 516 (2009), shows that a settlor's intent and charitable purpose is a guide star for the court in construing intent when a charitable gift is involved. In *Kids Hope,* the court stated:

> **In interpreting trusts, which are construed according to the same principles as wills, the goal is to determine the settlor's intent, which the court will effectuate if it is not contrary to law or public policy. *First National Bank of Chicago v. Canton Council of Campfire Girls, Inc.,* 85 Ill.2d 507, 513, 55 Ill.Dec. 824, 426 N.E.2d 1198 (1981). In determining this intent, courts consider the plain and ordinary meaning of the words used, taking into consideration the entire document. . . . "Charitable gifts are viewed with peculiar favor by the courts, and every presumption consistent with the language contained in the instruments of gift will be employed in order to sustain them." *Village of Hinsdale v. Chicago City Missionary Society,* 375 Ill. 220, 231, 30 N.E.2d 657 (1940); see also *Stubblefield v. Peoples Bank of Bloomington,* 406 Ill. 374, 384, 94 N.E.2d 127 (1950) ("The law looks with favor upon charitable trusts, and the courts apply liberal rules of construction to sustain them"). [**Citation omitted.**]** 922 N.E.2d at 1097.

In *Kids Hope,* the court considered gifts to entities that had merged and/or ceased to exist or had programs that had changed. The court's analysis gave consideration to numerous factors, and its decision drew a dissent and occurred after both the circuit court and the appellate court

decisions. An examination of trust construction cases shows a fact-intensive analysis can be required if a trust needs to be construed. Being precise and explicit when drafting terms of charitable gifts and detailing in the gift the entity, the purposes of the gift, and clear gift-over provisions if a purpose or entity terminates can prevent future litigation and costs.

B. [14.9] Charity Identification Checklist

The following is a short outline of things to consider when preparing an instrument naming a charitable entity as a taker.

1. Clear identification of charity in document. It is critical to identify the specific charitable entity to which the gift is to be made in the drafting stages of the estate plan.

   a. Correct name. Many charities have similar names, and it is best to contact the specific charity to which the gift is intended to be given and to identify that charity in the documents by use of its specific name, current address, etc., to avoid any future confusion.

   b. Require charitable status. It is also important at the drafting stage to specify that the gift goes to the specified charity if, and only if, the charity qualifies as a charitable organization under the relevant Internal Revenue Code, 26 U.S.C. §1, *et seq.,* sections (*e.g.,* Code §2055(a) for estate tax purposes) at the time the gift is to be made to it.

2. Identification of the charitable donee in the event of a merger or consolidation of charitable entities. It is important to consider the ability of the surviving entity following the merger of charities to receive a gift made under the estate planning documents of a donor to a predecessor charitable entity. In Illinois, if there is general charitable intent, the successor entity likely will be able to receive a gift made to a preceding entity if the surviving entity carries on the same activities, perhaps uses the same facilities, serves the same purposes, etc. *Estate of Fuller,* 10 Ill.App.3d 460, 294 N.E.2d 313 (4th Dist. 1973); *In re Estate of Trimmer,* 29 Ill.App.3d 209, 330 N.E.2d 241 (4th Dist. 1975). See also 805 ILCS 105/111.50(d) regarding the effect of a merger or consolidation of not-for-profit corporate entities. The settlor should provide direction in the instrument regarding the consequences of a named entity changing purposes or merging.

3. Gift to successor. It is also important to determine at the drafting stage and insert in the document an alternative charitable entity in addition to the first one named in a gift to deal with changed circumstances such as merger, consolidation, termination, etc. Further, a savings provision allowing the gift to be given to charitable entities selected by the fiduciary if the designated entities cannot take should be considered to prevent contests about what to do when gifts fail or are compromised by changed circumstances.

4. Donor's intent. Ultimately, whether a merged or successor organization may receive the gift depends on the donor's intention. It is important to address this issue at the drafting stage and to indicate precisely in the document under what circumstances a succeeding charitable entity will be entitled to receive a gift to a particular charitable entity and what should be done with the gift when it is not. In the end, if there is ambiguity, the question is, "To whom does the settlor want the gift to go?" The best course is for the settlor to spell it out in the instrument.

III. CHARITABLE PLEDGES

A. The Rule: Charitable Pledges Without Consideration or Reliance Are Unenforceable

1. [14.10] The Rule Generally

A charitable pledge is a promise to make a gift to a charity in the future. This promise can be as idle as mentioning an intention to donate at a casual luncheon or as serious as including the promise in a letter or other written document. No matter the promisor's intention, these promises are not enforceable simply because they are promises. While special circumstances may give rise to enforceability, the traditional view of American courts has been that these promises, without more, are not binding. See Melvin Aron Eisenberg, *The World of Contract and the World of Gift,* 85 Cal.L.Rev. 821, 822 nn.1 – 3 (1997) (Eisenberg) (referencing, *e.g.,* classic contracts cases *Dougherty v. Salt,* 227 N.Y. 200, 125 N.E. 94 (1919); *Fischer v. Union Trust Co.,* 138 Mich. 612, 101 N.W. 852 (1904); *Schnell v. Nell,* 17 Ind. 29 (1861)).

While a general rule, the proposition that mere promises to give are not enforceable is not the law in all states. Some states make specific exceptions for certain types of donative promises, *i.e.,* charitable ones. These exceptions are based on considerations of public policy and the importance of charitable giving. Eisenberg, pp. 861 – 862. Indeed,

> [a]**ssuming that charitable subscriptions are enforceable on the basis of public policy, rather than on the basis of actual reliance, then based on the principle that the measure of damages for breach of a given kind of promise should be based on the reason that the promise is enforceable, such promises should be enforceable to their full extent, rather than simply to the extent of any reliance.** Eisenberg, p. 861 n.107.

See also Salsbury v. Northwestern Bell Telephone Co., 221 N.W.2d 609, 613 (Iowa 1974) (finding charitable subscriptions to be enforceable without any reliance or consideration); *More Game Birds in America, Inc. v. Boettger,* 125 N.J.L. 97, 14 A.2d 778, 780 (1940); *Jewish Federation of Central New Jersey v. Barondess,* 234 N.J.Super. 526, 560 A.2d 1353 (1989); *Congregation B'Nai Sholom v. Martin,* 382 Mich. 659, 173 N.W.2d 504 (1969).

2. [14.11] The Rule as Applied in Illinois

The judiciary in Illinois has agreed with the courts of most other jurisdictions concerning the enforceability of charitable pledges:

> **a promise to donate money to a charitable purpose is gratuitous and unenforceable unless consideration therefor exists; however, the original gratuitous promise will be converted into a valid and enforceable contract, where before a withdrawal of the promise, and in reliance thereon, as well as on the promises of others, the charitable organization to which the promise was made, expends money and incurs enforceable liabilities in furtherance of the enterprise the donors intended to promote.** *In re Drain's Estate,* 311 Ill.App. 481, 36 N.E.2d 608, 609 (2d Dist. 1941).

Despite the general rule against enforcing charitable pledges, *Drain* reveals two methods by which a charitable pledge can become enforceable: by either finding consideration for the promise or finding reliance on the promise, courts have been able to enforce charitable pledges in Illinois. See §§14.12 – 14.17 below.

B. Finding Consideration for Charitable Pledges

1. [14.12] Finding Consideration Across State Courts

Various fictions have been used over the years to find a "peppercorn" of consideration when charitable pledges would otherwise be unenforceable. See James Gordley, *Enforcing Promises,* 83 Cal.L.Rev. 547, 575 (1995). Courts have been willing to find consideration for donative promises whenever a plausible argument can be made that some obligation was taken up in exchange for the promise. *See Allegheny College v. National Chautauqua County Bank of Jamestown,* 246 N.Y. 369, 159 N.E. 173, 176 (1927) (finding charity's commitment to name fund after donor to be sufficient consideration for that donor's charitable pledge); *Rogers v. Galloway Female College,* 64 Ark. 627, 44 S.W. 454, 455 (1898) (finding charity's promise to locate college in particular town to be sufficient consideration for donative pledge); *In re Griswold's Estate,* 113 Neb. 256, 202 N.W. 609, 616 (1925) (finding charity's promise to use donation for charitable purposes to be sufficient consideration for donative pledge). Courts are liberal in their attempts to find consideration for these pledges. Some have even gone as far as to find that an obligation taken up in exchange for a donative promise does not even have to come from the donee to make that promise binding; the commitment of others to donate money has been held enough to serve as consideration for a donor's promise to give. *See Congregation B'Nai Sholom v. Martin,* 382 Mich. 659, 173 N.W.2d 504, 510 (1969); *First Presbyterian Church of Mt. Vernon v. Dennis,* 178 Iowa 1352, 161 N.W. 183, 187 – 188 (1917).

2. [14.13] Finding Consideration in Illinois

Illinois' perspective on finding consideration for charitable pledges might be even more expansive than that of other jurisdictions. The leading case on consideration for charitable pledges in Illinois states "that an act which is of benefit to one party or a disadvantage to another constitutes a sufficient consideration to support the contract." *In re Wheeler's Estate,* 284 Ill.App. 132, 1 N.E.2d 425, 430 (1st Dist. 1936). This reading of consideration allows almost any change in the obligations between the parties to count as consideration.

In *Wheeler's Estate,* a church soliciting donations from its parishioners promised that it would hold the donations in perpetuity and establish an endowment fund that would support the church in its future religious and charitable endeavors. In light of these promises from the church, and in light of the charitable donations of other parishioners, Anna Wheeler made a donative promise to the church that was upheld as binding by the First District of Illinois. 1 N.E.2d at 431. This decision was based in part on a reading of the RESTATEMENT OF CONTRACTS §84 (1932), which said, "in effect, that consideration is not insufficient because of the fact that the party giving the consideration is bound by a duty owed to the promisor or to the public if the act promised as consideration 'differs in any way from what was previously due.' " 1 N.E.2d at 430. As long as the donee agrees to act in some way it was not otherwise obligated to act, that agreement qualifies as consideration for a donative pledge.

C. Promissory Estoppel and Charitable Pledges

1. [14.14] The Principle of Promissory Estoppel

The principle of promissory estoppel is best defined in the RESTATEMENT (SECOND) OF CONTRACTS §90 (1981), which states:

> **(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.**
>
> **(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.**

The RESTATEMENT lays out the traditional elements of promissory estoppel as being a promise, the foreseeability of reliance on that promise, actual reliance on the promise, and injustice or damages stemming from that reliance. See, *e.g.,* RESTATEMENT §90, cmt. a, illus. 1.

Comment f to §90 makes it clear that charitable subscriptions are a class of promise that courts have traditionally favored, and that courts following §90 should look merely for the probability of reliance when deciding if a charitable pledge is binding.

2. Promissory Estoppel in Illinois

a. [14.15] Origins

Illinois courts had embraced reliance as a means of enforcing charitable subscriptions by the mid-19th century. See Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain,* 39 Am.Bus.L.J. 289, 316 (2002). In *Pryor v. Cain,* 25 Ill. 292, 295 (1861), the Illinois Supreme Court held that the law of promissory estoppel was already well settled. There, the defendant had made a promise to donate money for the building of a church, and the court found that when other donors relied on the defendant's promise, he was "bound in good faith to fulfill the obligation, the [other parties] paying the money or furnishing the labor and materials having a right to rely on such subscription." *Id.* Similarly, in *Thompson v. Board of Supervisors of Mercer County,* 40 Ill. 379 (1866), the defendant had promised funds for the erection of a new courthouse. The Illinois Supreme Court decided he was bound to his charitable subscription because "liabilities incurred by others in consequence of such subscriptions . . . should, on general principles, be deemed sufficient to make them obligatory." 40 Ill. at 384.

b. [14.16] In re Drain's Estate

The most important case defining promissory estoppel as it relates to charitable pledges came in 1941. *In re Drain's Estate,* 311 Ill.App. 481, 36 N.E.2d 608, 609 (2d Dist. 1941), involved a

church to which a testatrix promised $2,000 in light of other donors making similar contributions. The executor of Drain's estate attempted to show that pledges cannot depend on contingencies that may never happen and that the subscription of others, or the labor and expense of obtaining those subscriptions, cannot constitute consideration for a promise. The court disagreed and found that a gratuitous promise becomes a "valid and enforceable contract, where before a withdrawal of the promise, and in reliance thereon, as well as on the promises of others," the charitable organization expends money and incurs "liabilities in furtherance of the enterprise the donors intended to promote." *Id.*

The court also laid out the rule for the state, saying that if the promisee, in reliance on a subscription before it is withdrawn, "performs some act such as the expenditure of money or incurring liabilities which are enforceable, in furtherance of the enterprise the promisor intended to assist or promote, consideration for the subscription is then supplied, and the same is thereafter deemed to be valid, binding and enforceable." *Id.* As long as such contracts can be enforced "without violating established rules of law," the contract will be sustained. *Id.*

c. [14.17] The Modern Understanding of Promissory Estoppel

The rule of *In re Drain's Estate,* 311 Ill.App. 481, 36 N.E.2d 608, 609 (2d Dist. 1941), is still in force. As recently as 2007, courts have said that when a pledge is not withdrawn, and expenditures are made in reliance on the pledge, it creates a valid and enforceable contract. In *In re Estate of Sessions,* 377 Ill.App.3d 1146, 953 N.E.2d 84, 352 Ill.Dec. 148 (1st Dist. 2007) (Rule 23) (related case at *Rush University Medical Center v. Sessions,* 2012 IL 112906, 980 N.E.2d 45, 366 Ill.Dec. 245), the decedent had pledged $1.5 million to Rush University Medical Center for the construction of a president's house to be named after the decedent. After the construction was completed, the decedent, Robert Sessions, had deleted the gift in payment of the pledge from his will and then died. Sessions' executor refused to honor the pledge. The court found *Drain* to be dispositive in this situation and concluded that Rush expended resources to build the Robert W. Sessions House in reliance on the pledge, the pledge was not withdrawn, and, thus, there was a valid and enforceable contract between Sessions and Rush.

D. [14.18] Ensuring the Enforceability of a Charitable Pledge

If a pledge is intended to be binding, that intent should be clearly documented. In addition to documenting the pledge to prove its terms and its existence, certain steps can be taken to help ensure the enforceability of a pledge. The following steps will help in constructing binding and enforceable pledges:

1. Avoid labeling a pledge document as a "letter of intent."

2. Detail how much is being pledged and how and when it will be paid.

3. Recite any consideration for the pledge, making sure it is not enough to threaten any deduction the donor expects because of the IRS' quid pro quo policy. See §14.21 below.

4. Detail how the charity will rely on the pledge and what injury will be incurred if the pledge is not fulfilled.

5. Recite that the pledge is binding on the donor and his or her estate.

6. Require that the donor modify his or her estate plan to provide for payment of the pledge and require that he or she keep such provisions in the estate plan.

7. Make the pledge known publicly.

8. Recite whether the pledge will be relied on as a "cornerstone gift" used to induce other pledges.

See Jack B. Siegel, A DESKTOP GUIDE FOR NONPROFIT DIRECTORS, OFFICERS, AND ADVISORS: AVOIDING TROUBLE WHILE DOING GOOD, p. 438 (2006).

E. [14.19] Duty of a Charity To Enforce Charitable Pledges

A charity has a fiduciary duty to its beneficiaries to ensure the propagation of funds for its charitable cause. In light of the charity's obligation to ensure the continued funding of its cause, does a charity have the duty to proactively enforce binding charitable pledges when it believes they are not being paid? The law is unsettled. Under §3(b) of the Uniform Prudent Management of Institutional Funds Act (UPMIFA), 760 ILCS 51/1, *et seq.,* charities have a duty to exercise good faith and prudence in governing their funds. If the collection of funds falls under that duty, then they may have a legal obligation to collect enforceable pledges.

This area of law has been investigated, and it has been suggested that in light of duties enumerated by the RESTATEMENT (SECOND) OF TRUSTS §177 (1959), charities have an obligation to enforce legally binding pledges; the extent of this duty depends on the standard of care directors of not-for-profit corporations are held to, whether it be the "trustee" standard or the looser "corporate" standard. Mary Frances Budig et al., *Pledges to Nonprofit Organizations: Are They Enforceable and Must They Be Enforced?,* 27 U.S.F.L.Rev. 47, 101 (1992) (Budig). The RESTATEMENT says plainly that a "trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust." RESTATEMENT §177.

Budig notes that Illinois law has drawn on language similar to that of the corporate standard. Budig, pp. 101 – 102 n.301. This standard is based on ordinary care and prudence, though Illinois courts have not yet determined whether this standard would demand charitable organizations to seek the enforcement of charitable pledges. However, this standard typically requires not-for-profit directors only to act in good faith with the care that an ordinary person would use. Budig, p. 90. The general rule is that directors of an organization judged by the corporate standard are liable only for gross negligence, whereas directors acting under the trustee standard can have liability attach to their actions for ordinary negligence. Budig, p. 97.

F. [14.20] Accounting Treatment

The Financial Accounting Standards Board (FASB) requires all charities to list as assets on their balance sheets the amount of any unconditional pledges, regardless of whether those pledges are legally binding. FASB Statement of Financial Accounting Standards No. 116, ¶24, states that recipients of unconditional promises to give must disclose the amounts of those pledges receivable in less than one year, in one to five years, and in more than five years. See www.fasb.org.

G. [14.21] Tax Considerations

The making and payment of charitable pledges can raise several tax considerations:

1. Deductions with a pledge can be taken only once the payment is made, not before. 26 U.S.C. §170(a)(1). Thus, making a charitable pledge does not alter the donor's tax liability in the year the pledge is made unless the donor also fulfills his or her promise during that same year.

2. The IRS has ruled that a binding pledge is not a debt for federal income tax purposes. Thus, using appreciated stock to pay a legally enforceable pledge is not considered a sale or exchange and does not cause gain to be realized. Rev.Rul. 55-410, 1955-1 Cum.Bull. 297; Rev.Rul. 64-240, 1964-2 Cum.Bull. 172.

3. No charitable deductions are allowed for payment of a decedent's non-legally binding pledges by the executor of an estate. 26 C.F.R. §20.2053-4. *See also Estate of Levin v. Commissioner,* 69 T.C.M. (CCH) 1951 (1995).

4. Deductions for the full amount of a charitable gift can be taken only when nothing of substantive value is given in return for the gift. Rev.Proc. 2007-66, 2007-45 Int.Rev.Bull. 970, an inflation update of Rev.Proc. 90-12, 1990-1 Cum.Bull. 471, lists benefits that will not be considered to have substantive value. (Note that Rev.Proc. 2007-66 was modified and superseded in part by Rev.Proc. 2009-21, 2009-16 Int.Rev.Bull. 860.) Also, several benefits that may accrue from donations to charity are not considered to have any value whatsoever. This includes naming rights and the use of logos. See, *e.g.,* Rev.Rul. 77-367, 1977-2 Cum.Bull. 193 ("Although the corporation benefits by having the [historic] village named after it . . . such benefits are merely incidental to the benefits flowing to the general public from access to the village and its historic structures.").

5. Private foundations are not allowed to satisfy the personal pledges of individuals. This counts as an act of self-dealing under Treas.Reg. §53.4941(d)-2(f)(1). See also Tech.Adv.Mem. 8534001 (May 14, 1985) (finding that donations by a foundation to satisfy the pledge of an individual are not charitable contributions and may constitute self-dealing).

6. If an individual makes a payment to a public charity in satisfaction of a binding pledge made to the charity by a private foundation and, thus, discharges the foundation's obligation, the IRS may well view this as a gift by the individual to the private foundation resulting in a

reduction in the deductibility of the contribution by the individual to the lower levels of deductibility allowed for gifts to private foundations. See, *e.g.,* 26 U.S.C. §§170(b)(1)(B), 170(b)(1)(D), 170(e)(1)(B)(ii).

IV. RESTRICTED GIFTS

A. [14.22] Restricted Gifts Generally

A restricted gift is a gift given with a condition or restriction imposed. Jack B. Siegel, A DESKTOP GUIDE FOR NONPROFIT DIRECTORS, OFFICERS, AND ADVISORS: AVOIDING TROUBLE WHILE DOING GOOD, p. 441 (2006) (Siegel). These restrictions can take many forms. They can include restrictions on the charitable purposes for which a donation may be used, and they can include restrictions on how the funds themselves can be accessed for charitable use. See *id. See, e.g., Dickenson v. City of Anna,* 310 Ill. 222, 141 N.E. 754, 757 (1923) ("A gift to a charitable use, with a direction that no part of it should at any time be alienated, does not create a perpetuity that the law forbids, but merely a perpetuity which the law permits.").

These restrictions can be placed on the gift by either the donor of the gift or the charitable organization's board of directors or trustees. On one hand, "[t]he law requires trustees of a charitable trust to adhere to the donor's stated charitable purpose for the stated period, even if forever." Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty,* 39 Ariz.L.Rev. 873, 877 (1997) (Brody). Even when the donor's restrictions are not entirely clear, "[e]quity considers the general charitable purpose of a testator or donor as the substance of the devise or gift." *First Nat. Bank of Chicago v. Elliott,* 406 Ill. 44, 92 N.E.2d 66, 73 (1950). Additionally, since many charitable endowments consist of several asset pools, each carrying their own restrictions from their respective donors, charitable organizations must make sure they adhere to the restrictions placed on each separate fund. Siegel, p. 456.

On the other hand, "[o]nly a donor can impose a legally binding . . . restriction" (Brody, p. 885), because any decision made by a charitable board on how to use a gift could be easily modified. Any restriction placed on a gift by a board is a restriction only until the board meets again and chooses to do something else with the contribution. As such, "[a] charity's self-imposed restriction to maintain principal cannot be legally enforced; the charity can always change its mind." *Id.* Because charitable boards can so easily alter these restrictions, §§14.23 – 14.33 below deal only with donor-restricted gifts.

B. [14.23] The Existence of a Restriction

Sometimes it is difficult to determine what should count as a restriction on a charitable gift. It is possible that a restriction could be totally unrelated to any charitable intention, in which case courts probably would not honor the restriction. As one scholar put it:

> **[**T**]here are limits to the idiosyncratic or whimsical directives that a donor can impose without jeopardizing the charitable nature of [**a**] gift. Among the class of "too idiosyncratic" provisions are restrictions that tend to divert the use or**

> **administration of gifted property away from the pursuit of some recognized charitable mission to other, non-charitable purposes, as well as provisions that may be deemed capricious or frivolous.** John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around,* 76 Fordham L.Rev. 693, 699 (2007).

The Uniform Prudent Management of Institutional Funds Act instructs courts to look at the documents surrounding a charitable gift to determine whether there is a charitable restriction placed on that gift. 760 ILCS 51/2(3). Such documents can include gift documentation, correspondence, and solicitation materials.

While it stands that if a gift is subject to a limiting restriction, charities are under an obligation to use the gift within the bounds of that restriction, Illinois courts have been lenient in granting charitable organizations discretion in deciding how to fulfill this obligation. "The efforts of a trustee to comply with the conditions attached to a charitable conveyance will be regarded in the light most favorable to the trust, and for the purpose of determining the reasonableness, prudence and diligence of his action or forbearance, all evidence bearing upon the question should be admitted and considered." *Village of Hinsdale v. Chicago City Missionary Soc.,* 375 Ill. 220, 30 N.E.2d 657, 663 (1940). In *Hinsdale,* real property was donated to the Village of Hinsdale to be placed in a trust that would go toward the erection of a new public library on that property. The village delayed several years in building on the property and eventually erected a village memorial building within which the village library rented space. The Illinois Supreme Court found this to be an acceptable use of the property since the general purpose of the gift was to benefit the library and the sale of the remainder of the donor's contribution could be used for general maintenance and upkeep of the library. Generally, if a charitable organization's reading of a restriction can be seen as falling within the bounds of that restriction, courts will not question the organization's reading. *See* 30 N.E.2d at 663 ("Charitable gifts are viewed with peculiar favor by the courts, and every presumption consistent with the language contained in the instruments of gift will be employed in order to sustain them."). See also the Illinois Supreme Court's decision in *Citizens National Bank of Paris v. Kids Hope United, Inc.,* 235 Ill.2d 565, 922 N.E.2d 1093, 337 Ill.Dec. 516 (2009).

C. What To Do When a Donor's Stated Purpose Is Not Feasible

1. [14.24] Cy Pres

Cy pres was adopted by Illinois courts in *First Nat. Bank of Chicago v. Elliott,* 406 Ill. 44, 92 N.E.2d 66, 73 (1950), quoting the metric found in the RESTATEMENT OF TRUSTS §399 (1935):

> **If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.**

2. [14.25] Equitable Deviation

Later Illinois Supreme Court cases started to move away from cy pres as the only method of reading meaning into otherwise ambiguous or infeasible restricted gifts. The court began to recognize the doctrine of equitable deviation as a way of allowing changes in the use of restricted funds. As with cy pres, the court relied on a RESTATEMENT OF TRUSTS to define "equitable deviation":

> **The doctrine of equitable deviation is stated in section 381 of the Restatement (Second) of Trusts, at 273 (1959), as follows:**
>
> > **"The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purpose of the trust."** *Burr v. Brooks,* 83 Ill.2d 488, 416 N.E.2d 231, 234, 48 Ill.Dec. 200 (1981).

While frequently used in similar situations, cy pres and equitable deviation are not the same. Comment a to §381 explains the difference:

> **this Section has to do with the powers and duties of the trustees of charitable trusts with respect to the administration of the trust; it has to do with the methods of accomplishing the purposes of the trust. The question of the extent to which the court will permit or direct the trustee to apply the trust property to charitable purposes other than the particular charitable purpose designated by the settlor where it is or becomes impossible or illegal or impracticable to carry out the particular purpose involves the doctrine of cy pres.** RESTATEMENT §381, cmt. a.

See the extensive discussion of cy pres and equitable deviation in §§14.34 – 14.54 below.

3. [14.26] Reversionary Restrictions

One hindrance to applying the doctrines of cy pres and equitable deviation is the inclusion of a reversionary restriction in a gift instrument. A reversionary restriction provides for the reallocation of the gift to some other party, or the return of the gift to the donor, in the event the donee is unable to meet all the donor's other restrictions. Courts have said that "[t]he absence of . . . a reversion in case of the failure of a charitable purpose constitutes evidence of a general charitable intent," which would also imply that the inclusion of a reversion implies that there is no general charitable intent in a gift. *In re Estate of Tomlinson,* 65 Ill.2d 382, 359 N.E.2d 109, 112, 3 Ill.Dec. 699 (1976). *See also In re Elizabeth J.K.L. Lucas Charitable Gift,* 125 Haw. 351, 261 P.3d 800 (App. 2011). In addition to hindering the application of cy pres and equitable deviation, reversionary restrictions have the potential to cause serious tax problems. Deductions cannot be taken for any gift "unless the possibility that the charitable transfer will not become effective is so remote as to be negligible." 26 C.F.R. §1.170A-1(e). Put another way, if there is more than a negligible chance that a charitable gift will revert, no deductions can be taken for that gift.

D. Statutory Law on Restrictions

1. [14.27] The Illinois Uniform Management of Institutional Funds Act and the Illinois Uniform Prudent Management of Institutional Funds Act

In 1972, the National Conference of Commissioners on Uniform State Laws introduced the Uniform Management of Institutional Funds Act to provide guidelines for the managers of not-for-profit institutions. Lisa Loftin, Note, *Protecting the Charitable Investor: A Rationale for Donor Enforcement of Restricted Gifts,* 8 B.U.Pub.Int.L.J. 361, 372 (1999). This Act was subsequently adopted by Illinois. Former 760 ILCS 50/1, *et seq.* Several of the sections of the Act dealt specifically with restricted gifts and governed how the managers of charitable funds could treat those gifts. Section 3 required a charitable fund to respect endowment restrictions. Former 760 ILCS 50/3. Section 5 required a charitable fund to respect restrictions on purpose, limiting use of a gift to purposes set forth by the gift instrument. Former 760 ILCS 50/5. Section 8 provided that restrictions on gifts could be lifted with the written consent of the donor or a court order. Former 760 ILCS 50/8.

The Uniform Prudent Management of Institutional Funds Act became effective in Illinois and replaced the Uniform Management of Institutional Funds Act on June 30, 2009. 760 ILCS 51/1 – 51/10. UPMIFA applies to institutional funds existing on or established after June 30, 2009, but as to institutional funds already existing on the effective date of the Act, the Act governs only decisions made or actions taken on or after that date. Note that UPMIFA applies to funds held by a charitable organization but not funds held in trust for a charitable organization or charitable organizations by a trustee that is not itself a charitable organization.

UPMIFA provides that a donor can make his or her gifts to a charity subject to restrictions of the donor's choosing, and as long as the charity agrees to accept such gifts subject to those restrictions, UPMIFA provides that such donor's restrictions will apply, even to the extent inconsistent with the provisions of UPMIFA. Thus, the donor can establish his or her own restrictions as to the use and/or expenditure of funds given to a charity to be held in an endowment as long as the donor clearly describes the restrictions he or she wishes to impose.

UPMIFA differentiates between funds held by a charity that are restricted as to use by the governing body of the charity, such as board-restricted endowment funds and funds that are held by a charity subject to a donor's restrictions. As to the former, any such board-restricted funds can be rendered unrestricted by board action and used in other ways consistent with the charity's purpose. As to those funds that are restricted as to expenditure and/or use by a donor or donors, however, such funds must be used in ways consistent with those restrictions.

UPMIFA provides that a restriction on the use or investment of a charitable fund imposed by a donor may be released or modified with the consent of the donor. Although this provision can be useful, it is somewhat limited in its applicability insofar as sometimes it is impossible to seek a donor's consent, such as when the donor has died, or such as when there are many donors who have contributed to a fund that is restricted in its use under the gift instrument.

UPMIFA includes a provision allowing a charity to modify a restriction on a fund that is old and small. Specifically, if a charity determines that a restriction on the management, investment, or purpose of the fund is unlawful, impracticable, impossible to achieve, or wasteful, the charity, 60 days after notification has been given to the Illinois Attorney General, may, without court approval, release or modify the restriction in whole or in part if (a) the fund subject to the restriction has a total value of less than $50,000, (b) more than 20 years have elapsed since the fund was created, and (c) the institution then uses the assets of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. 760 ILCS 51/6(d).

By permitting the charity to make appropriate modifications with such old and small funds, the expense of a court proceeding, which is often prohibitive as to such small funds, is avoided. If the Attorney General has concerns about the modification, the Attorney General can always commence a court action to prohibit it. Note that the donor, even if available, need not be given notification in the case of such a modification of an old and small fund.

A good discussion of UPMIFA can be found in Johnny R. Buckles, *Probing UPMIFA: The Mysteries of the Uniform Act in Light of Federal Tax and State Charity Laws and Concepts,* 46 Real Prop.Tr. & Est.J. 281 (Fall 2011).

2. [14.28] The Charitable Trust Act

The Charitable Trust Act provides guidelines for the Illinois Attorney General in enforcing restrictions placed on charitable gifts. "The purpose of the Charitable Trust Act is to assist the Attorney General in carrying out his common law powers and duties to enforce charitable trusts and to see to the application of their funds to their intended charitable uses." *People ex rel. Scott v. George F. Harding Museum,* 58 Ill.App.3d 408, 374 N.E.2d 756, 760, 15 Ill.Dec. 973 (1st Dist. 1978). Under the Act, every charity must record and file any duties it has in regard to any gifts it has accepted; if a charity fails to meet this obligation, the Attorney General can revoke its registration. 760 ILCS 55/7. The Attorney General is also given power to initiate proceedings under the Act if he or she learns of any violations. 760 ILCS 55/12. Not only that, but "[t]he Attorney General is a necessary party to litigation over whether charitable assets are properly devoted to their governing charitable purposes and are being administered in accordance with charitable trust principles." *Buntrock v. Terra,* 348 Ill.App.3d 875, 810 N.E.2d 991, 1001, 284 Ill.Dec. 884 (1st Dist. 2004).

The Act also lays out the guidelines for the termination and transfer to charity of a restricted gift held in trust in certain cases. Section 15.5 of the Charitable Trust Act allows changes in the administration of a trust when administration becomes "impractical because of the trust's small size or because of changed circumstances that adversely affect the charitable purpose or purposes of the trust." 760 ILCS 55/15.5(a). A trust is of small size when administration of the trust costs more than 25 percent of the trust's income on an annual basis and changed circumstances include conditions in which the purposes of the trust "have become illegal, unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community." 760 ILCS 55/15.5(b). After notifying all the organizations for which the trust was created, such a trust can be terminated and transferred to charity with the consent of the Attorney General without the need for a court order. 760 ILCS 55/15.5(a).

E. Who Can Enforce the Use of a Restricted Gift?

1. [14.29] The Illinois Attorney General

As codified in the Charitable Trust Act, Illinois' Attorney General is given the power to enforce restricted gifts. 760 ILCS 55/12. The Act codifies a common-law tradition of enforcement by Attorneys General. As a rule, "private parties — including donors — have no legal authority to sue to enforce charitable duties. '[D]espite the fact that the organization is legally bound by specific terms of the gift, legally it is not the donor's concern. It is society's concern, to be pursued (or not) by society's representative, the attorney general.' " Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing,* 41 Ga.L.Rev. 1183, 1187 (2007), quoting Laura B. Chisolm, *Accountability of Nonprofit Organizations and Those Who Control Them: The Legal Framework,* 6 Nonprofit Mgmt. & Leadership 141, 147 (1995). This is because the gift "is not given to individual beneficiaries, but instead for purposes beneficial to the community. . . . Thus, the community has an interest in enforcing the trust and the Attorney General represents the community in seeing that the trust is properly construed and that the funds are applied to their intended charitable uses." [Citation omitted.] *Brown v. Ryan,* 338 Ill.App.3d 864, 788 N.E.2d 1183, 1191, 273 Ill.Dec. 307 (1st Dist. 2003).

2. [14.30] Special-Interest Enforcement

Some jurisdictions recognize what is known as "special-interest enforcement." The RESTATEMENT (THIRD) OF TRUSTS §94(2) (2012) provides that, in addition to the Attorney General, a "person who has a special interest in the enforcement of the [charitable] trust" may bring suit to enforce a restriction on a gift. *Id.* While the Illinois Supreme Court recognized the existence of special-interest enforcement in *Holden Hospital Corp. v. Southern Illinois Hospital Corp.,* 22 Ill.2d 150, 174 N.E.2d 793, 796 (1961) (stating "that the interest of a donor to a trust or a member of the public concerned with its work is insufficient to give standing . . . although there is dicta to the contrary" and that "[w]e agree[] with the well supported view . . . that the Attorney General is usually the proper party to represent the public's interest in the trust" [Citations omitted.]), this recognition was not controlling. *See also Northern Illinois Medical Center v. Home State Bank of Crystal Lake,* 136 Ill.App.3d 129, 482 N.E.2d 1085, 1101, 90 Ill.Dec. 802 (2d Dist. 1985) (stating that "we do not believe that potential beneficiaries or persons having a special interest in the enforcement of a charitable trust are precluded from seeking the application of equitable deviation where they are clearly potential recipients under the trust's provisions" because there are "long standing principles of liberal construction afforded to charitable bequests in Illinois").

3. Donor Enforcement

a. [14.31] Donor Enforcement Without Contract

Generally, donors cannot enforce restrictions placed on gifts. "The donor's legal rights cease upon a transfer to a charitable trust or corporation." Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty,* 39 Ariz.L.Rev. 873, 879 – 880 (1997). There have been some changes to this general rule, though. A Connecticut appellate court, after looking at the floor

debate of their own state legislature, said that a private right of action was implied from the Connecticut Uniform Prudent Management of Institutional Funds Act's requirement of donor or court approval before a charity's release from a gift restriction. *Carl J. Herzog Foundation, Inc. v. University of Bridgeport,* 41 Conn.App. 790, 677 A.2d 1378 (1996) (*Herzog I*); Lisa Loftin, Note, *Protecting the Charitable Investor: A Rationale for Donor Enforcement of Restricted Gifts,* 8 B.U.Pub.Int.L.J. 361, 376 – 377 (1999) (Loftin). The Connecticut Supreme Court then reversed, relying on the common-law tradition that donors do not have standing unless it is reserved at the time of donation. *Carl J. Herzog Foundation, Inc. v. University of Bridgeport,* 243 Conn. 1, 699 A.2d 995, 1002 (1997) (*Herzog II*). However, the dissent in *Herzog II* claimed that

> **[t]he majority . . . holds that the donor itself may not enforce a restriction in a gift to an educational institution when the institution had specifically agreed to that restriction. This decision is simply an approval of a donee, in the words of the donor, "double crossing the donor," and doing it with impunity unless an elected attorney general does something about it.** 699 A.2d at 1002 (McDonald, J., dissenting).

From *Herzog II,* Loftin argues that the Connecticut Supreme Court failed to adequately address the section of the Uniform Prudent Management of Institutional Funds Act requiring approval for release from gift restrictions; she believes that this section grants a donor a "special interest" exception under the RESTATEMENT (SECOND) OF TRUSTS §391 (1959) (which is the comparable section to RESTATEMENT (THIRD) OF TRUSTS §94(2) (2012)). Loftin, p. 379. As noted in §14.30 above, Illinois has been willing to recognize the special-interest exception of the RESTATEMENT §94(2), if only in dicta.

Even more recently, a 2005 California appellate court decision found that whether a donation with restrictions was a contract subject to a condition subsequent or a charitable trust, the donor had standing to sue for enforcement. *L.B. Research & Education Foundation v. UCLA Foundation,* 130 Cal.App.4th 171, 29 Cal.Rptr.3d 710, 716 – 717 (2005). Illinois courts have yet to directly address the subject.

b. [14.32] Donor Enforcement Through Contract

The Connecticut Supreme Court in *Carl J. Herzog Foundation, Inc. v. University of Bridgeport,* 243 Conn. 1, 699 A.2d 995, 1002 (1997), implied that if a donor included a provision for reverter in a gift instrument, it could be enforceable in court by the donor. In *Community Unit School Dist. No. 4 v. Booth,* 1 Ill.2d 545, 116 N.E.2d 161 (1953), the Illinois Supreme Court discussed a situation in which the charitable institution to which a gift is made ceases to exist. The court stated that the gift could be passed along through cy pres to a similar institution unless the donor "manifested an intention to restrict his gift to the institution which he named." 116 N.E.2d at 168. This suggests that donors may have the power to create contingent restrictions on a gift, perhaps even contracting in the gift documentation for the right to enforce a restriction.

Cases holding, at least on their specific facts, that a donor did not have the right to enforce a restricted charitable gift are *Pearson v. Garrett-Evangelical Theological Seminary, Inc.,* 790 F.Supp.2d 759 (N.D.Ill. 2011), and *Hardt v. Vitae Foundation, Inc.,* 302 S.W.3d 133 (Mo.App. 2009). Articles discussing the evolving law in this area are Edward C. Halbach, Jr., *Standing To*

Enforce Trusts: Renewing and Expanding Professor Gaubatz's 1984 Discussion of Settlor Enforcement, 62 U. Miami L.Rev. 713 (Apr. 2008), and Reid Kress Weisbord and Peter DeScioli, *The Effects of Donor Standing on Philanthropy: Insights from the Psychology of Gift-Giving,* 45 Gonzaga L.Rev. 225 (2009 – 2010).

F. [14.33] Steps To Avoid Litigation Regarding Restricted Gifts

The following are a few steps that can be taken to avoid litigation with restricted gifts:

1. The donor and the charity should discuss their prospective desires for how the gift is to be used with one another at the planning stage of the donation, before any commitments have been made, to make certain that any restrictions meet the donor's goals and also are possible, practical, and useful for the charity.

2. When donating to a charity, flexibility should be built into the gift instrument. A charity will not have to undertake expensive court action to redetermine the charitable purposes of a gift if the gift instrument includes contingencies for what should happen if planned administration of the gift becomes infeasible, *e.g.,* by giving the board of the charity the authority to use the gift for an alternate purpose if the restricted purpose becomes impossible, impractical, or even undesirable in the board's judgment.

3. If a donor is concerned about giving a charity itself the ability to change the purposes for which a restricted gift can be used, consideration should be given to drafting a provision into the gift instrument requiring any contemplated changes to the donation's use by the board to be approved by the Attorney General but without the necessity of court action.

V. [14.34] MODIFYING THE CHARITABLE TRUST

The primary methods for modifying a charitable trust are the doctrines of cy pres and equitable deviation. Often somewhat understandably confused by courts and practitioners alike, cy pres is generally described as changing the purpose of the charitable gift, while equitable deviation is said to deal only with the administration of the fund. Cy pres is applicable only to charitable trusts, while equitable deviation is available to private trusts as well. See §§14.35 – 14.54 below.

A. Cy Pres

1. [14.35] History and Rationale

The doctrine of cy pres originates from the powers of equity under English common law. "Cy pres" has been defined as meaning "as near" or "as near to." 14 C.J.S. *Charities* §45 (2006). Cy pres applies only to charitable bequests and is inapplicable to private trusts. The rationale behind the doctrine today is founded on the belief that charitable trusts should be afforded perpetual duration and that such trusts should not fail simply because the needs and circumstances of society evolve over time or because the particular purpose of the trust cannot be fully

accomplished. See RESTATEMENT (THIRD) OF TRUSTS §67 (2003). Thus, "[c]ourts favor gifts to charity and will indulge in every presumption, consistent with the words used, to sustain them." *Graham Hospital Ass'n v. Talley,* 29 Ill.App.3d 190, 329 N.E.2d 918, 921 (3d Dist. 1975), citing *First Nat. Bank of Chicago v. Elliott,* 406 Ill. 44, 92 N.E.2d 66 (1950).

Cy pres is a rule of construction that allows a court to construe the wording of a will as giving effect to the testator's general intention in situations in which the testator delineates both a particular and a general intention and the particular intention cannot be realized. *Miller v. Riddle,* 130 Ill.App. 392 (3d Dist. 1906), *rev'd on other grounds,* 227 Ill. 53 (1907). Thus, when a testator directs the performance of a definite function and that function cannot be done in exact conformity with the testator's provision, then the function may be carried out with as close approximation to the provision as is reasonably practicable. *Quimby v. Quimby,* 175 Ill.App. 367 (1st Dist. 1912). The doctrine rests on the presumption that the exact manner in which the charitable purpose is carried out is immaterial as long as the donor's general charitable intention can be substantially honored. *People ex rel. Smith v. Braucher,* 258 Ill. 604, 101 N.E. 944, 946 (1913). The charity is regarded as the substance of the donation, while the manner in which the donation is made is of secondary importance. *Village of Hinsdale v. Chicago City Missionary Soc.,* 375 Ill. 220, 30 N.E.2d 657, 664 (1940); *Heuser v. Harris,* 42 Ill. 425 (1867).

Under the cy pres doctrine, if property is given in trust to be used for a specific charitable purpose and it becomes impossible, impracticable, or illegal to carry out that purpose, and if the grantor manifested a more general intention to give the property to charitable purposes, then the trust will not fail, but the court will allow the property to be applied to some charitable purpose that falls within the general charitable intention of the grantor. *Community Unit School Dist. No. 4 v. Booth,* 1 Ill.2d 545, 116 N.E.2d 161, 168 (1953).

2. Requirements for Application

a. [14.36] General Charitable Intent

The cy pres doctrine assumes that absent any gift-over or reversionary provisions, the general charitable purpose of the trust is the substance of the gift, while the manner in which the purpose is carried out is secondary. Thus, by upholding the general charitable purpose when the originally specified method of implementation becomes impractical, the court simply implements the true intent of the grantor. It seems to be "that if the bequest is to a cause or for a purpose or to aid and further a plan or scheme of public benefit, there is evidence of a general charitable intent." *Quimby v. Quimby,* 175 Ill.App. 367, 373 (1st Dist. 1912).

In *In re Estate of Tomlinson,* 65 Ill.2d 382, 359 N.E.2d 109, 110, 3 Ill.Dec. 699 (1976), the Illinois Supreme Court found general charitable intent when the grantor directed the trustee to "distribute all of the remainder of my said estate to the CANCER RESEARCH FUND absolutely and forever" and specifically provided that it was her intent to disinherit each of her heirs at law. At the time the grant was made, there was no organization known as the "Cancer Research Fund," and the will contained no provision for the disposition of the remainder of the estate if the charitable bequest failed. The court held that the absence of a gift over or reversion in the event of

the failure of the charitable purpose established evidence of a general charitable intent, and thus the general purpose of the will could be carried out by giving the grant to the American Cancer Society, Inc. 359 N.E.2d at 112 – 113.

b. [14.37] Words and Phrases That Do Not Preclude Application

Terms of a trust dictating that the funds shall be "forever" devoted to a particular charity do not necessarily mean that the grantor lacked a more general charitable intent. RESTATEMENT (THIRD) OF TRUSTS §67, cmt. b (2003). Such provisions often reflect only the grantor's intention that the trust should not be applied to other charitable purposes as long as it can feasibly be applied to the specific purpose named in the will. This sort of language does not, without more, necessitate a finding that the trust should automatically fail should it become illegal, impossible, or impracticable to undertake the specifically named charitable purpose. *Id.*

The Illinois Supreme Court has delineated several circumstances that will not prevent application of cy pres. For example, the fact that a grantor instructs that funds be used with a specific institution will not prevent the application of the funds to a different institution if it becomes impossible or impracticable to direct the funds to the named institution. *First Nat. Bank of Chicago v. Elliott,* 406 Ill. 44, 92 N.E.2d 66, 73 (1950). Thus, the *Elliott* court found that when the testator provided for an orphanage to be run by the Sisters of Charity and to be erected on a tract of land belonging to his estate, the intended beneficiaries of the trust were orphans in general, and the testator did not specifically intend to benefit the Sisters of Charity.

Cy pres prevents failure of a trust when the literal execution of the charity in the manner set out by the donor is impossible or illegal. *Eychaner v. Gross,* 202 Ill.2d 228, 779 N.E.2d 1115, 1145, 269 Ill.Dec. 80 (2002); *Citizens National Bank of Paris v. Kids Hope United, Inc.,* 235 Ill.2d 565, 922 N.E.2d 1093, 337 Ill.Dec. 516 (2009); RESTATEMENT (SECOND) OF TRUSTS §399 (1959); RESTATEMENT (THIRD) OF TRUSTS §67 (2003). For example, if an endowment for a charity is given in trust with a provision that it accumulate beyond the legal period, the court will redesign a legal management of the trust and effectuate the original charitable purpose cy pres. *Mason v. Bloomington Library Ass'n,* 143 Ill.App. 39, 47 (3d Dist.), *rev'd on other grounds,* 237 Ill. 442 (1908), quoting 2 Jairus Ware Perry, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES §728 (5th ed. 1899). The court will direct a legal management of the funds on the assumption that the donor would not have wanted the charity to fail because some incidental direction could not be executed. 143 Ill.App. at 47.

Finally, when the trust directs that the charity memorialize the name of the grantor, such direction will be regarded as part of the administration of the gift rather than as the incentive behind the gift. *Elliott, supra,* 92 N.E.2d at 74. When the donor's name can be perpetuated in another manner presumed to be consistent with the donor's intentions, an objection to a proposed change is without force. *Village of Hinsdale v. Chicago City Missionary Soc.,* 375 Ill. 220, 30 N.E.2d 657, 665 (1940).

3. Common Problems

a. [14.38] Location

When the grantor instructs the trustee to construct a building on a particular tract of land, the location is not always essential to the grant. *First Nat. Bank of Chicago v. Elliott,* 406 Ill. 44, 92 N.E.2d 66, 73 (1950). Thus, when the general intent of a donor in conveying land in trust for use as a library was to make available to the community the advantages of having a library, and when another building became available that would appropriately house such a library, the trust fund could be used to maintain the library in another building. *See Village of Hinsdale v. Chicago City Missionary Soc.,* 375 Ill. 220, 30 N.E.2d 657 (1940). The benefit of the library was the substance of the gift, while housing the building on the particular tract of land was secondary and not necessary to fulfill the donor's wishes. *Id.*

b. [14.39] Gift Not Useful

Sometimes a testator will make a bequest for the establishment of a certain type of charitable institution when a similar institution already exists and sufficiently serves the intended purpose. RESTATEMENT (THIRD) OF TRUSTS §67 (2003). In these cases, it would be impracticable to carry out the particular purpose since it would serve no added useful purpose to the community. Other times, a grantor may devise a trust to benefit a hospital or school but prescribe a particular use that is not useful to the institution. In these scenarios, "the court may modify the terms of the trust to allow a similar but more general charitable purpose to be accomplished." RESTATEMENT §67, cmt. c.

For example, in one case before the Illinois Supreme Court, a group of citizens conveyed three lots to the city to be used solely for school purposes. *Board of Education of City of Rockford v. City of Rockford,* 372 Ill. 442, 24 N.E.2d 366 (1939). However, eventually use of the land for school purposes became impracticable and economically inadvisable. In this case, the court allowed the property to be sold and the proceeds to be applied to similar educational purposes.

As mentioned in §14.23 above, in *Village of Hinsdale v. Chicago City Missionary Soc.,* 375 Ill. 220, 30 N.E.2d 657, 660 (1940), a widower left some property to be used to build a public library in his name. Due to delay in constructing the building on this lot, it ended up that another library was erected first on another site. In this scenario, the court again allowed the grantor's land to be sold and the proceeds to be applied cy pres for the maintenance of the other library and the purchase of books when doing so would more completely fulfill the charitable purpose of the donor. *But see Graham Hospital Ass'n v. Talley,* 29 Ill.App.3d 190, 329 N.E.2d 918 (3d Dist. 1975) (application of cy pres improper when trust period had not yet expired, so determination that execution would be impractical and/or infeasible was premature).

c. [14.40] Not Enough Money

When the resources donated for a charitable purpose are insufficient, or become insufficient after the grant is made, the trust will not necessarily fail. *First Nat. Bank of Chicago v. Elliott,* 406 Ill. 44, 92 N.E.2d 66, 76 (1950). In fact, such a scenario presents a good reason to apply the

doctrine of cy pres. The charitable purpose is the important objective, and the trust should be so administered as to fulfill, as nearly as possible, the intention of the grantor. Thus, when a testator granted $125,000 in his will to erect an orphanage and the amount granted was insufficient to build such an establishment ten years later, it was appropriate to use the trust to maintain another orphanage. 92 N.E.2d at 74.

d. [14.41] Too Much Money

On the other hand, sometimes the amount of property bequeathed to a charity exceeds the amount needed to fulfill the particular charitable purpose, and the continued disbursement of the funds would be wasteful. In a scenario like this, a court might choose to expand the purpose of the trust or direct the surplus funds to a different but similar charitable purpose. RESTATEMENT (THIRD) OF TRUSTS §67 (2003); *Kerner v. Thompson,* 293 Ill.App. 454, 13 N.E.2d 110 (1st Dist.) (finding that when funds were collected for relief of Mississippi Valley citizens following great flood in 1927, and when funds collected were not fully used, surplus was to be given under cy pres doctrine to Red Cross for relief of future flood sufferers in Mississippi Valley), *cert. denied,* 59 S.Ct. 102 (1938).

e. [14.42] Third-Party Issues

When a trust is established for a particular charitable purpose and that purpose cannot be attained without the cooperation of a third party, then, absent a provision in the trust preventing the court from applying cy pres, the trust will not fail simply because the third party fails to cooperate. *First Nat. Bank of Chicago v. Elliott,* 406 Ill. 44, 92 N.E.2d 66, 73 (1950). As long as the testator indicated an intention to give the funds to charitable purposes and not exclusively to make a gift to the particular association, cy pres is applicable. For example, when a grantor provided for an orphanage to be managed by the Sisters of Charity, the trust did not fail when the Sisters refused the trust. *Elliott, supra.* The Supreme Court allowed the trust to benefit a separate orphanage, reasoning that the grantor's intent was to benefit orphans in general rather than solely those cared for by the Sisters of Charity.

4. [14.43] Limitations

Courts are given substantial discretion in deciding when to apply cy pres, but they cannot and will not apply the doctrine in all cases. *See Burr v. Brooks,* 75 Ill.App.3d 80, 393 N.E.2d 1091, 1097 – 1098, 30 Ill.Dec. 744 (4th Dist. 1979) (remanding case to trial court to decide whether general rule should apply that trust funds may not be executed cy pres if there is alternate charitable gift), *aff'd,* 83 Ill.2d 488 (1981); *Strand v. United (Methodist) Church of Sheldon, Illinois,* 12 Ill.App.3d 917, 298 N.E.2d 779, 783 (court found intent solely to benefit specific church and lack of general charitable intent and, thus, would not execute trust cy pres to benefit merged church), *different results reached on reh'g,* 16 Ill.App.3d 744 (3d Dist. 1973). As the Illinois Supreme Court expressed, "cy pres is regarded as an extraordinary application [of the general powers of chancery over charitable trusts] and not to be used on every occasion where administration becomes difficult." *First Nat. Bank of Chicago v. Elliott,* 406 Ill. 44, 92 N.E.2d 66, 76 – 77 (1950).

a. [14.44] Requirements for Application of Cy Pres

There are two strict requirements for the application of cy pres: "first, a failure of the specific gift; and, second, a general charitable intent disclosed in the instrument creating the trust." *Strand v. United (Methodist) Church of Sheldon, Illinois,* 12 Ill.App.3d 917, 298 N.E.2d 779, 783, *different results reached on reh'g,* 16 Ill.App.3d 744 (3d Dist. 1973). Because cy pres is founded on the notion that the charitable purpose of a grantor should be respected when possible, if a gift can be carried out in the manner intended by the grantor, then a court will not alter the intended method of execution. *National City Bank of Michigan/Illinois v. Northern Illinois University,* 353 Ill.App.3d 282, 818 N.E.2d 453, 288 Ill.Dec. 765 (2d Dist. 2004) (cy pres inapplicable when no impediment hindered administration of trust despite fact that proposed deviation would allegedly allow trust to avoid federal excise taxes and administrative costs). The rationale behind the doctrine does not support restraining the primary purpose of the grantor to bring the purpose within the bounds of legal charity. *Taylor v. Keep,* 2 Ill.App. 368, 383 – 384 (1st Dist. 1878) (refusing to apply doctrine of cy pres when bequest was not made exclusively to charity but was so made that trustees could, if they so chose, devote entirety of it to noncharitable purposes).

b. [14.45] Limitations on Inferring General Charitable Intent

A court will not find general charitable intent based solely on the fact that the testator provided grants in trust for several distinct charities. When a testator wished to benefit several charities and picked several from a list prepared by his trustee to include in his will, the First District found no indication that the testator intended to benefit any charities other than those specifically named in the document. *Chicago Daily News Fresh Air Fund v. Kerner,* 305 Ill.App. 237, 27 N.E.2d 310, 312 (1st Dist. 1940). The trustee did not select the charities but merely submitted a list of several organizations from which the testator chose the ones he wished to benefit. Further, "a general charitable intent cannot be deduced from the sole fact that the organization named in the will is engaged in a particular charitable work." *Id.,* citing *Quimby v. Quimby,* 175 Ill.App. 367 (1st Dist. 1912). A rule otherwise would necessitate finding a general charitable intent in every case in which the specific charitable trust fails. *Quimby, supra,* 175 Ill.App. at 373.

c. [14.46] Other Scenarios Precluding Application of Cy Pres

There are several scenarios in which cy pres will not be applied. First, cy pres cannot be used to change the central purpose of a charitable gift. Thus, "property devised to education, for example, cannot be judicially diverted to religion, the relief of the poor or sick, or to general charity, or vice versa." *Board of Education of City of Rockford v. City of Rockford,* 372 Ill. 442, 24 N.E.2d 366, 371 (1939), citing 14 C.J.S. *Charities* §52, p. 517 (1936). Second, cy pres is inapplicable when the donor provides for a gift over or reversion if the charitable use fails. The donor's unmistakable wish to devote the fund to another purpose in such a scenario will be honored if the primary purpose cannot be attained by any reasonable method. *Village of Hinsdale v. Chicago City Missionary Soc.,* 375 Ill. 220, 30 N.E.2d 657, 665 (1940). Finally, a court will apply cy pres only when the trust can be carried out practically by agencies to which the court commonly resorts. A court is not required to use a corps of engineers or other experts to estimate

costs and report plans, especially when the court would then have to employ more experts to carry out the plan. *See generally Board of Supervisors of Henry County v. Winnebago Swamp Drainage Co.,* 52 Ill. 454, 462 (1869) (refusing to apply doctrine of cy pres when "the court would have to organize all of the necessary means for an extensive internal improvement").

B. [14.47] Equitable Deviation

While cy pres involves altering the purpose to which the corpus of the trust is to be applied, equitable deviation deals only with altering the administrative provisions of a trust. *In re Estate of Offerman,* 153 Ill.App.3d 299, 505 N.E.2d 413, 417, 106 Ill.Dec. 107 (3d Dist. 1987). Often, the grantor of a charitable trust will clearly indicate a primary charitable intention and a distinct manner of carrying out that intention. However, it may later become hard or even impossible to implement the specific manner delineated by the grantor. If the grantor's purpose can still be fulfilled, albeit by some other method, then the trustee may petition the court to alter the trust pursuant to the doctrine of equitable deviation and allow the trustee to use the alternative method. *Village of Hinsdale v. Chicago City Missionary Soc.,* 375 Ill. 220, 30 N.E.2d 657, 664 (1940).

While cy pres applies only to charitable trusts, equitable deviation is applicable to all trusts, charitable or private, and without regard to whether the grantor manifests both a general and a specific charitable intent. *Burr v. Brooks,* 75 Ill.App.3d 80, 393 N.E.2d 1091, 1095, 30 Ill.Dec. 744 (4th Dist. 1979), *aff'd,* 83 Ill.2d 488 (1981). Additionally, unlike cy pres generally, equitable deviation can be implemented even when the grantor provides an alternate use for the trust if the primary use fails or is refused. *Id.*

1. [14.48] Requirements

The requirements for stating a case for equitable deviation are less strenuous than for a case of cy pres. One way to establish a case for equitable deviation is to show that the administrative apparatus established for carrying out the grantor's charitable purpose has become illegal, impossible, or impractical and that the purpose may still be fulfilled if the manner of carrying it out is altered. *In re Estate of Offerman,* 153 Ill.App.3d 299, 505 N.E.2d 413, 417, 106 Ill.Dec. 107 (3d Dist. 1987).

Another possible avenue is to establish that due to circumstances not known to the testator at the time the bequest was made, literal compliance with the provision would actually defeat or impair the purpose of the trust. *Id.* If necessary, a court in this situation may permit a trustee to undertake acts that are not authorized or are actually forbidden by the trust. RESTATEMENT (SECOND) OF TRUSTS §381, cmt. d (1959).

2. [14.49] Common Problems

The Illinois Supreme Court recognized the doctrine of equitable deviation in *Burr v. Brooks,* 83 Ill.2d 488, 416 N.E.2d 231, 235 – 236, 48 Ill.Dec. 200 (1981) (recognizing doctrine as defined by RESTATEMENT (SECOND) OF TRUSTS §381 (1959), but finding it inapplicable under circumstances), *aff'g* 75 Ill.App.3d 80 (4th Dist. 1979). However, Illinois cases have not clearly

distinguished this doctrine from the similar principles that permit a court to execute a charitable trust cy pres. *See Burr, supra.* When there is a dearth of caselaw pertaining to an issue, the courts will look to the RESTATEMENT for guidance. Additionally, it is helpful to look to decisions of other jurisdictions for illustrative examples of when the doctrine may be used.

a. [14.50] Investments and Income Only

In *In re Trusteeship Under Agreement with Mayo,* 259 Minn. 91, 105 N.W.2d 900, 903 (1960), the provisions of the applicable trust prohibited investments in real estate and corporate stocks. This prohibition caused unforeseen shrinkage in the value of the trust over time due to a period of inflation. The trustees argued that the donor's ultimate intention was to preserve the value of the trust corpus and that this intention would be thwarted unless the court allowed the trustees to deviate from the investment provisions in the trust and invest part of the funds in corporate stocks. 105 N.W.2d at 902. The court noted that it would not permit such a deviation merely because it would be advantageous to the beneficiaries to make it but that this sort of deviation was acceptable, if owing to changes since the creation of the trust, the accomplishment of the purposes of the trust would be otherwise defeated or substantially impaired. 105 N.W.2d at 904. Ultimately, the court found that the economic and financial conditions unforeseen to the grantor compelled deviation to prevent loss of the principal of the trusts. 105 N.W.2d at 904 – 905.

The Supreme Court of Mississippi allowed a trustee to deviate from the income-only provision of a trust and invade the corpus of the trust when the income had become insufficient to maintain the purpose of the trust. *Merchants Bank & Trust Co. v. Garrett,* 203 Miss. 182, 33 So.2d 603 (1948). The trust was created to maintain an "Old Ladies Home," but the point had been reached at which the home could not be kept up on the income from the stated endowment. The court found that unless it allowed the requested deviation, the residence would have to be vacated and would thereupon be useless. 33 So.2d at 604. It inferred that had the testator foreseen this situation, she would not have left her arrangements in such shape that the residents of the home would be turned out while the endowment would merely accumulate without being of any service to anybody. *Id.*

In another case, a hospital beneficiary of a trust, the income only of which was to be made available for hospital purposes, petitioned the court for allowance to borrow from the corpus of the trust fund to finish the furnishing and equipping of a new main building. *Trustees of Alexander Linn Hospital Ass'n v. Richman,* 46 N.J.Super. 594, 135 A.2d 221 (1957). The court recognized that it had the power to authorize such invasion of the trust corpus even when the designated use was limited to income only. 135 A.2d at 223, citing RESTATEMENT OF TRUSTS §167 (1935). In situations in which the existence of the trust itself is in danger, or in which the successful operation of the trust is threatened, courts can protect the public welfare by modifying the grantor's intent to the extent necessary to preserve the trust. 135 A.2d at 223. Thus, the court allowed the hospital to borrow from the trust corpus to complete the furnishing of the new building when the hospital secured the loan by a second mortgage on the hospital property.

In another case arising in New Jersey, a school's gymnasium was destroyed by fire, and the replacement of the gymnasium was essential to the survival of the school. *Morristown School, Inc. v. Parsons,* 23 N.J.Super. 146, 92 A.2d 646 (1952). The school needed $40,000 to complete

the new facility and thereby avoid the otherwise inevitable closing of the school altogether. The school was endowed by a trust fund that allowed the school to use the income of the fund to increase salaries, to provide scholarships for worthy boys, or for any desirable general purposes. The court noted that were the school to close permanently, there would be no students to benefit from the fund, and thus the purpose of the fund would be frustrated. 92 A.2d at 647. The court therefore allowed the school to borrow from the fund to invest in a second mortgage and complete the construction of the gymnasium.

The Supreme Court of Errors of Connecticut allowed for deviation from the express provision of a trust requiring that the trustees make investments only in mortgages of double the value of the amount invested. *Second Ecclesiastical Soc. of Hartford v. Attorney General,* 133 Conn. 89, 48 A.2d 266 (1946). When there was a lack of such mortgages such that an investment had become practically impossible, the dominant intent of the testator to provide funds for religious and charitable uses was frustrated and could be served only by the substitution of a method of investment that would be safe and provide funds for the intended purpose. 48 A.2d at 268 (holding that deviation from trust's investment requirements was necessary to maintain charity in then-current economic climate). Similarly, in a New York case in which a donor created a trust for the benefit of a specific church and stated that the purpose of the trust was to maintain the entire edifice of the church, the court allowed a deviation from an administrative investment direction on the ground that the change in economic circumstances had made the income inadequate for the purpose intended by the grantor. *In re Trustees of Estate & Property of Diocesan Convention of New York,* 126 Misc.2d 860, 484 N.Y.S.2d 406 (Sur. 1984).

b. [14.51] Restrictions on Trustee

Sometimes circumstances not known or unforeseeable to the grantor make compliance with the grantor's specific directions and restrictions substantially harmful to the accomplishment of the purpose of the trust. RESTATEMENT (SECOND) OF TRUSTS §167, cmt. a (1959). In this scenario, a court will permit the trustee not to comply with the specific direction when such compliance would be enough to at least substantially impair the purpose of the trust. *Id.* Thus, the RESTATEMENT dictates that even when the sale of certain property is prohibited by the terms of the trust, a court may direct the sale of the property nonetheless if its retention would result in a serious loss to the trust estate. *Id.* However, deviation from the terms of the trust will not be permitted just because such deviation would be advantageous to the beneficiaries; rather, it must be necessary to fulfill the purpose of the trust. RESTATEMENT §167, cmt. b.

c. [14.52] Inefficiency

In some cases, a trust estate either is or becomes so small that the interests of the beneficiaries would be better served by terminating the trust altogether. RESTATEMENT (THIRD) OF TRUSTS §66, cmt. d (2003). In these cases, the court may order the termination of the trust and shall then direct distribution of the funds in a manner consistent with the likely intention of the grantor. *Id.* In this regard, it should be noted that effective June 1, 2008, trustees have statutory authority under the Trusts and Trustees Act, 760 ILCS 5/1, *et seq.,* to terminate trusts when their value is less than $100,000. 760 ILCS 5/4.26. *But see National City Bank of Michigan/Illinois v.*

Northern Illinois University, 353 Ill.App.3d 282, 818 N.E.2d 453, 288 Ill.Dec. 765 (2d Dist. 2004) (equitable deviation inapplicable when no impediment hindered administration of trust, despite fact that proposed deviation would allegedly allow trust to avoid federal excise taxes and administrative costs).

C. [14.53] Equitable Deviation and Cy Pres Under the Uniform Prudent Management of Institutional Funds Act

The Uniform Prudent Management of Institutional Funds Act makes it clear that the doctrines of cy pres and equitable deviation apply to charitable funds held by not-for-profit corporations as well as to funds held by charitable trusts.

As to equitable deviation from a restriction, UPMIFA provides that the court, upon application by the charity, may modify a restriction contained in the gift instrument regarding the management or investment of a charitable fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of the restriction will further the purposes of the fund. UPMIFA provides that the Illinois Attorney General shall be notified and that to the extent practicable, any modification must be made in accordance with the donor's probable intention. 760 ILCS 51/6(b).

UPMIFA further provides, as to the doctrine of cy pres, that if a particular charitable purpose or restriction becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application by the charity, may modify the purpose of the fund or the restriction in a manner consistent with the charitable purposes expressed in the gift instrument. Again, the charity shall notify the Illinois Attorney General of the application to court, and the Attorney General will have an opportunity to be heard. 760 ILCS 51/6(c).

D. [14.54] Process and Procedure

The usual procedure for invoking the court's powers of cy pres or equitable deviation is by petition in the chancery or probate division. In Cook County, venue would be proper in the Probate Division if the action arises during the administration of a related estate (Cook County Circuit Court Rule 12.1), and, in all other cases, the Chancery Division would be the appropriate forum. If the usual jurisdictional requirements regarding diversity of citizenship and amount in controversy are met, federal courts would also have subject-matter jurisdiction. 28 U.S.C. §1332.

Because charitable trusts are often perpetual, and by definition unforeseen circumstances can arise at any time, there is no statute of limitations on either cy pres or equitable deviation (in any cases the authors could locate). It may be that in certain situations laches would apply because the doctrines bear some similarity to construction actions.

Necessary parties include all trust beneficiaries and the Illinois Attorney General. Service can be had on the Charitable Trust Bureau in Chicago. Typically, the Attorney General would be listed in the caption as, *e.g.,* "*The People of the State of Illinois ex rel.* [Lisa Madigan]." If the trust is not wholly charitable, or if there is a possibility of reversion or gift over, guardians ad litem for minors and unborn beneficiaries may need to be appointed unless the court is persuaded

that common-law virtual representation applies such that their interests are adequately protected by the adult beneficiaries. Especially in cy pres cases, the court may order that the settlor's heirs or legatees be made parties because they may want to argue that the trust fails and reverts to them.

The petition itself should state the background facts, the reason the changes are necessary, the proposed modifications, and whether the relief requested is pursuant to cy pres or equitable deviation. Serious consideration should be given to approaching the Attorney General prior to filing because the support of that office for the relief requested is invaluable to the success of the petition.

15 Apportionment and Statutory Rights of Recovery

PEGGY A. QUINN
McDermott Will & Emery LLP
Chicago

The contribution of Margaret Sanne Molina to the previous edition of this chapter is gratefully acknowledged.

I. Apportionment of Federal Estate Tax

A. Federal Law
   1. [15.1] Federal Law Generally Does Not Apportion Federal Estate Tax
   2. [15.2] Executor Required To Pay Federal Estate Tax (Internal Revenue Code §2002)
   3. Code Provides Limited Recovery Rights
      a. [15.3] Reimbursement from Estate and Other Beneficiaries (Internal Revenue Code §2205)
      b. [15.4] Recovery from Life Insurance Beneficiaries (Internal Revenue Code §2206)
         (1) [15.5] Waiver of right to recover
         (2) [15.6] Failure to recover/delay in recovering
      c. [15.7] Recovery from Recipients of General Power of Appointment Property (Internal Revenue Code §2207)
         (1) [15.8] Waiver of right to recover
         (2) [15.9] Failure to recover/delay in recovering
      d. [15.10] Recovery from Recipients of Qualified Terminable Interest Property (Internal Revenue Code §2207A)
         (1) [15.11] Waiver of right to recover
         (2) [15.12] Failure to recover/delay in recovering
      e. [15.13] Recovery from Recipients of Property in Which Decedent Retained Interest (Internal Revenue Code §2207B)
         (1) [15.14] Waiver of right to recover
         (2) [15.15] Failure to recover/delay in recovering

B. [15.16] Illinois Law
   1. [15.17] Decedent's Intentions Control Apportionment of Federal Estate Tax
   2. [15.18] Federal Estate Tax Equitably Apportioned Between Probate and Nonprobate Assets
   3. [15.19] No Equitable Apportionment of Federal Estate Tax Among Probate Assets
   4. [15.20] Special Equitable Apportionment Rules for Marital Deduction Property and Charitable Deduction Property

II. Apportionment of Illinois Estate Tax

A. [15.21] Illinois Reimbursement Statute
B. [15.22] Illinois Common Law and Other Statutory Provisions

III. Apportionment of Generation-Skipping Tax

A. Federal Law
   1. [15.23] Code Defines Three Types of Generation-Skipping Transfers
   2. [15.24] General Rules: Type of Transfer Determines Primary Liability for Generation-Skipping Transfer Tax
   3. [15.25] Special Rules: Direct Skips Occurring at Death from Trust Arrangements
   4. [15.26] Generation-Skipping Transfer Tax Paid from Property Generating Tax

B. [15.27] Illinois Law

IV. [15.28] Apportionment of Estate Administration Expenses

I. APPORTIONMENT OF FEDERAL ESTATE TAX

A. Federal Law

1. [15.1] Federal Law Generally Does Not Apportion Federal Estate Tax

Riggs v. Del Drago, 317 U.S. 95, 87 L.Ed. 106, 63 S.Ct. 109 (1942), is the seminal case defining the interplay of state law and federal law in the apportionment of federal estate tax. In *Riggs,* the Supreme Court reviewed the New York Court of Appeals' holding that New York's death tax apportionment statute violated the Supremacy and Uniformity Clauses of the U.S. Constitution by contradicting federal law requiring the payment of federal estate tax from the decedent's residuary estate. 63 S.Ct. at 110. The Supreme Court reversed the New York Court of Appeals and upheld the constitutionality of New York's apportionment statute. 63 S.Ct. at 112. The Supreme Court found that, contrary to the New York court's conclusion, federal law generally does not specify who shall bear the federal estate tax burden, as Congress intended that state law should place the ultimate burden. 63 S.Ct. at 110 – 112.

However, the Supreme Court in *Riggs* did note that federal law does govern the apportionment of federal estate tax generated by certain types of property. 63 S.Ct. at 111. In this regard, the Supreme Court identified the statutory predecessors to Internal Revenue Code §§2206 (permitting the executor to recover federal estate tax from the beneficiaries of insurance proceeds) and 2207 (permitting the executor to recover federal estate tax from the recipients of general power-of-appointment property) as exceptions to the general rule that state law controls the apportionment of federal estate tax. 63 S.Ct. at 111. The Illinois appellate court has acknowledged the supremacy of federal recovery rights under Code §§2206 and 2207. *See Estate of Lyons,* 98 Ill.App.3d 995, 425 N.E.2d 19, 20, 54 Ill.Dec. 507 (2d Dist. 1981). Code §§2207A and 2207B, which became effective after *Riggs* and *Lyons* were decided, grant executors additional federal estate tax recovery rights and should likewise preempt state apportionment laws. The Code's federal estate tax recovery provisions are discussed in §§15.3 – 15.15 below.

2. [15.2] Executor Required To Pay Federal Estate Tax (Internal Revenue Code §2002)

Internal Revenue Code §2002 requires the executor of an estate to pay all federal estate tax generated by the decedent's death. For purposes of Chapter 11 of the Code, which comprises the federal estate tax provisions, Code §2203 defines "executor" to mean the executor or administrator or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent. Thus, for example, if no probate estate is opened after an individual's death, then the trustee of assets held in the decedent's revocable trust and any other custodian of the decedent's assets constitutes an "executor" for purposes of the federal estate tax provisions.

In *Riggs v. Del Drago,* 317 U.S. 95, 87 L.Ed. 106, 63 S.Ct. 109, 110 – 111 (1942), the Supreme Court clarified that Code §2002's requirement that the executor pay the decedent's federal estate tax does not apportion federal estate tax to the probate estate but merely provides a mechanism for the payment of federal estate tax.

3. Code Provides Limited Recovery Rights

a. [15.3] Reimbursement from Estate and Other Beneficiaries (Internal Revenue Code §2205)

A person, other than the executor, might initially pay a portion or all of a decedent's federal estate tax out of estate property passing to or in the possession of such person. For example, if federal estate taxes are not paid when due, the Internal Revenue Service may collect the tax from a person who receives property included in the gross estate to the extent of the date-of-death value of such property. 26 U.S.C. §§6301, 6324. As a result, the person may pay federal estate tax in excess of the person's share of tax under applicable apportionment law. Code §2205 grants such a person a right to obtain reimbursement from the estate or other estate beneficiaries to the extent necessary to achieve the proper apportionment of the federal estate tax under applicable law.

The final clause of Code §2205 states that it is "the purpose and intent of this chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." In *Riggs v. Del Drago,* 317 U.S. 95, 87 L.Ed. 106, 63 S.Ct. 109, 112 (1942), the New York Court of Appeals had interpreted this language to mean that federal law required the payment of federal estate taxes from the residue of the probate estate. The Supreme Court in *Riggs* dispelled this construction, stating that the precursor to Code §2205

> **does not direct how the estate is to be distributed, nor does it determine who shall bear the ultimate burden of the tax. . . .** [It] **simply provides that, if the tax must be collected after distribution, the final impact of the tax shall be the same as though it had first been taken out of the estate before distribution, thus leaving to state law the determination of where that final impact shall be.** 63 S.Ct. at 111 – 112.

Hence, Code §2205 does not apportion the federal estate tax to the probate estate residue but provides a beneficiary with a means to enforce the applicable apportionment laws if the beneficiary pays more than the beneficiary's share of the federal estate tax.

b. [15.4] Recovery from Life Insurance Beneficiaries (Internal Revenue Code §2206)

Internal Revenue Code §2206 gives the executor of an estate a federal estate tax recovery right if any part of the gross estate on which federal estate tax has been paid consists of proceeds from insurance policies on the decedent's life receivable by a beneficiary other than the executor. The executor is entitled to recover from the beneficiary of those insurance proceeds such portion of the total federal estate tax paid as those insurance proceeds bear to the taxable estate. 26 U.S.C. §2206. If there is more than one beneficiary, the executor is entitled to recover from each of them in the same ratio. *Id.*

Code §2206 specifically provides that the executor's recovery right does not apply to insurance proceeds for which a marital deduction is allowed pursuant to Code §2056. Code §2206 limits this exemption from recovery to the extent the insurance proceeds for which a marital deduction is allowed exceed the aggregate marital deduction allowed the decedent's estate. Code

§2206 has not been amended since the marital deduction became unlimited in 1982. Presumably, the limitation on the recovery exemption was intended to preserve the executor's Code §2206 recovery right to the extent insurance proceeds passing to the surviving spouse generated federal estate tax. Now that the marital deduction is unlimited, the aggregate marital deduction allowed an estate will not be less than the insurance proceeds for which a marital deduction is allowed, and the limitation on the recovery exemption for marital deduction insurance proceeds will be inapplicable.

Code §2206 calculates the aggregate amount the executor may recover from beneficiaries of insurance proceeds as follows:

$$\text{Aggregate amount recoverable under §2206} = \frac{\text{Code §2042(2) proceeds, excluding proceeds for which a marital deduction is allowed}}{\text{Taxable estate}} \times \text{Total federal estate tax paid}$$

Although the Code §2206 recovery formula specifically provides for a denominator net of deductions by specifying that the denominator be the taxable estate, it does not specifically provide for such reduction of the numerator except in the case of the marital deduction. Nevertheless, the author suggests that the practitioner consider reducing the numerator by all deductions allowed with respect to insurance proceeds included in the gross estate under Code §2042(2) in calculating the recoverable amount, including deductions allowed pursuant to Code §§2053 (deduction for expenses, indebtedness, and taxes) and 2055 (charitable deduction). Code §2206's specific exemption from recovery for marital deduction property suggests the reasonable principle that the recovery right should not apply to property that does not generate tax. Consistent application of this principle would require reduction of the numerator for all deductions allowed with respect to the insurance proceeds. The author also notes that the use of a numerator net of only marital deduction property and a denominator net of all deductions is mathematically inconsistent. In addition, use of a numerator net of all deductions would be consistent with the approach called for under the regulations applicable to the Code §2207A recovery right discussed in §§15.10 – 15.12 below. However, the practitioner should note that Code §2206 does not explicitly sanction this approach, and the author found no authority supporting it.

(1) [15.5] Waiver of right to recover

The Internal Revenue Code §2206 recovery right does not apply if the "decedent directs otherwise in his will." 26 U.S.C. §2206.

Estate of Kahanic v. Commissioner, 103 T.C.M. (CCH) 1434, 1445 (2012), evaluates what constitutes a sufficient "otherwise" direction under Code §2206 in the context of determining whether interest on a loan made to the estate was actually and reasonably necessary in the administration of the estate for purposes of a Code §2053(a)(2) deduction. In *Kahanic,* the Tax Court found that, when the Illinois decedent's will provided that estate tax liabilities were to be paid first out of the decedent's residuary estate and, if insufficient, out of the decedent's declaration of trust, and also waived "any right of reimbursement for, recovery of, or contribution

toward the payment of . . . taxes," the executor did not have a right pursuant to Code §2206 to request contribution from the beneficiary of life insurance proceeds included in the decedent's gross estate when the estate had sufficient, albeit illiquid, assets to cover its estate tax liabilities. *Id*. See also Tech.Adv.Mem. 199915001 (Apr. 16, 1998).

No Illinois case has analyzed what constitutes a sufficient "otherwise" direction under Code §2206. However, the Illinois appellate court in *In re Estate of Miller,* 230 Ill.App.3d 141, 595 N.E.2d 630, 172 Ill.Dec. 269 (5th Dist. 1992), provided helpful guidance when it interpreted virtually identical statutory language under Code §2207A, as then in effect. Before amendment by the Taxpayer Relief Act of 1997 (TRA '97), Pub.L. No. 105-34, 111 Stat. 788, Code §2207A(a)(2) provided that the Code §2207A recovery right did not apply if the decedent "otherwise direct[ed] by will." The *Miller* court held that a will provision directing the executor to pay all estate taxes assessed by reason of the decedent's death, "without reimbursement or contribution," was sufficient to waive the Code §2207A recovery right. 595 N.E.2d at 633 – 634. Thus, such a direction should also effectively waive the Code §2206 recovery right.

(2) [15.6] Failure to recover/delay in recovering

Although no regulations have been promulgated under Internal Revenue Code §2206 regarding the gift and income tax consequences of a failure to enforce or a delay in enforcing the Code §2206 recovery right, the regulations promulgated under Code §2207A should provide guidance. See §15.12 below.

c. [15.7] Recovery from Recipients of General Power of Appointment Property (Internal Revenue Code §2207)

Internal Revenue Code §2207 gives the executor of an estate a federal estate tax recovery right if any part of the gross estate on which federal estate tax has been paid consists of property included in the gross estate under Code §2041 (general power of appointment (GPA) property). The executor is entitled to recover from the person receiving the GPA property by reason of the exercise, non-exercise, or release of the power of appointment such portion of the total tax paid as the value of the GPA property bears to the taxable estate. 26 U.S.C. §2207. If there is more than one recipient of GPA property, the executor is entitled to recover from each of them in the same ratio. *Id.*

Code §2207 specifically provides that the executor's recovery right does not apply to GPA property received by the decedent's surviving spouse for which a marital deduction is allowed pursuant to Code §2056. Code §2207 limits this exemption from recovery to the extent the value of the GPA property for which a marital deduction is allowed exceeds the aggregate marital deduction allowed the decedent's estate, less life insurance proceeds for which a marital deduction is allowed. Code §2207 has not been amended since the marital deduction became unlimited in 1982. Presumably, this limitation on the recovery exemption was intended to preserve the executor's Code §2207 recovery right to the extent the GPA property passing to the surviving spouse generated federal estate tax and to prioritize the application of the Code §§2206 and 2207 recovery rights. Now that the marital deduction is unlimited, the aggregate marital

deduction allowed an estate will not be less than the GPA property and insurance proceeds for which a marital deduction is allowed, and the limitation on the recovery exemption for marital deduction GPA property will be inapplicable.

Code §2207 calculates the aggregate amount the executor may recover from recipients of GPA property as follows:

$$\text{Aggregate amount recoverable under §2207} = \frac{\text{GPA property, excluding property for which a marital deduction is allowed}}{\text{Taxable estate}} \times \text{Total federal estate tax paid}$$

As with the Code §2206 recovery formula (see §15.4 above), the Code §2207 recovery formula specifically provides for a denominator net of deductions by specifying that the denominator be the "taxable estate" but does not provide for such reduction of the numerator except in the case of the marital deduction. For the same reasons described in the discussion of Code §2206 in §15.4 above, the author suggests that the practitioner consider reducing the numerator by all deductions allowed with respect to GPA property included in the gross estate in calculating the recoverable amount. The practitioner should note, however, that Code §2207 does not explicitly sanction this approach, and the author found no authority supporting it.

(1) [15.8] Waiver of right to recover

The Internal Revenue Code §2207 recovery right does not apply if the "decedent directs otherwise in his will."

Estate of Kahanic v. Commissioner, 103 T.C.M. (CCH) 1434, 1445 (2012), discussed in §15.5 above, is instructive in analyzing what constitutes a sufficient "otherwise" direction under Code §2207, as the Tax Court in *Kahanic* interpreted identical statutory language under Code §2206. In *Kahanic,* the Tax Court found that where the Illinois decedent's will provided that estate tax liabilities were to be paid first out of the decedent's residuary estate and, if insufficient, out of the decedent's declaration of trust, and also waived "any right of reimbursement for, recovery of, or contribution toward the payment of . . . taxes," the executor of the estate did not have a right pursuant to Code §2206 to request contribution from the beneficiary of life insurance proceeds included in the decedent's gross estate where the estate had sufficient, albeit illiquid, assets to cover its estate tax liabilities. *Id*. Thus, such language also should be sufficient to waive the Code §2207 recovery right.

No Illinois case has analyzed what constitutes a sufficient "otherwise" direction under Code §2207. However, *In re Estate of Miller,* 230 Ill.App.3d 141, 595 N.E.2d 630, 633 – 634, 172 Ill.Dec. 269 (5th Dist. 1992), likewise discussed in §15.5 above, also is instructive in analyzing the sufficiency of an "otherwise" direction under Code §2207, as the Illinois appellate court in *Miller* interpreted virtually identical statutory language under Code §2207A, as then in effect. The *Miller* court held that a will provision directing the executor to pay all estate taxes assessed by reason of the decedent's death, "without reimbursement or contribution," was sufficient to waive the Code §2207A recovery right. 595 N.E.2d at 633 – 634. Thus, such a direction also should effectively waive the Code §2207 recovery right.

(2) [15.9] Failure to recover/delay in recovering

Although no regulations have been promulgated under Internal Revenue Code §2207 regarding the gift and income tax consequences of a failure to enforce or a delay in enforcing the Code §2207 recovery right, the regulations promulgated under Code §2207A should provide guidance. See §15.12 below.

d. [15.10] Recovery from Recipients of Qualified Terminable Interest Property (Internal Revenue Code §2207A)

Internal Revenue Code §2207A gives an estate a federal estate tax recovery right if qualified terminable interest property (QTIP) is included in the gross estate pursuant to Code §2044. The recovery right arises when the federal estate tax with respect to the QTIP has been paid. 26 C.F.R. §20.2207A-1(a)(1).

The aggregate amount that the estate is entitled to recover from the recipients of QTIP pursuant to Code §2207A is the incremental increase in the federal estate tax (including penalties and interest attributable to such increase) resulting from inclusion of QTIP in the gross estate. Treas.Reg. §20.2207A-1(b) defines the "incremental increase" as the amount by which the total federal estate tax paid (including penalties and interest attributable to the tax) exceeds the total federal estate tax (including penalties and interest attributable to the tax) that would have been paid if the QTIP had not been included. 26 C.F.R. §20.2207A-1(b).

If there are multiple sources of QTIP, Treas.Reg. §20.2207A-1(c) calculates the aggregate amount recoverable from the recipients of a particular property by multiplying the aggregate amount recoverable from all recipients of QTIP by the following fraction:

$$\frac{\text{Particular QTIP, less deductions allowed with respect to such property}}{\text{All QTIP, less deductions allowed with respect to all QTIP}}$$

26 C.F.R. §20.2207A-1(c).

Code §2207A(c) provides that if there is more than one person receiving the QTIP, "the right of recovery shall be against each such person." 26 U.S.C. §2207A(c). The ambiguous wording of this section could be interpreted to create a joint and several recovery right against each recipient of QTIP. This reading, however, is not clearly mandated by the Code, the regulations, or any other authority. Absent such authority, the author believes that Code §2207A is better interpreted to permit an estate to recover from each recipient of QTIP only the incremental increase in federal estate tax (including penalties and interest) generated by the QTIP received by that recipient.

If QTIP is held in trust on the decedent's death, the estate may recover from the trustee of the QTIP trust and any person to whom QTIP trust property is distributed before the expiration of the estate's right of recovery. 26 C.F.R. §§20.2207A-1(d), 20.2207A-1(e). The Treasury Regulations appear to provide that the estate is entitled to recover from the QTIP trustee regardless of whether the trustee has retained the trust property. Thus, a QTIP trustee should satisfy, or maintain

reserves to satisfy, Code §2207A recovery rights before distributing QTIP. Otherwise, the trustee may be forced to seek reimbursement from the trust beneficiaries after the estate recovers from the trustee. 26 C.F.R. §20.2207A-1(d).

(1) [15.11] Waiver of right to recover

For decedents dying on or before August 5, 1997, the Internal Revenue Code §2207A recovery right did not apply if the decedent "otherwise direct[ed] by will." 26 U.S.C. §2207A(a)(2) (as in effect prior to Taxpayer Relief Act of 1997). TRA '97 amended the waiver requirements of Code §2207A to provide that, for decedents dying after August 5, 1997, the Code §2207A recovery right does not apply to any qualified terminable interest "property to the extent that the decedent in his will (or a revocable trust) specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property." 26 U.S.C. §2207A(a)(2).

The legislative history for TRA '97 indicates that Congress intended to eliminate the inadvertent waivers of Code §2207A recovery rights that were common under the prior version of Code §2207A(a)(2). See TRA '97, H.R.Rep. No. 148, 105th Cong., 1st Sess. 614 (1997). The legislative history suggests that a waiver specifically referring to "QTIP, the QTIP trust, section 2044, or section 2207A" would be sufficient to comply with Code §2207A(a)(2) as amended. *Id.* These examples highlight the importance of the amended statutory language requiring the decedent to "*specifically indicate[ ]* an intent to waive *any right of recovery under this subchapter with respect to such property.*" [Emphasis added.] 26 U.S.C. §2207A(a)(2).

The amended statutory waiver language has not yet been interpreted by the Illinois courts. However, the general waiver of recovery rights found to be a sufficient waiver under prior law in *In re Estate of Miller,* 230 Ill.App.3d 141, 595 N.E.2d 630, 633 – 634, 172 Ill.Dec. 269 (5th Dist. 1992), discussed in §15.5 above, probably would not suffice under Code §2207A(a)(2) as amended. At minimum, the language of Code §2207A appears to require specific reference to waiver of federal recovery rights with respect to the specific QTIP or, at least, QTIP as a category of property for which the waiver applies. To ensure an effective waiver, the decedent's will or revocable trust should specifically indicate an intention to waive federal recovery rights under Code §2207A with respect to the intended QTIP or all QTIP includable in the decedent's gross estate.

(2) [15.12] Failure to recover/delay in recovering

If an estate fails to enforce its Internal Revenue Code §2207A recovery right, the persons who would have benefited from the recovery are treated as making a transfer for federal gift tax purposes of the unrecovered amount to the persons from whom the amount was recoverable. 26 C.F.R. §20.2207A-1(a)(2). The transfer is considered made when the recovery right is no longer enforceable under applicable law. *Id.*

However, a failure to recover under Code §2207A will not be treated as an addition of nonexempt property to a qualified terminable interest property trust for which a reverse QTIP election was made on the death of the first spouse to die (26 C.F.R. §§26.2652-1(a)(3), 26.2652-1(a)(5), Example 7) or to a QTIP trust irrevocable on September 25, 1985, as described

in Treas.Reg. §26.2601-1(b)(1)(ii) (26 C.F.R. §§26.2601-1(b)(1)(v)(C), 26.2601-1(b)(1)(ii), 26.2601-1(b)(1)(iii), 26.2652-1(a)(3), 26.2652-1(a)(5), Example 7).

Treas.Reg. §20.2207A-1(a)(2) was amended by final regulations issued in 2003. T.D. 9077, 68 Fed.Reg. 42,593 (July 18, 2003). Before the 2003 amendment, Treas.Reg. §20.2207A-1(a)(2) provided that a delay in the exercise of the Code §2207A right of recovery may be treated as an interest-free loan with appropriate gift tax consequences under Code §7872 depending on the facts of the particular case. Amended Treas.Reg. §20.2207A-1(a)(2) provides that a delay in the exercise of the Code §2207A right of recovery without payment of sufficient interest is a below-market loan.

Amended Treas.Reg. §20.2207A-1(a)(2) goes on to say that Temp.Treas.Reg. §1.7872-5T "describes factors used to determine, based on the facts and circumstances of a particular case, whether a loan otherwise subject to imputation under section 7872 . . . is exempted from its provisions." 26 C.F.R. §20.2207A-1(a)(2). The "Explanation of Provisions" in T.D. 9077 points out that the Treasury Department and the IRS believe that, in most cases, a reasonable delay in the exercise of the right of recovery will result in a loan without significant tax effect under the facts-and-circumstances test in Temp.Treas.Reg. §1.7872-5T(c)(3), which is exempt from the application of Code §7872. 68 Fed.Reg. 42,593-01. Treas.Reg. §20.2207A-1(a)(3) provides that the gift and below-market loan provisions of Treas.Reg. §20.2207A-1(a)(2) do not apply if the surviving spouse's will provides that recovery shall not be made or to the extent that the persons who would benefit from recovery cannot otherwise compel recovery.

e. [15.13] Recovery from Recipients of Property in Which Decedent Retained Interest (Internal Revenue Code §2207B)

Internal Revenue Code §2207B gives an estate a federal estate tax recovery right if any part of the gross estate on which federal estate tax has been paid consists of property included in the gross estate pursuant to Code §2036 (Code §2036 property). In the aggregate, the estate is entitled to recover from the recipients of Code §2036 property such portion of the total federal estate tax paid (including penalties and interest attributable to the tax) as the value of the Code §2036 property bears to the taxable estate. 26 U.S.C. §§2207B(a)(1), 2207B(c). Code §2207B(d) specifically provides that the §2207B recovery right does not apply to charitable remainder trusts (trusts to which Code §664 applies).

Code §2207B calculates the aggregate amount an estate may recover from recipients of Code §2036 property as follows:

$$\text{Aggregate amount recoverable under Code §2207B} = \frac{\text{Code §2036 property, excluding charitable remainder trust property}}{\text{Taxable estate}} \times \text{Total federal estate tax, penalties, and interest paid}$$

As with the Code §§2206 and 2207 recovery formulas, the Code §2207B recovery formula specifically provides for a denominator net of deductions — the taxable estate — but does not provide for such reduction of the numerator except in the case of charitable remainder trust

property. For the same reasons described in the discussion of Code §2206 in §15.4 above, the author suggests that the practitioner consider reducing the numerator by all deductions allowed with respect to Code §2036 property included in the gross estate in calculating the recoverable amount. The practitioner should note, however, that Code §2207B does not explicitly sanction this approach, and the author found no authority supporting it.

Code §2207B(b) provides that if there is more than one person receiving the Code §2036 property, the estate's "right of recovery shall be against each such person." As with Code §2207A(c), the ambiguous wording of Code §2207B(b) could be interpreted to create a joint and several right of recovery against each recipient of Code §2036 property. This reading, however, is not clearly mandated by the Code or any other authority. Absent such authority, the author believes that Code §2207B is better interpreted to permit an estate to recover from each recipient of Code §2036 property only the proportionate share of federal estate tax, interest, and penalties generated by the Code §2036 property received by that recipient.

(1) [15.14] Waiver of right to recover

For decedents dying on or before August 5, 1997, the Internal Revenue Code §2207B recovery right did "not apply if the decedent otherwise direct[ed] in a provision of his will (or a revocable trust) *specifically referring to this section.*" [Emphasis added.] 26 U.S.C. §2207B(b) (as in effect prior to the Taxpayer Relief Act of 1997). The plain language of former Code §2207B(b) and the scarce authority discussing it agreed that, before TRA '97, waiver of the Code §2207B recovery right required specific reference to Code §2207B. Tech.Adv.Mem. 199918003 (May 7, 1999); *In re Estate of Miller,* 230 Ill.App.3d 141, 595 N.E.2d 630, 634, 172 Ill.Dec. 269 (5th Dist. 1992).

Concerned that the specific statutory reference requirement was too stringent, Congress amended the waiver requirements of Code §2207B for decedents dying after August 5, 1997, in TRA '97. See TRA '97, H.R.Rep. No. 148, 105th Cong., 1st Sess. 614 (1997). Code §2207B(a)(2) now mirrors the language in Code §2207A(a)(2) and provides that the Code §2207B recovery right does not apply "to any property to the extent that the decedent in his will (or a revocable trust) specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property."

The legislative history of TRA '97 provides no guidance regarding what would constitute a sufficient waiver under Code §2207B(a)(2) as amended, other than to say that a specific reference to the section itself is no longer necessary. See TRA '97, H.R.Rep. No. 148, 105th Cong., 1st Sess. 614 (1997).

Although the amended language of Code §2207B(a)(2) has not yet been interpreted by the Illinois courts, a general waiver of reimbursement or recovery rights probably would not suffice. At minimum, the statutory language appears to require specific reference to waiver of federal recovery rights with respect to the specific Code §2036 property, or at least Code §2036 property as a category of property for which the waiver applies. To ensure an effective waiver, the decedent's will or revocable trust should specifically indicate an intention to waive recovery

rights under Code §2207B with respect to the intended Code §2036 property or all Code §2036 property includable in the decedent's gross estate.

(2) [15.15] Failure to recover/delay in recovering

Although no regulations have been promulgated under Internal Revenue Code §2207B regarding the gift and income tax consequences of a failure to enforce or a delay in enforcing the Code §2207B recovery right, the regulations promulgated under Code §2207A should provide guidance. See §15.12 above.

B. [15.16] Illinois Law

Illinois law governs the apportionment of federal estate tax to the extent the federal recovery statutes discussed in §§15.1 – 15.15 above do not apply. Unlike many other states, Illinois does not have an apportionment statute. Instead, as described more fully in §§15.17 – 15.20 below, Illinois caselaw provides for equitable apportionment of federal estate tax between probate and nonprobate property, but not among recipients of probate property.

1. [15.17] Decedent's Intentions Control Apportionment of Federal Estate Tax

The decedent's intentions, expressed in a will or a trust, control the apportionment of federal estate tax under Illinois law. *See Estate of Malik v. Lashkariya,* 369 Ill.App.3d 457, 861 N.E.2d 272, 275 – 276, 308 Ill.Dec. 207 (1st Dist. 2006) (regarding decedent's expression of intentions in will); *Frederick v. Lewis,* 164 Ill.App.3d 240, 517 N.E.2d 742, 743 – 745, 115 Ill.Dec. 331 (4th Dist. 1987), *appeal denied,* 121 Ill.2d 569 (1988); *Lurie v. Commissioner,* 425 F.3d 1021, 1027 (7th Cir. 2005) (regarding decedent's expression of intentions in trust).

2. [15.18] Federal Estate Tax Equitably Apportioned Between Probate and Nonprobate Assets

Absent a contrary expression of intent by the decedent, Illinois law requires equitable apportionment of federal estate tax between probate and nonprobate assets in testate and intestate estates. *In re Estate of Gowling,* 82 Ill.2d 15, 411 N.E.2d 266, 269, 44 Ill.Dec. 297 (1980) (requiring equitable apportionment in testate estate); *Roe v. Estate of Farrell,* 69 Ill.2d 525, 372 N.E.2d 662, 665 – 666, 14 Ill.Dec. 466 (1978) (requiring equitable apportionment in intestate estate). This means that, except as provided in §15.20 below, probate and nonprobate assets bear their proportionate shares of the decedent's federal estate tax liability. *Gowling, supra; Roe, supra.*

Equitable apportionment of federal estate tax between probate and nonprobate property is not waived by a general direction in a will that all "just debts, funeral expenses and any other proper charges against my estate be paid in due course during the administration of my estate." *Estate of Rosta,* 111 Ill.App.3d 786, 444 N.E.2d 704, 710 – 711, 67 Ill.Dec. 468 (1st Dist. 1982). Even a specific direction to the executor to pay "all my debts, legitimate charges against my estate . . . and the expense of the administration of my estate, including any and all taxes and legitimate

claims . . . out of the first monies available therefor" does not waive equitable apportionment. *Estate of Fender v. Fender,* 96 Ill.App.3d 1029, 422 N.E.2d 107, 108 – 111, 52 Ill.Dec. 426 (1st Dist. 1981).

NOTE: In passing, the court in *Fender* stated that before the advent of equitable apportionment in Illinois, Illinois' burden-on-the-residue rule superseded application of the Internal Revenue Code §2206 recovery right in Illinois estates. 422 N.E.2d at 109 and n.1. The author believes that the *Fender* court misstated the interplay of federal and state law apportionment rules and that the Illinois appellate court in *Estate of Lyons,* 98 Ill.App.3d 995, 425 N.E.2d 19, 20, 54 Ill.Dec. 507 (2d Dist. 1981), properly stated that federal law controls apportionment of federal estate tax when Code §2206 is applicable.

By contrast, a direction in a will that all taxes be paid by the decedent's estate waives equitable apportionment between probate and nonprobate property. *Estate of Malik v. Lashkariya,* 369 Ill.App.3d 457, 861 N.E.2d 272, 275 – 276, 308 Ill.Dec. 207 (1st Dist. 2006). In *Estate of Lurie v. Commissioner,* 87 T.C.M. (CCH) 830, 834 (2004), *aff'd,* 425 F.3d 1021 (7th Cir. 2005), the Tax Court, applying Illinois law, found that the following language in the decedent's revocable trust waived equitable apportionment between the revocable trust and other trusts included in the decedent's gross estate:

> **Upon the death of the Grantor, the Trustee shall, to the extent that the assets of the Grantor's estate . . . are insufficient, pay . . . all income, estate, inheritance, transfer and succession taxes . . . which may be assessed by reason of the Grantor's death, without reimbursement from the Grantor's Executor or Administrator, from any beneficiary of insurance upon the Grantor's life, or from any other person.**

As a result, the value of the pre-residuary marital trust created under the revocable trust for the decedent's surviving spouse and the marital deduction were reduced, which substantially increased the estate taxes owed by the estate. *Id.*

Further developing Illinois common law relating to waiver of equitable apportionment, *In re Estate of Fry,* 188 Ill.App.3d 336, 544 N.E.2d 109, 111 – 112, 135 Ill.Dec. 752 (3d Dist. 1989), established the rule that a direction in a will that all estate taxes generated by the decedent's death be paid out of the decedent's *residuary* estate, without reimbursement from any person, not only waived equitable apportionment of federal estate tax between residuary probate property and nonprobate property, but also waived equitable apportionment between pre-residuary probate property and nonprobate property after the residuary probate estate was exhausted (*Fry* rule). Upon exhaustion of the residuary estate, the balance of the federal estate tax was to be paid from the remaining probate assets. *Id*. As a result, the pre-residuary legacies would abate to satisfy the residuary deficit. The Illinois abatement statute provides that, unless otherwise provided by will, if a testator's estate is insufficient to pay all legacies, general legacies abate pro rata to the extent necessary, and, if exhausted, specific legacies abate pro rata. 755 ILCS 5/24-3.

In 2006, the Third District Appellate Court overruled *Fry*. *In re Estate of Williams,* 366 Ill.App.3d 746, 853 N.E.2d 79, 84, 304 Ill.Dec. 547 (3d Dist.), *appeal denied,* 222 Ill.2d 573 (2006). The *Williams* court established a rule that when the testator's will directs the executor to

pay administration expenses and taxes from the residue of the estate, without apportionment or reimbursement, the residue is insufficient to pay all such expenses and taxes, and the will is otherwise silent regarding the source of payment upon the exhaustion of the residue, equitable apportionment between pre-residuary probate property and nonprobate property must be applied (*Williams* rule). 853 N.E.2d at 82 – 84. The court reasoned that in such a case the testator failed to clearly express an intent as to who should bear the excess, making the will ambiguous on that point. 853 N.E.2d at 84.

Although an exhaustive analysis of the proper resolution of conflicts among the various districts of the Illinois appellate court is beyond the scope of this chapter, the author notes that with the Third District's overruling of *Fry, supra,* it is uncertain whether courts in other districts will follow the *Williams* rule or the *Fry* rule, given that other districts have published appellate opinions in place following *Fry*. *See, e.g., Landmark Trust Co. v. Aitken,* 224 Ill.App.3d 843, 587 N.E.2d 1076, 1082 – 1086, 167 Ill.Dec. 461 (5th Dist. 1992); *In re Estate of Overturf,* 353 Ill.App.3d 640, 819 N.E.2d 324, 326 – 328, 289 Ill.Dec. 167 (4th Dist. 2004). "It is fundamental in Illinois that the decisions of an appellate court are binding precedent on all circuit courts regardless of locale." *People v. Harris,* 123 Ill.2d 113, 526 N.E.2d 335, 340, 122 Ill.Dec. 76 (1988). However, "when conflicts arise amongst the districts, the circuit court is bound by the decisions of the appellate court of the district in which it sits" (*Aleckson v. Village of Round Lake Park,* 176 Ill.2d 82, 679 N.E.2d 1224, 1229, 223 Ill.Dec. 451 (1997)), while a circuit court in a district with no precedent is "free to choose between the decisions of the [conflicting] appellate districts" (*State Farm Fire & Casualty Co. v. Yapejian,* 152 Ill.2d 533, 605 N.E.2d 539, 542, 178 Ill.Dec. 745 (1992)). At the appellate court level, it remains to be seen whether the appellate courts in districts with no precedent will follow *Fry* or *Williams* and whether appellate courts in districts with precedent following *Fry* will continue to follow such precedent or will overrule it and follow *Williams*. It also remains to be seen whether the Illinois Supreme Court will weigh in, though the author notes that the Illinois Supreme Court declined to take up the appeal of the Third District's opinion in *Williams*.

3. [15.19] No Equitable Apportionment of Federal Estate Tax Among Probate Assets

Illinois law does not provide for apportionment of federal estate tax among the recipients of probate property absent a specific direction by the decedent.

When a decedent provides no direction regarding federal estate tax apportionment, Illinois law requires that the federal estate tax equitably apportioned to the decedent's probate estate (when the balance of the federal estate tax is equitably apportioned to nonprobate property) or all federal estate tax (when the estate consists only of probate property) be paid first from the residue of the probate estate. *In re Estate of Gowling,* 77 Ill.App.3d 548, 396 N.E.2d 82, 86, 33 Ill.Dec. 6 (4th Dist. 1979) (applying burden-on-the-residue rule to federal estate tax apportioned to probate estate), *aff'd,* 82 Ill.2d 15 (1980); *Haberl v. County of Monroe,* 142 Ill.App.3d 152, 491 N.E.2d 909, 911 – 912, 96 Ill.Dec. 630 (5th Dist. 1986); *In re Estate of Maddux,* 93 Ill.App.3d 435, 417 N.E.2d 266, 268 – 270, 48 Ill.Dec. 864 (5th Dist. 1981) (applying burden-on-the-residue rule when decedent had only probate assets). The Illinois appellate court has interpreted the Illinois Supreme Court's affirmance in *Gowling, supra,* as implicitly approving the application of the burden-on-the-residue rule to federal estate tax allocable to the probate estate. *Maddux, supra,* 417 N.E.2d at 268.

In *In re Estate of Maierhofer,* 328 Ill.App.3d 987, 767 N.E.2d 850, 852 – 854, 263 Ill.Dec. 124 (3d Dist. 2002), the appellate court reaffirmed the burden-on-the-residue rule, holding that equitable apportionment does not apply within the probate estate absent a clear direction by the testator. The court found that the testator's direction to the executor to pay all debts, funeral expenses, and costs of administering the estate, including estate taxes, was consistent with the burden-on-the-residue rule. 767 N.E.2d at 854. It should be noted that the court does not discuss or apply equitable apportionment between probate and nonprobate assets, even though no waiver of equitable apportionment was apparent. It is possible that the issue was not before the court because the nonprobate assets were too insignificant to make such a discussion worthwhile; the court noted that the estate "consisted almost entirely of probate assets." 767 N.E.2d at 853.

If the decedent's residuary estate is exhausted, the balance of the federal estate tax allocable to the probate estate is paid according to the rules governing abatement of estates, not equitably apportioned among pre-residuary legacies. *Gowling, supra,* 396 N.E.2d at 86; *Landmark Trust Co. v. Aitken,* 224 Ill.App.3d 843, 587 N.E.2d 1076, 1082 – 1086, 167 Ill.Dec. 461 (5th Dist. 1992). The Illinois abatement statute provides that, unless otherwise provided by will, if a testator's estate is insufficient to pay all legacies, general legacies abate pro rata to the extent necessary, and, if exhausted, specific legacies abate pro rata. 755 ILCS 5/24-3(b).

4. [15.20] Special Equitable Apportionment Rules for Marital Deduction Property and Charitable Deduction Property

In *In re Estate of Gowling,* 82 Ill.2d 15, 411 N.E.2d 266, 269 – 271, 44 Ill.Dec. 297 (1980), the Illinois Supreme Court broadly stated that, absent an expression of intent by the decedent, federal estate tax should not be apportioned to property qualifying for the marital deduction, as it generates no tax. Although the author found no Illinois case on point, the same reasoning could apply to exempt property qualifying for the charitable deduction from bearing a share of federal estate tax.

Despite the Illinois Supreme Court's broad statement in *Gowling,* the exemption of marital deduction property from equitable apportionment of federal estate tax may be limited to the specific facts in *Gowling, i.e.,* limited to joint tenancy property and pre-residuary bequests qualifying for the marital deduction. Because the surviving spouse in *Gowling* received only joint tenancy property (and, perhaps, other nonprobate property) and a pre-residuary bequest, the court did not specifically address whether federal estate tax should be apportioned to residuary marital bequests. Moreover, the Illinois Supreme Court tacitly affirmed the appellate court's determination that the federal estate tax apportioned to the probate estate should be paid from the residue without further equitable apportionment among probate assets, thereby sustaining the burden-on-the-residue rule. Therefore, *Gowling* is ambiguous as to whether the burden-on-the-residue rule or the equitable exemption of marital deduction property from apportionment would prevail in the case of a marital residuary bequest.

Consistent with a narrow reading of *Gowling,* the Illinois appellate court has refused to extend the reasoning in *Gowling* to charitable residuary bequests even though the bequests would not have generated estate tax. *Haberl v. County of Monroe,* 142 Ill.App.3d 152, 491 N.E.2d 909,

910 – 912, 96 Ill.Dec. 630 (5th Dist. 1986); *In re Estate of Maddux,* 93 Ill.App.3d 435, 417 N.E.2d 266, 268 – 270, 48 Ill.Dec. 864 (5th Dist. 1981). In *Maddux* and *Haberl,* absent direction from the testator regarding the payment of estate tax, the court applied the burden-on-the-residue rule, which exhausted the residue and extinguished the charitable residuary bequests.

Adopting a narrow reading of *Gowling, supra,* the IRS in Tech.Adv.Mem. 8240014 (June 29, 1982) ruled that, absent a direction by the testator, a residuary marital bequest qualifying for the marital deduction is not exonerated from bearing federal estate tax, even though the bequest generates no tax, due to the application of the burden-on-the-residue rule, while nonprobate property qualifying for the marital deduction is exonerated from bearing federal estate tax under principles of equitable apportionment.

In *In re Estate of Grant,* 83 Ill.2d 379, 415 N.E.2d 416, 417 – 420, 47 Ill.Dec. 411 (1980), the Illinois Supreme Court clarified that the equitable exemption of marital deduction property from apportionment of federal estate tax does not apply when the legislature has expressed a contrary intention. In *Grant,* the surviving spouse renounced the decedent's will and argued that his renunciatory share of the estate should be calculated based on the gross estate, not the estate net of estate taxes, because his renunciatory share generated no tax. 415 N.E.2d at 417. The Illinois Supreme Court held that, by providing for calculation of the renunciatory share based on the value of the estate "after payment of all just claims," the Illinois renunciatory share statute (now codified at 755 ILCS 5/2-8) required calculation of the renunciatory share after reducing the value of the estate by federal estate tax, which is a claim against the estate. 415 N.E.2d at 417 – 420. In calculating the renunciatory share, the Illinois probate estate subject to the renunciatory share should be reduced only by the federal estate tax properly apportioned to it. *In re Estate of Pericles,* 266 Ill.App.3d 1096, 641 N.E.2d 10, 13 – 14, 204 Ill.Dec. 51 (1st Dist. 1994).

Like the Illinois renunciatory share statute, Illinois' statute governing descent and distribution for intestate estates provides that the heirs' intestate shares are determined "*after all just claims against* [the] *estate are fully paid*." [Emphasis added.] 755 ILCS 5/2-1. Therefore, even though a surviving spouse's share of an intestate probate estate generates no federal estate tax, the surviving spouse's share must be calculated after reducing the value of the intestate probate estate by the federal estate tax allocable to it. *See Grant, supra,* 415 N.E.2d at 418.

II. APPORTIONMENT OF ILLINOIS ESTATE TAX

A. [15.21] Illinois Reimbursement Statute

The same person who is required to pay the federal estate tax — generally, the executor — is required to pay the Illinois estate tax. 35 ILCS 405/6(c).

Unless the governing instrument directs otherwise, if the payor of the Illinois estate tax imposed on a decedent's estate has a right of reimbursement under the Internal Revenue Code or other authority against a recipient of property included in the decedent's gross estate for a portion of the federal estate tax imposed on such estate, then the payor shall have a right of reimbursement from the recipient for a portion of the Illinois estate tax. 35 ILCS 405/11. Thus, to

determine whether a payor of Illinois estate tax has a right to recover such tax, the payor initially must determine whether the payor has the right to recover federal estate tax, under the analysis described in §§15.1 – 15.15 above. If the payor has the right to recover federal estate tax from a recipient, then the payor also may recover Illinois estate tax from such recipient. *Id.*

The amount of reimbursement to which the payor is entitled shall be such portion of the total Illinois estate tax as (1) the gross value of the property transferred to the recipient that has an Illinois tax situs and gives rise to a right of reimbursement of the federal estate tax bears to (2) the gross value of all property in the decedent's gross estate having an Illinois tax situs. This formula for calculation of the Illinois estate tax reimbursement right differs from the federal estate tax recovery formulas and merits further examination. *Id*.

The federal estate tax recovery formulas for insurance proceeds (Code §2206), general power of appointment property (Code §2207), and Code §2036 property (Code §2207B), like the Illinois reimbursement statute (35 ILCS 405/11), permit recovery of the proportional share of tax attributable to the inclusion of the property in question. However, the federal formulas and the Illinois formula use different fractions to determine the recoverable amount. The federal formulas multiply the federal estate tax by the value of the recovery property over the taxable estate. In contrast, assuming that all of the decedent's assets have an Illinois tax situs, the Illinois statute multiplies the Illinois estate tax by the value of the recovery property over the gross estate. Accordingly, when all of the decedent's assets have an Illinois tax situs, the percentage of Illinois estate taxes recoverable under the Illinois reimbursement statute generally will be smaller than the percentage of federal estate taxes recoverable under the federal provisions because the Illinois denominator (the gross estate) will always be greater than the federal denominator (the taxable estate). However, if, as the author suggests in §§15.4, 15.7, and 15.13 above, the numerators of the federal recovery formulas should be reduced by the deductions attributable to the recovery property, the federal and Illinois recovery formulas may produce more comparable recovery percentages.

In addition, Code §2207A permits recovery of the incremental increase in the federal estate tax caused by inclusion of QTIP, while the Illinois statute permits recovery of only the proportional share of tax attributable to the inclusion of the QTIP.

B. [15.22] Illinois Common Law and Other Statutory Provisions

Illinois does not have an Illinois estate tax apportionment statute. Consequently, to the extent the Illinois reimbursement statute, discussed in §15.21 above, is inapplicable, Illinois caselaw governs apportionment of Illinois estate taxes. Illinois cases began addressing such apportionment only after Illinois replaced its "inheritance tax" with an "estate tax" in 1982. P.A. 82-1021 (eff. Jan. 1, 1983). Illinois courts have emphasized the difference in the natures of these taxes when comparing the federal estate tax and the former Illinois inheritance tax:

> **At the outset, it must be recognized that Federal estate tax and State inheritance taxes are entirely different. Speaking generally, the State inheritance tax is a tax imposed against a beneficiary of the decedent on his right to receive his designated share of an estate. The Federal estate tax on the other hand is a tax on the right to**

> **transmit property from the dead to the living and has no relationship to the quantity or quantum of the estate received by a specific beneficiary. The Federal estate tax is a tax upon the gross estate without relationship to the amount received by specific beneficiaries.** *In re Estate of Fairchild,* 21 Ill.App.3d 459, 315 N.E.2d 658, 659 – 660 (4th Dist. 1974).

See also First Nat. Bank of Chicago v. Hart, 383 Ill. 489, 50 N.E.2d 461, 463 – 465 (1943); *In re Estate of Murphey,* 130 Ill.App.3d 870, 474 N.E.2d 945, 948, 86 Ill.Dec. 31 (4th Dist. 1985). Thus, unlike the federal estate tax, "the Illinois inheritance tax [was] a personal tax upon the interest received, payable by the recipient personally." 474 N.E.2d at 948. *See also In re Betts' Estate,* 2 Ill.App.2d 453, 119 N.E.2d 801, 803 (3d Dist. 1954); *In re McDonald's Estate,* 314 Ill.App. 148, 41 N.E.2d 128, 130 (2d Dist. 1942). As a result, apportionment among recipients of a decedent's property was unnecessary because each recipient was separately liable for the inheritance tax assessed on the interest received.

Since Illinois adopted its estate tax, to the extent the Illinois estate tax is mentioned, Illinois courts have applied the same apportionment analysis to both federal and Illinois estate taxes. *See Haberl v. County of Monroe,* 142 Ill.App.3d 152, 491 N.E.2d 909, 911 – 912, 96 Ill.Dec. 630 (5th Dist. 1986); *In re Estate of Maierhofer,* 328 Ill.App.3d 987, 767 N.E.2d 850, 851 – 854, 263 Ill.Dec. 124 (3d Dist. 2002); *In re Estate of Overturf,* 353 Ill.App.3d 640, 819 N.E.2d 324, 326 – 328, 289 Ill.Dec. 167 (4th Dist. 2004). Thus, the Illinois common-law apportionment principles, discussed in §§15.16 – 15.20 above, including the special rules applicable to marital, and possibly charitable, deduction property discussed in §15.20 above, should apply equally to apportionment of the Illinois estate tax.

III. APPORTIONMENT OF GENERATION-SKIPPING TAX

A. Federal Law

1. [15.23] Code Defines Three Types of Generation-Skipping Transfers

The Internal Revenue Code imposes a generation-skipping transfer (GST) tax on generation-skipping transfers. 26 U.S.C. §2601. Code §§2611 and 2612 define three types of generation-skipping transfers: "direct skips"; "taxable terminations"; and "taxable distributions." 26 U.S.C. §§2611, 2612. The type of generation-skipping transfer determines who is liable for the GST tax imposed on such transfer.

"Direct skip" means a transfer of an interest in property to a "skip person" that is subject to federal estate or gift tax. 26 U.S.C. §2612(c). The term "skip person" is defined in Code §2613 and applies for all purposes of this discussion. 26 U.S.C. §2613.

"Taxable termination" generally means "the termination (by death, lapse of time, release of power, or otherwise) of an interest in property held in a trust unless — (A) immediately after the termination, a non-skip person has an interest in the property, or (B) at no time after the

termination may a distribution (including distributions on termination) be made from the trust to a skip person." 26 U.S.C. §2612(a)(1).

" '[T]axable distribution' means any distribution from a trust to a skip person (other than a taxable termination or a direct skip)." 26 U.S.C. §2612(b).

For purposes of the GST tax provisions of the Code, a "trust" is "any arrangement (other than an estate) which, although not a trust, has substantially the same effect as a trust." 26 U.S.C. §2652(b). Thus, arrangements involving life estates and remainders, estates for years, and insurance and annuity contracts are trusts for GST tax purposes. *Id.;* 26 C.F.R. §26.2652-1(b)(1). "In the case of an arrangement which is not a trust but which is treated as a trust under this subsection, the term 'trustee' shall mean the person in actual or constructive possession of the property subject to such arrangement." 26 U.S.C. §2652(b)(2).

2. [15.24] General Rules: Type of Transfer Determines Primary Liability for Generation-Skipping Transfer Tax

Generally, the type of generation-skipping transfer determines the identity of the person who bears liability for the payment of the generation-skipping transfer tax on that transfer. The following persons are liable for the GST tax on the following types of generation-skipping transfers:

a. The transferee is liable for the payment of the GST tax on a taxable distribution. Consequently, if the transferee does not pay the GST tax assessed on a taxable distribution, and instead the GST tax is paid from the trust, the Internal Revenue Code specifies that such payment constitutes a further taxable distribution subject to additional GST tax. 26 U.S.C. §§2603(a), 2621(b); 26 C.F.R. §§26.2612-1(c), 26.2662-1(c)(1).

b. The trustee is liable for the payment of the GST tax on a taxable termination or a direct skip occurring from a trust. 26 U.S.C. §2603(a); 26 C.F.R. §26.2662-1(c)(1).

c. The "transferor" (as defined in Code §2652(a)(1)(B)) is liable for the payment of the GST tax on an inter vivos direct skip. 26 U.S.C. §2603(a); 26 C.F.R. §26.2662-1(c)(1).

d. The transferor's "executor" is liable for the payment of the GST tax on a direct skip (other than a direct skip from a trust for which the trustee is liable) if the transfer is subject to federal estate tax. 26 U.S.C. §2603(a); 26 C.F.R. §26.2662-1(c)(1). For purposes of the GST tax, the term "executor" has the same meaning as the term is given under Code §2203, discussed in §15.2 above. 26 U.S.C. §2652(d); 26 C.F.R. §26.2652-1(d).

3. [15.25] Special Rules: Direct Skips Occurring at Death from Trust Arrangements

As discussed in §15.24 above, if a direct skip occurs at death from a trust, the trustee is liable for the payment of generation-skipping transfer tax on that direct skip. 26 U.S.C. §2603(a); 26 C.F.R. §26.2662-1(c)(1). However, when property is held in a "trust arrangement" at the

transferor's death, the transferor's executor is liable for payment of the GST tax attributable to a direct skip occurring at death involving such property if the total value of direct skips with respect to the trustee of that trust arrangement is less than $250,000. 26 C.F.R. §26.2662-1(c)(2).

A "trust arrangement" includes any arrangement (other than an estate) that, although not an explicit trust, has the same effect as an explicit trust. 26 C.F.R. §26.2662-1(c)(2)(ii). An "explicit trust" for this purpose is a trust described in Treas.Reg. §301.7701-4(a), which provides:

> **Generally speaking, an arrangement will be treated as a trust under the Internal Revenue Code if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.** 26 C.F.R. §301.7701-4(a).

Treas.Reg. §26.2662-1(c)(2)(vi) provides examples illustrating the application of this special rule relating to trust arrangements in circumstances in which a decedent dies on or after June 24, 1996. The first two examples are as follows:

> **Example 1. Insurance proceeds less than $250,000. On August 1, 1997, T, the insured under an insurance policy, died. The proceeds ($200,000) were includible in T's gross estate for Federal estate tax purposes. T's grandchild, GC, was named the sole beneficiary of the policy. The insurance policy is treated as a trust under section 2652(b)(1), and the payment of the proceeds to GC is a transfer from a trust for purposes of chapter 13. Therefore, the payment of the proceeds to GC is a direct skip. Since the proceeds from the policy ($200,000) are less than $250,000, the executor is liable for the tax imposed by chapter 13 and is required to file Form 706.**
>
> **Example 2. Aggregate insurance proceeds of $250,000 or more. Assume the same facts as in Example 1, except T is the insured under two insurance policies issued by the same insurance company. The proceeds ($150,000) from each policy are includible in T's gross estate for Federal estate tax purposes. T's grandchild, GC1, was named the sole beneficiary of Policy 1, and T's other grandchild, GC2, was named the sole beneficiary of Policy 2. GC1 and GC2 are skip persons (as defined in section 2613). Therefore, the payments of the proceeds are direct skips. Since the total value of the policies ($300,000) exceeds $250,000, the insurance company is liable for the tax imposed by chapter 13 and is required to file Schedule R-1 of Form 706.** *Id*.

Because the special rules governing direct skips from trust arrangements may impose primary liability for the GST tax attributable to those transfers on an executor who does not possess the transferred property, the executor can recover such GST tax from (a) the trustee if the property continues to be held in a trust arrangement or (b) the recipient of the property if the property has been transferred from the trust arrangement. 26 C.F.R. §26.2662-1(c)(2)(v).

4. [15.26] Generation-Skipping Transfer Tax Paid from Property Generating Tax

Unless otherwise directed in the governing instrument by specific reference to the generation-skipping transfer tax imposed by Chapter 13 of the Internal Revenue Code, the GST tax imposed on a generation-skipping transfer is charged to the property constituting such transfer. 26 U.S.C. §2603(b).

Estate of Monroe v. Commissioner, 104 T.C. 352 (1995), *rev'd in part, remanded on other grounds,* 124 F.3d 699 (5th Cir. 1997), discusses what constitutes an "otherwise" direction sufficient to waive the default source of payment rule under Code §2603(b). In *Monroe,* the decedent's will made three specific bequests of property to skip people to be held in separate trusts for their benefit and "directed that 'all federal estate taxes, state and City inheritance or estate transfer taxes, or other death taxes attributable to the bequests . . . shall be paid from the residuum of my estate.' " 104 T.C. at 364. The *Monroe* court noted that Code §2603(b) requires a "specific reference" to the GST tax to prevent the tax from being charged to the property constituting the transfer. *Id*. The court explained:

> **Decedent's reference to "death taxes" is not equivalent to a "specific reference" to the generation-skipping transfer tax. Section 2603(b) requires a will or other governing instrument to make specific reference to the tax "imposed by this chapter", namely, chapter 13, captioned Tax on Certain Generation-Skipping Transfers, whereas the provisions of the Federal estate tax are in a different chapter of the Code, i.e., chapter 11. There is no evidence of legislative purpose overriding the plain meaning of "specific reference", and, thus, we hold that an explicit reference to generation-skipping transfer taxes is required by section 2603(b).** 104 T.C. at 364 – 365.

Thus, the court in *Monroe* held that the tax payment provisions of the decedent's will were insufficient to shift the burden of the GST tax from the specific bequests — as required by the Code §2603(a) default rule — to the residue of the decedent's estate. 104 T.C. at 365. See also Tech.Adv.Mem. 9822001 (May 29, 1998); Pvt.Ltr.Rul. 9731030 (Aug. 1, 1997).

In *Estate of Green v. Commissioner,* 86 T.C.M. (CCH) 758 (2003), the Tax Court held that the testator's will contained an "otherwise" direction sufficient to overcome the default-source-of-payment rule under Code §2603(b) for direct-skip bequests made by the testator as follows: "I direct my Personal Representative to pay, out of my estate, any tax imposed under Chapter 13 of the Internal Federal Revenue Code on property transferred in a 'direct skip,' as defined in Section 2612(c) of the Code; such tax shall not be deducted from or reduce the gift, bequest or devise which constitutes a 'direct skip.' "

B. [15.27] Illinois Law

The same person who is required to pay the federal generation-skipping transfer tax is required to pay the Illinois GST tax. 35 ILCS 405/6(c).

Unless the governing instrument directs otherwise, if the payor of the Illinois GST tax imposed on a transfer has a right of reimbursement under the Internal Revenue Code or other authority against a recipient of property constituting such transfer for a portion of the federal GST tax imposed on such transfer, then the payor shall have a right of reimbursement from the recipient for the Illinois GST tax on that transfer. 35 ILCS 405/11. The Code provides a recovery right for federal GST tax only when the transferor's executor is liable for federal GST tax imposed on a direct skip involving a trust arrangement. 26 C.F.R. §26.2662-1(c)(2)(v). See discussion of Treas.Reg. §26.2662-1(c)(2)(v) in §15.25 above. Accordingly, the right to recover Illinois GST tax will exist only in those same circumstances. 35 ILCS 405/11.

When a right of recovery exists, the Illinois statute provides that the amount of reimbursement to which the payor is entitled shall be such portion of the total Illinois GST tax imposed on a transfer as (1) the gross value of the property transferred to the recipient that has an Illinois tax situs and gives rise to a right of reimbursement of the federal GST tax bears to (2) the gross value of all property constituting the generation-skipping transfer having an Illinois tax situs. *Id*.

IV. [15.28] APPORTIONMENT OF ESTATE ADMINISTRATION EXPENSES

Apportionment of estate administration expenses in Illinois is governed by caselaw, not statute. In determining whether estate administration expenses should be allocated between probate and nonprobate assets or among probate assets, the Illinois courts have applied principles comparable to those applicable to estate tax apportionment. Unlike estate tax apportionment, which is based readily on asset value, the proper methodology for apportionment of estate administration expenses is less apparent and must be decided on a case-by-case basis.

The Illinois Supreme Court approved equitable apportionment of attorneys' fees and executors' fees between probate and nonprobate property in an intestate estate in *Roe v. Estate of Farrell,* 69 Ill.2d 525, 372 N.E.2d 662, 666, 14 Ill.Dec. 466 (1978). The Illinois Supreme Court noted that the equitable considerations supporting the apportionment of federal estate tax between probate and nonprobate property "logically extend to and are applicable to expenses incurred in behalf of the nonprobate assets." *Id.*

The Illinois appellate court extended equitable apportionment of attorneys' fees and other administration expenses between probate and nonprobate property to a testate estate when the testator did not express a contrary intention in *Estate of Fender v. Fender,* 96 Ill.App.3d 1029, 422 N.E.2d 107, 111, 52 Ill.Dec. 426 (1st Dist. 1981). In *Fender,* the court found that the testator's direction for the executor to pay all estate administration expenses out of the first moneys available therefor did not waive equitable apportionment of administration expenses. 422 N.E.2d at 108 – 111.

Subsequent cases specifically addressing apportionment of administration expenses have applied principles comparable to those applied to apportionment of estate taxes. *In re Estate of Fry,* 188 Ill.App.3d 336, 544 N.E.2d 109, 111 – 112, 135 Ill.Dec. 752 (3d Dist. 1989), *overruled by In re Estate of Williams,* 366 Ill.App.3d 746 (3d Dist.), *appeal denied,* 222 Ill.2d 573 (2006);

In re Estate of Britt, 112 Ill.App.3d 186, 445 N.E.2d 367, 369 – 371, 67 Ill.Dec. 887 (1st Dist. 1983); *In re Estate of Maddux,* 93 Ill.App.3d 435, 417 N.E.2d 266, 268 – 270, 48 Ill.Dec. 864 (5th Dist. 1981). Thus, the Illinois common-law apportionment principles discussed in §§15.16 – 15.20 above should be referred to in analyzing the proper apportionment of administration expenses.

When equitable apportionment of estate administration expenses between probate and nonprobate property is appropriate, the practitioner will need to consider the proper allocation of such expenses to each type of property. In *Roe, supra,* the Illinois Supreme Court found that equitable apportionment of administration expenses to nonprobate assets was appropriate for fees "incurred in behalf of the nonprobate assets." 372 N.E.2d at 666. Accordingly, it appears that apportionment of administration expenses may require analysis of the source of the administration expenses. For example, in *Roe,* the circuit court took testimony from the estate's attorney regarding the time and service required with respect to nonprobate assets to determine how much of the attorney's fee was attributable to such assets. *Id*.

16 Tax Aspects of Fiduciary Litigation

LOUIS S. HARRISON
Harrison & Held, LLP
SUZANNE L. SHIER
Northern Trust
JULIE J. OLENN
Sidley Austin LLP
Chicago

The assistance of Benjamin Lavin of the Northern Trust in Chicago in the preparation of this chapter for the 2016 edition is gratefully acknowledged.

I. [16.1] INTRODUCTION

The settlement of estate and trust controversies or the successful outcome in litigation (for purposes of this chapter, the "end result") must always take into account the federal and state estate, gift, and generation-skipping transfer (GST) tax (collectively, transfer tax) consequences.

Income taxes also come into play, both in terms of whether the end result causes income tax to be realized and in terms of the basis or other inherent tax consequences of the property in the hands of the parties after the end of the controversy. Practitioners should give greater consideration to end results causing federal income tax consequences in light of the convergence of the federal tax rates, with the top federal income tax rate 43.4 percent in 2016, including a 3.8-percent net investment income tax, and the federal transfer tax rate lowered to 40 percent.

The structuring of settlements often can be done to achieve favorable tax consequences for the parties, subject to the discussion of *Commissioner v. Estate of Bosch,* 387 U.S. 456, 18 L.Ed.2d 886, 87 S.Ct. 1776 (1967), in §16.2 below. Conversely, a practitioner should not assume that there are no new tax consequences caused by the end result.

This chapter identifies the major tax considerations that practitioners should consider in any estate and trust controversy.

II. [16.2] STATE COURT DETERMINATION OF PROPERTY RIGHTS AND FEDERAL TAXING AUTHORITIES

Disputes giving rise to fiduciary litigation are frequently based on property rights and duties established by state law. The general rule is that when federal estate tax liability turns on the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made of such property interest by a state trial court; if there is no decision by the state's highest court, federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the state. *Commissioner v. Estate of Bosch,* 387 U.S. 456, 18 L.Ed.2d 886, 87 S.Ct. 1776, 1782 (1967), quoting S.Rep. No. 1013, Pt. 2, 80th Cong., 2d Sess. 4 (1948).

Accordingly, the practitioner should not assume that a state court order interpreting, reforming, or clarifying a provision of the document will be binding on the Internal Revenue Service. Importantly, in practice the federal courts instead often gave no regard (versus proper regard) to state court decisions in applying *Bosch* over the past four decades. The enormous interest generated by *Bush v. Gore,* 531 U.S. 98, 148 L.Ed.2d 388, 121 S.Ct. 525 (2000), makes this an important time to argue the correct application of *Bosch* and adherence to the proper regard standard.

In arguing the applicability of a state court decision, the practitioner should be mindful to create an order that appears consistent with state law and that appears considered by the court. If all else fails, the practitioner should argue that the federal court (if it gets that far) should return to

the *Bosch*-required roots for the proper regard test (going all the way back to the doctrine enunciated in *Erie R.R. v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938)) and provide more deference to the state court decision-making.

The general rule on the IRS not following state court decisions often arises in two important settings in the tax area: (a) preserving the marital deduction by modification of documents; and (b) preserving the charitable deduction by the same approach. As an example, if, in a will or trust controversy, more property is left to the surviving spouse by settlement than would have occurred under the estate plan documents, the practitioner has to consider whether the marital deduction is available. Similarly, if the documents are revised to remove noncharitable interests in a charitable bequest, does this qualify the bequest for a charitable deduction? These issues are discussed in greater detail in §§16.39 and 16.40 below.

Pvt.Ltr.Rul. 201132017 (Aug. 12, 2011) is an example of the application of the *Bosch* principles in the gift and estate tax area. In the ruling, the IRS addressed the effect of a state probate court order reforming a credit shelter bypass trust nunc pro tunc to correct a scrivener's error that would have had the unintended effect of causing the bypass trust to be included in the gross estate of the surviving spouse under §2041 (Powers of appointment) of the Internal Revenue Code, 26 U.S.C. §2041. Citing *Bosch, supra,* the IRS determined that under state law, a trust had standing to seek a reformation, a probate court had the power to modify a trust if the provisions were ambiguous or if adherence to the terms of the trust would defeat the primary purpose of the trust, and the power of the court to reform a trust extended to a situation in which the trust instrument contains some expression of the trustor's intention. But a drafting error rendered that expression ambiguous, and the power to amend nunc pro tunc is a limited one that may be used only when necessary to correct a clear mistake and prevent injustice. The IRS concluded that the court's order modifying the trust nunc pro tunc based on a scrivener's error was consistent with applicable state law that would have been applied by the highest court of the state, and as modified the bypass trust would not be included in the gross estate of the surviving spouse under Code §2041 upon his death.

III. GIFT TAX

A. [16.3] Background

The federal government imposes a tax on the transfer of property by gift. In 2015, the gift and estate tax applicable exclusion amount for U.S. citizens and U.S. residents is unified at $5.43 million, adjusted for inflation, and the marginal tax rate is 40 percent.

B. [16.4] Gift Tax in Estate and Trust Controversies

In estate and trust controversies, property interests as set forth in wills, trusts, beneficiary designations, or other documents are often changed, either as a result of court intervention or as a result of settlement. To the extent those interests are changed because of a voluntary settlement entered into by the parties, the potential gift tax consequences of the shifting of the property interests must be considered.

Treas.Reg. §25.2511-1(a) provides: "The gift tax applies to a transfer by way of gift whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal." 26 C.F.R. §25.2511-1(a). Treas.Reg. §25.2511-1(g)(1) provides: "Donative intent on the part of the transferor is not an essential element in the application of the gift tax to the transfer." 26 C.F.R. §25.2511-1(g)(1).

Transfers that are for full and adequate consideration are not subject to the gift tax. See, *e.g.,* 26 C.F.R. §25.2512-8.

When a settlement results in a shifting of assets among those otherwise entitled to receive property interests under the challenged estate plan or documents, and a genuine controversy truly exists among family members, a court typically will find that consideration exists, and the exception to the gift tax for transfers for full and adequate consideration will apply. This is based on the language in the Treasury Regulations:

> **[**A**] sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth.** *Id.*

See also, e.g, Estate of Natkanski v. Commissioner, 64 T.C.M. (CCH) 55 (1992). In applying these regulations within the context of settlements arising from family disputes, the factors considered by the court in determining whether a gift was made include whether (1) a genuine controversy existed between the parties, (2) the parties were represented by and acted on the advice of counsel, (3) the parties engaged in bona fide arm's-length negotiations, (4) the value of the property involved was substantial, and (5) the settlement was motivated by the parties' desire to avoid the uncertainty and expense of litigation. *See Estate of Friedman v. Commissioner,* 40 T.C. 714, 720 (1963); *Beveridge v. Commissioner,* 10 T.C. 915, 918 (1948); Gen.Couns.Mem. 33,351 (Oct. 13, 1966) (transfer to four stepdaughters in settlement of their unliquidated claim under or against will does not constitute gift because compromise settlement of will contest constituted bona fide arm's-length business transaction in which there was no donative intent).

The question, basic in its asking but sophisticated in its analysis, is whether consideration was received for the transfer. When property interests are transferred to individuals who are not parties to the litigation or otherwise provided for in the contested documents, there is a question as to whether the passing of property to these individuals constitutes a gift. For example, in the context of the enforcement of marital settlements postmortem, often transfers are required to be made to the children of the divorced spouses. Enforcement of these rights triggers gift tax concerns, and courts have held, depending on the age of the children and the required statutory rights toward those children, that such enforcement may or may not be a gift. *See, e.g, Estate of Hartshorne v. Commissioner,* 48 T.C. 882, 896 (1967), in which the court concluded:

> **With respect to the quid pro quo argument, case law indicates that merely because a husband, in his divorce settlement agreement, makes transfers to his adult children, that fact alone does not mean that such transfers are made for consideration. After all, they are objects of his natural bounty; while the husband may have no desire to**

> **give the wife anything more than she would be entitled to under the local law, he may well desire to make generous transfers to the adult children. Such transfers, therefore, must be carefully examined to make sure that the husband undergoing divorce does not use the occasion to convey, in the divorce property settlement agreement, property to his adult children in avoidance of estate or gift taxes. Thus, the taxpayer must show that such transfers to adult children are made at the insistence of the wife and for consideration in money or money's worth.** Citing *Estate of Keller v. Commissioner,* 44 T.C. 851 (1965), and *Wiedemann v. Commissioner,* 26 T.C. 565 (1956*).*

Cf. Edwards v. Commissioner, 74 T.C.M. (CCH) 748 (1997).

C. [16.5] Compliance with Gift Tax Requirements

Because of the nature of the transfers and potential gift tax applications of the end result, practitioners should be versed with the filing requirements for gift tax returns.

An IRS Form 709 (2015), United States Gift (and Generation-Skipping Transfer) Tax Return, must be filed if the donor made gifts that did not qualify for the following:

1. the annual exclusion under Internal Revenue Code §2503(b), currently inflation adjusted to $14,000 per donee in 2015;

2. the super-annual exclusion for noncitizen donee spouses under Code §2523(i)(2), inflation-adjusted to $147,000 in 2015;

3. the marital deduction for outright gifts to spouses;

4. the marital deduction applicable to life estates with a general power of appointment under Code §2523(e); or

5. the charitable deduction applicable to gifts of the donor's entire interest in the subject property under Code §2522. See Instructions for IRS Form 709, p. 1 (Oct. 21, 2015).

Even if the gift must be reported, it will not necessarily generate a gift tax or require the allocation of the donor's applicable credit amount. Some gift tax returns are required for demonstrating to the IRS that the donor is entitled to deduct the full value of a gift, *e.g.,* a gift to charity of less than the donor's entire interest in the subject property, or one requiring a qualified terminable interest property (QTIP) election, for gifts to a spouse (discussed in item 3 below). See Instructions for IRS Form 709, p. 3.

Other reasons to file a gift tax return when no tax will be paid and no credit will be allocated include

1. the timely allocation or late allocation of the donor's GST tax exemption to direct skips or trusts that might have future taxable terminations or taxable distributions (The

Treasury Regulations permit a formula allocation. See 26 C.F.R. §§26.2632-1(b)(2)(ii), 26.2632-1(d)(1). A separate page containing the notice of allocation should be attached to the return.) (Note that automatic allocations may allocate the GST exemption even without the filing of a return; but some practitioners do a belt-and-suspenders opt-in under Code §2632.);

2. the filing of the consent of the donor's spouse to split the donor's gifts under Code §2513 (If the gifts exceed the donor's and the spouse's combined annual exclusions, the spouse must file a separate return to split the donor's gifts even if the spouse made no gifts of his or her own.);

3. the filing of a QTIP election (The election is deemed made if the property is listed on Schedule A of IRS Form 709 and taken as a marital deduction in the deductions section of Part 4 of Schedule A.);

4. the filing of the donor's opt-out from the deemed allocation rules of Code §2632 to avoid wasting the donor's GST tax exemption (The notice of opt-out should be made on a separate page attached to the return; the deemed allocation rules of Code §2632 may cause unintended allocations that would not have occurred under this provision as it was in effect at the time that the donor signed an irrevocable trust.);

5. the filing of the donor's election to treat contributions to a qualified state tuition program under Code §529(c)(2)(B) as having been made ratably over a five-year period (The box on Schedule A of IRS Form 709 should be checked, and only one fifth of the contribution amount should be reported as a current-year gift; an additional one fifth per year should be reported on each of the next four years' gift tax returns, if they are otherwise required, and an explanation of the total contribution and election should be attached.); and

6. the disclosure of valuation discounts used in calculating the donor's taxable gifts, or sales to grantor trusts, to trigger the three-year limitations period under Treas.Reg. §301.6501(a)-1, to trigger the six-year limitations period for omissions greater than 25 percent under Treas.Reg. §301.6501(e)-1(b), and to provide adequate disclosure in avoidance of Treas.Reg. §301.6501(c)-1(f).

If a gift is not adequately disclosed on a gift tax return, regardless of whether the return is required to be filed, then the period of limitations is not triggered, and the gift tax due may be assessed at any time. 26 C.F.R. §301.6501(c)-1(f)(1). This exposure typically arises when a donor has used valuation discounts to bring a gift within the annual exclusion amount.

Adequate disclosure requires the filing of a description of the property transferred; the relationship between the donor and donee; the taxpayer identification number for any trust vehicle involved; a summary of the trust terms or a copy of the trust; a description of any return position taken that is contrary to any proposed, temporary, or final Treasury Regulation or contrary to any published Revenue Ruling; and

a detailed description of the method used to determine the fair market value of property transferred, including any financial data (for example, balance sheets, etc.

with explanations of any adjustments) that were utilized in determining the value of the interest, any restrictions on the transferred property that were considered in determining the fair market value of the property, and a description of any discounts, such as discounts for blockage, minority or fractional interests, and lack of marketability, claimed in valuing the property. 26 C.F.R. §301.6501(c)-1(f)(2)(iv).

In lieu of the detailed financial disclosures, the donor may submit a qualified appraisal with the return. A qualified appraisal must meet the following requirements:

(i) The appraisal is prepared by an appraiser who satisfies all of the following requirements:

(A) The appraiser is an individual who holds himself or herself out to the public as an appraiser or performs appraisals on a regular basis.

(B) Because of the appraiser's qualifications, as described in the appraisal that details the appraiser's background, experience, education, and membership, if any, in professional appraisal associations, the appraiser is qualified to make appraisals of the type of property being valued.

(C) The appraiser is not the donor or the donee of the property or a member of the family of the donor or donee, as defined in [Code §2032A(e)(2)**], or any person employed by the donor, the donee, or a member of the family of either; and**

(ii) The appraisal contains all of the following:

(A) The date of the transfer, the date on which the transferred property was appraised, and the purpose of the appraisal.

(B) A description of the property.

(C) A description of the appraisal process employed.

(D) A description of the assumptions, hypothetical conditions, and any limiting conditions and restrictions on the transferred property that affect the analyses, opinions, and conclusions.

(E) The information considered in determining the appraised value, including in the case of an ownership interest in a business, all financial data that was used in determining the value of the interest that is sufficiently detailed so that another person can replicate the process and arrive at the appraised value.

(F) The appraisal procedures followed, and the reasoning that supports the analyses, opinions, and conclusions.

(G) The valuation method utilized, the rationale for the valuation method, and the procedure used in determining the fair market value of the asset transferred.

(H) The specific basis for the valuation, such as specific comparable sales or transactions, sales of similar interests, asset-based approaches, merger-acquisition transactions, etc. 26 C.F.R. §301.6501(c)-1(f)(3).

Importantly, the practitioner must weigh the benefit that could be obtained from filing the return to trigger the period of limitations against the potential detriment of an increased risk of audit.

In the event of a donor's sale of an interest to trust, rather than or in addition to any gift to such trust, disclosure on a gift tax return may also be desirable to trigger the three-year limitations period on assessment, regardless of whether the return is required to be filed. The donor's sale of an interest in a partnership, limited liability company, or closely held corporation to a trust created by the donor may be reportable on the federal estate tax return even if the assets are not includable in the gross estate. See IRS Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, Part 4, Q 12 (Rev. Aug. 2013). Filing a gift tax return that reports the sale with a gift tax value of zero and adequately discloses valuation of the transferred interest, the terms of the sale, and the terms of the trust will begin the three-year limitations period. After the period expires, the value of the interest sold may not be adjusted for either gift or estate tax purposes. The practitioner will have to carefully consider the benefits of certainty for gift and estate tax purposes relative to the risks of inviting the IRS to scrutinize the sale transaction.

D. [16.6] Exercise or Release of Powers of Appointment

Settlement of cases often involves the release or giving up of beneficial rights in a trust. For example, an individual may have a discretionary income or principal interest that is sought to be relinquished in satisfaction of a lawsuit, or that same individual may have a limited power of appointment to be exercised in favor of a third party, as part of the settlement, over a trust in which the same individual exercising the power also has a beneficial interest.

The practitioner should consider the effect, for gift tax purposes, of that release or exercise of a power of appointment on the discretionary right as a beneficiary to income or principal. By appointing the property to a third party, that discretionary right is in essence given up, and theoretically a transfer and, perhaps, a gift of that property occur. See, *e.g.,* 26 C.F.R. §§25.2514-1(b)(2), 25.2514-3(e), Example (3). Although the IRS may assert the gift position, an important earlier case, *Self v. United States,* 142 F.Supp. 939 (Cl.Ct. 1956), held that the exercise of a limited power of appointment by a beneficiary of a trust does not result in a gift of the lost income interest that the donor of the exercise has given up by the exercise of the power.

IV. ESTATE TAX

A. [16.7] Background

The federal government also imposes a tax on all the decedent's property at the time of the decedent's death. This includes property that (1) a decedent owns, (2) pays a decedent certain benefits, or (3) a decedent controls in certain ways. Generally, the amount subject to the tax is the fair market value of the property at the decedent's date of death. The decedent's gross estate may deduct certain debts, expenses, charitable gifts, and gifts to a surviving spouse (discussed in more detail below). State death taxes will be a deduction against the federal gross estate, rather than a credit against the federal estate tax.

Property passing outright, and often property passing in trust for a surviving spouse, qualifies for an estate tax marital deduction. For trust transfers, a decedent (1) need only give the decedent's spouse the right to receive all of the income produced by property in trust and (2) have the spouse as sole beneficiary during the spouse's life for that trust to qualify for the marital deduction. This provides flexibility when a decedent wants the decedent's spouse to have the benefit of the property for life and wants to ensure that it will pass to the decedent's children or other specified beneficiaries after the decedent's spouse's death.

The marital deduction generally is available only if the decedent's spouse is a U.S. citizen. However, if the surviving spouse is not a U.S. citizen, the estate still may claim a marital deduction for property passing into a qualified domestic trust for the benefit of the noncitizen spouse.

Each person has an estate tax applicable exemption amount that prevents the estate tax from applying to smaller estates. The amount of the exemption available at death is reduced for each dollar of exemption that was used for lifetime gifts that did not qualify for the annual exclusion or the marital or charitable deductions. The estate tax applicable exclusion amount, unified credit, and maximum marginal estate tax rate as a result of American Taxpayer Relief Act of 2012 (ATRA), Pub.L. No. 112-240, 126 Stat. 2313 (2013), are as follows:

Year	Basic Exclusion Amount	Unified Credit	Maximum Rate
2015	$5,430,000	$2,117,800	40%

See Instructions for Form 706, pp. 2, 9 (Rev. Aug. 2015).

For married decedents, the surviving spouse's basic exclusion amount may be increased by the unused exclusion amount of a predeceased spouse, referred to as "portability." (A complete analysis of portability is beyond the scope of this background discussion.)

B. [16.8] Estate Tax in Estate and Trust Controversies

The implications of the estate tax on estate and trust controversies are threefold. First, does an item get brought back and become subject to taxation as part of a decedent's gross estate? The term "gross estate" is a tax term defined by the Internal Revenue Code that is not tied directly to probate matters and is much more expansive than one would think. Many assets that one unfamiliar with the estate tax return may think are not subject to estate tax may, in fact, be subject (*e.g.,* insurance, retained fiduciary appointments, joint interests).

Second, does the shifting of interests change the qualification of a Code-sanctioned deduction, thereby either allowing it to apply to offset the estate taxes or prohibiting its use? This is discussed in §§16.20 – 16.40 below in reference to the marital and charitable deductions.

Third, are expenses incurred in the litigation process deductible? See §16.71 below.

C. [16.9] Filing the Return and Paying the Tax

In modern practice, one of the great overhangs in any litigation matter is the estate tax return due date, both for filing the return and paying the tax. Controversies are rarely settled prior to the due date, and the parties should make some accommodation as to how the estate tax return filing and payment are handled on that due date.

1. [16.10] Due Dates for the Return

The estate tax return must be filed and the tax paid within nine months after the date of the decedent's death. 26 U.S.C. §6075(a). The exact due date is "the day of the ninth calendar month after the decedent's death numerically corresponding to the day of the calendar month on which death occurred," modified by the following two exceptions:

a. If there is no numerically corresponding day in the ninth month, the due date is the last day of the month. For example, say the decedent dies on May 31. The ninth calendar month thereafter is February, which typically has only 28 days. The due date would be, therefore, the last day of February.

b. If the due date falls on a Saturday, Sunday, or legal holiday, the next day that is not a Saturday, Sunday, or legal holiday is the due date. *Id.* For example, if the decedent died Friday, March 7, 2015, the return would be due Monday, December 7, 2015. 26 C.F.R. §20.6075-1.

Either the filing date, the payment date, or both may be extended, in which case the due date is the last day covered by the extension. Granting an extension for filing is now mandatory if it is applied for before the return due date. The request must be filed before the expiration of nine months after the date of death. The automatic extension now allowed to file the return may not be more than six months. 26 C.F.R. §20.6081-1(b). The regulations do not allow the district director to grant an additional extension of time for filing the return beyond the six months (except in the case of taxpayers who are abroad).

However, an extension of the date for filing does not extend the due date for tax payment. 26 U.S.C. §6151(a).

From a practical standpoint, this means that in most circumstances both filing and payment will occur on the required date. Unlike an income tax return, for which extension is quite common, an extension on the filing of an estate tax return should be treated as an unusual circumstance and is to be avoided. The practical effect of extending the filing and not the payment is that penalties for late filing (discussed at §16.73 below) will not occur. However, there are still penalties, 0.5 percent of the tax due per month, up to an aggregate of 25 percent for the underpayment of the estate tax due as of the required payment date (discussed in §16.11 below). 26 U.S.C. §6651(a)(2).

2. [16.11] Due Dates for Payment

The estate tax is due within nine months from death, except if an extension of time to pay is received (discretionarily under Internal Revenue Code §6161 or pursuant to an election to pay the estate tax in installments under Code §6166). Payment, as a practical matter, should not occur much before the required payment date. No discount is granted for an advance payment. Hence, payment early is, in effect, an interest-free loan to the government. At a six-percent earnings rate, the payment one month early of $1 million costs the estate $5,000 in lost interest. It is advisable, however, to be ready for payment and perhaps even to file and pay one day early in case there are mishaps with the filing or payment, thereby allowing the executor another day to correct them and still timely file.

3. [16.12] Where To File and What Is Considered Timely

All returns are filed in Cincinnati, in an effort by the IRS to consolidate the filing and review process. The filing address for U.S. citizens is Department of the Treasury, Internal Revenue Service Center, Cincinnati, OH 45999. See Instructions for Form 706, p. 3 (Rev. Aug. 2015). The practitioner should use certified mail or a private delivery service approved by the IRS, *e.g.,* FedEx or UPS. If using a private delivery service, the filing address is Internal Revenue Service, 201 W. Rivercenter Blvd., Covington, KY 41011.

The general rule is that as long as the return is sent on the due date, it is considered a timely filed return. However, unlike income tax returns, there is not yet a matching computer program to record the date of mailing with the timely receipt, meaning that a late filing penalty notice can inadvertently and erroneously be caused by mailing the check on the date the return is due.

The check should be made payable to the "United States Treasury" for the full amount of tax shown due on the return. The decedent's name and social security number and the comment "Form 706," as well as, for pragmatic reasons primarily, the date of death should all be written on the check. *Id.* Other forms of payment are possible, though unusual. As for the old practice of occasionally paying the estate tax with Treasury bonds at par, no such "flower" bonds exist any longer (they should have "flowered" by, at the latest, 2001), and therefore this practice is no longer relevant to the practitioner.

D. [16.13] Gross Estate

A decedent's "gross estate" is comprised of "the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated." 26 U.S.C. §2031(a). Such property is included in the gross estate "to the extent of the interest therein of the decedent at the time of his death." 26 U.S.C. §2033. This very broad definition includes choses in action, acquired before death or because of the decedent's death, that remain unpaid at the time of death. *Rubenstein v. United States,* 826 F.Supp. 448 (S.D.Fla. 1993); *Shackleford v. United States,* No. Civ. S-96-1370LKKPAN, 1999 WL 744121 (E.D.Cal. Aug. 6, 1999); *Estate of Aldrich v. Commissioner,* 46 T.C.M. (CCH) 1295 (1983); *United States v. Simmons,* 346 F.2d 213 (5th Cir. 1965).

Whether a judgment in a lawsuit or a settlement award is includable in a decedent's gross estate requires a determination of the nature of the underlying claim and an assessment of the decedent's interest in the claim. An award or settlement may be includable in a decedent's estate even if the value of the award or settlement as of the decedent's date of death is difficult to determine. 26 C.F.R. §20.2033-1(b); *Duffield v. United States,* 136 F.Supp. 944 (E.D.Pa. 1955). The valuation issue is separate from the inclusion issue but central to the tax impact on the decedent's estate.

1. [16.14] Survival Action/Wrongful-Death Action

Proceeds from post-death personal injury lawsuits recovered on behalf of a decedent's probate estate may be included in the decedent's gross estate under certain circumstances. The determinative question is whether the decedent had an interest in the amount recoverable under the applicable statute or in the right of action at the time of his or her death.

State law generally includes two types of statutes relevant for purposes of this inquiry — survival acts and wrongful-death acts. Some states have hybrid-type survival wrongful-death acts.

a. [16.15] Survival Acts

Survival acts provide for a cause of action for injuries resulting in death that survives the victim's death and may be brought by his or her personal representative to recover for the decedent's pain and suffering, as well as medical expenses incurred by the decedent. Recovered proceeds are subject to the debts of the decedent's estate and are disposed of as an asset of the decedent's probate estate.

Recoveries from a survival action must be included in the gross estate under Internal Revenue Code §2033 because the decedent held an interest in the action prior to his or her death. Essentially, such an action allows the estate to pursue claims to which the decedent became entitled while still alive. Therefore, the IRS has taken the position that the value of proceeds received in a survival action must be included in the gross estate as interests of the decedent at the time of his or her death. Rev.Rul. 75-127, 1975-1 Cum.Bull. 297.

b. [16.16] Wrongful-Death Acts

Wrongful-death statutes allow for recovery from those responsible for a decedent's death despite the death of the would-be plaintiff in the action. Some state statutes, such as the Illinois Wrongful Death Act, 740 ILCS 180/0.01, *et seq.,* create a cause of action for the benefit of designated beneficiaries (death acts); others provide for a cause of action that survives the victim's death and may be brought by his or her personal representative for the decedent's probate estate (survival acts). Recoveries under either type of wrongful-death statute generally escape inclusion in the decedent's gross estate, however, because in either circumstance "the wrongful death action cannot exist until the decedent has died." Rev.Rul. 75-127, 1975-1 Cum.Bull. 297.

(1) [16.17] Death statutes

Death statutes create a right to sue in or on behalf of certain beneficiaries of the decedent holding certain statutorily defined relationships to the decedent or in the personal representative on behalf of such persons. Most death statutes allow recovery for the beneficiaries' loss of companionship in addition to any economic loss suffered. Under the Illinois Wrongful Death Act, for instance, damages may be awarded for "the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, to the surviving spouse and next of kin of such deceased person." 740 ILCS 180/2.

The IRS has consistently held that actions under death statutes will not trigger inclusion of the wrongful-death proceeds in the decedent's gross estate. The IRS excludes such awards because such statutes create the right of action in the beneficiaries at the time of the decedent's death, indicating that the decedent did not have an interest in the cause of action at the time of his or her death. Rev.Rul. 54-19, 1954-1 Cum.Bull. 179. Without an interest at the time of death, Code §2033 does not require that proceeds from the cause of action be included in the gross estate.

(2) [16.18] Survival wrongful-death statutes

Under a hybrid-type of statute known as a survival wrongful-death statute, "the cause of action for personal injury resulting in death survives the victim's death and passes to his personal representative to be pursued as an asset of the probate estate." Rev.Rul. 75-127, 1975-1 Cum.Bull. 297. This differs from the death statute discussed in §16.17 above in which the proceeds are not an asset of the decedent's probate estate but an asset of the designated beneficiaries for losses personally incurred as a result of the decedent's death.

Despite the difference, and despite the fact that such proceeds are considered an asset of the decedent's probate estate, proceeds received by the estate as a result of an award under a survival statute are not includable in the decedent's gross estate under Internal Revenue Code §2033. Following a line of cases holding that the proceeds of such statutes are not includable in the gross estate because such a wrongful-death action cannot exist until the decedent has died, including *Connecticut Bank & Trust Co. v. United States,* 465 F.2d 760 (2d Cir. 1972), the IRS acquiesced by issuing Rev.Rul. 75-127, which acknowledged that the decedent did not possess a property

interest in the cause of action at the time of his death. However, the IRS limited its acquiescence by asserting that "where it can be established that [the wrongful-death] proceeds represent damages to which the decedent had become entitled during his lifetime (such as for pain and suffering and medical expenses) rather than damages for his premature death," the IRS will seek to include such litigation proceeds in the decedent's gross estate. Rev.Rul 75-127.

2. [16.19] Other Types of Settlement Payments and Litigation Awards and Value of Claim

Settlement payments and litigation awards arising in the context of fiduciary litigation other than personal injury litigation also may be included in a decedent's gross estate if and to the extent that the decedent had an interest in the litigation or the claim giving rise to the litigation at the time of his or her death. Representative of the types of claims that have been found to be includable in a decedent's gross estate are compromise settlements of post-death individual income tax litigation, claims against the general partner of a partnership for misappropriation of funds of a partnership in which the decedent had an interest, and malpractice claims against an attorney with the preparation of the decedent's estate plan.

In *United States v. Simmons,* 346 F.2d 213 (5th Cir. 1965), following review of the decedent's tax records after his death, the executors of the decedent's estate filed a claim for refund of overpaid income taxes, and their offer of compromise in settlement of the claim was subsequently accepted. However, after the income tax suit settled, the IRS determined that the legal claim for the income tax refund was includable in the decedent's gross estate. The question then became one of valuation: What was the value of a claim for a refund of a decedent's income tax litigation, which claim was initiated by the executor of the decedent's estate after the decedent's death, that was settled at a later date for less than the amount claimed?

"Value" for estate tax purposes means "fair market value," which is defined under the familiar willing buyer-willing seller test, and applies to the valuation of claims as it does to any other type of property included in a decedent's gross estate. Specifically, "fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." 26 C.F.R. §20.2031-1(b). Fair market value is a factual issue, not a legal issue, and is therefore determined by the trier of fact. Nonetheless, in *Simmons,* although the original jury determined that the claim had no value, the appellate court reversed and remanded the case to the district court with instruction to grant a motion for a new trial, holding that "ignorance of the value of an asset at the time of a decedent's death does not justify treating the asset as valueless, any more than ignorance of the existence of an asset, discovered after the date of death, justifies exclusion of the asset from the decedent's gross estate." 346 F.2d at 218.

Similarly, in *Rubenstein v. United States,* 826 F.Supp. 448 (S.D.Fla. 1993), the court determined that the amount received in the settlement of a claim for misappropriation of partnership funds brought following the decedent's death against the general partner of a partnership in which the decedent held a limited partnership was included in the decedent's gross estate. The majority of the general partner's conduct giving rise to the claim occurred during the

decedent's lifetime, so the right to seek damages arose before the decedent's death and was an intangible asset of the decedent that was includable in his gross estate. 826 F.Supp. at 456. The value of the claim included in the gross estate was the settlement amount in excess of the stipulated value of the assets of the partnership. *Id.*

Recovery in a malpractice claim with respect to the preparation of a decedent's estate plan is also includable in a decedent's gross estate. In *Estate of Glover v. Commissioner,* 84 T.C.M. (CCH) 120 (2002), the recovery of the decedent's estate in settlement of a malpractice claim arising from the preparation of the decedent's estate plan was included in the decedent's gross estate. *Glover* is instructive in terms of its discussion of the allocation of the $750,000 settlement amount between includable and non-includable items and the valuation of the includable portion of the settlement. The recovery was for both fees incurred in the post-death administration of the decedent's estate and damages with respect to the planning done during the lifetime of the decedent. However, the settlement agreement itself failed to make an allocation of the award among the claims asserted. See §16.53 below regarding the importance of making such allocations. Therefore, the court looked to the "intent of the payor" in making the settlement payment, looking first to the settlement agreement and then to the surrounding facts and circumstances. 84 T.C.M. (CCH) at 128, quoting *Knuckles v. Commissioner,* 349 F.2d 610, 613 (10th Cir. 1965). Factors that the court considered included the details surrounding the litigation, the allegations made in the complaint, and the arguments made by the parties in the proceeding. Of the $750,000 settlement amount, $247,500 was allocated to reimbursement of post-death administration fees in which the decedent did not have an interest, leaving $502,500, which was reduced for legal costs in prosecuting the malpractice claim, with the remaining $298,841 discounted to its present value at the date of the decedent's death, resulting in inclusion of $130,962 in the decedent's gross estate.

E. [16.20] The Marital Deduction and How It Is Affected by Estate and Trust Controversies

One spouse may leave any amount of property to the other spouse, free of estate or gift taxes, provided the gift is done in certain ways. This is referred to as the marital deduction.

But to qualify, certain requirements must be met, and the issue that occurs is whether, if they are not met, a trust may be reformed or otherwise corrected to address those deficiencies. As discussed §16.39 below, not all such corrections will be given credence by a court.

1. [16.21] Requirements for the Marital Deduction

Requirements for the marital deduction for outright transfers to a spouse focus primarily on gifts at death. Analogous rules apply to gifts made during life.

a. [16.22] Requirement One: Legally Married at Time of Death

For the marital deduction to apply, the person receiving the property must have been the legal spouse of the decedent at the time of death.

(1) [16.23] State law question

The validity of the marriage is generally a state law question, specifically, the law of the state of the decedent's domicile. *Estate of Spalding v. Commissioner,* 537 F.2d 666 (2d Cir. 1976). In light of the 2015 Supreme Court decision in *Obergefell v. Hodges,* ___ U.S. ___, 192 L.Ed.2d 609, 135 S.Ct. 2584 (2015), there is recognition of a surviving spouse of the same gender as the decedent as a surviving spouse for federal tax purposes, even if the marriage was not recognized under state law because of that state's laws against same-sex marriage.

(2) [16.24] Prior dissolution

The validity of the decedent's marriage may depend on the validity of a prior dissolution of marriage of either the decedent or the surviving spouse. Again, the law of the decedent's domicile would control whether the prior dissolution was recognized to permit a valid marriage between the decedent and the surviving spouse. *Estate of Steffke v. Commissioner,* 538 F.2d 730 (7th Cir.), *cert. denied,* 97 S.Ct. 639 (1976); Rev.Rul. 67-442, 1967-2 Cum.Bull. 65.

b. [16.25] Requirement Two: Survived the Decedent

The spouse must have survived the decedent, or at least be deemed to have so survived under the governing instrument or local law, for the marital deduction to apply.

(1) [16.26] Period of survival

The decedent may require that the spouse survive the decedent by more than an instant. A survival period requirement of up to six months is permitted. 26 U.S.C. §2056(b)(3).

(2) [16.27] Common disaster

If the surviving spouse's interest is conditioned on the surviving spouse's not dying from a common disaster that caused the decedent's death, the allowance of the deduction will be determined upon final audit of the return. No deduction will be allowed if it is still possible that the surviving spouse will forfeit the property under the governing instrument or under local law. 26 C.F.R. §20.2056(b)-3(c). (This could happen, for example, if the surviving spouse initially survived the common disaster but continues to linger in a coma or in critical condition for months or years.)

(3) [16.28] Complications under Internal Revenue Code §2035

The key to the second requirement for application of the marital deduction is whether the person receiving the property survived the decedent. This is rarely an issue and rarely controversial. The following example illustrates this rareness: Property given by the decedent during life to a spouse but brought back into the decedent's estate under Internal Revenue Code §2035 did not qualify for the marital deduction because the spouse receiving the property did not survive the decedent. Rev.Rul. 79-354, 1979-2 Cum.Bull. 334. However, property given by a

decedent during life to a non-spouse but brought back into the decedent's estate under Code §2035 did qualify for the marital deduction when the decedent and the donee had married after the gift and before the decedent's death. *Id.*

c. [16.29] Requirement Three: Property Included in the Gross Estate of the Decedent

That the property must be included in the gross estate of the decedent for the marital deduction to apply may seem self-evident. Without this requirement, however, an estate might claim a deduction for property outside the estate but passing to the spouse because of the decedent's death, such as life insurance excluded from the estate but payable to the spouse.

d. [16.30] Requirement Four: Property Passing from the Decedent to the Surviving Spouse

It is not sufficient in obtaining the marital deduction that the property end up in the hands of the surviving spouse after the decedent's death. The property must have "passed from" the decedent to the surviving spouse. 26 U.S.C. §§2056(a), 2056(c). The following types of transfers satisfy the "passing from" requirement:

1. a bequest or devise under the decedent's will outright to the surviving spouse;

2. the intestate share for the surviving spouse;

3. a dower or courtesy interest of the surviving spouse, or a statutory interest in lieu thereof (This includes a spouse's share upon renunciation of the decedent's will. The renunciation or election must be valid under state law. If the renunciation or election is invalid, no marital deduction is allowable, even if the other beneficiaries agree that the spouse should be paid the renunciatory or elective share. Such a payment does not pass from the decedent. *See Estate of Goldstein v. Commissioner,* 479 F.2d 813 (10th Cir. 1973); *Estate of Ahlstrom v. Commissioner,* 52 T.C. 220 (1969).);

4. property transferred by the decedent to the spouse at any time (*e.g.,* a lifetime transfer to the spouse brought back into the estate under Internal Revenue Code §2035);

5. property held in joint ownership with right of survivorship (The deduction is limited, however, to the portion includable in the decedent's estate under Code §2040.);

6. property subject to a power of appointment that passes to the spouse under the exercise of power or in default of exercise;

7. proceeds of life insurance payable to the spouse;

8. property passing to the spouse as a result of a disclaimer by a third party (The disclaimer must be a qualified disclaimer under Code §2518. 26 C.F.R. §20.2056(d)-2.); and

9. property passing to the spouse in a will contest or similar litigation (The deduction will be allowed only if the transfer of property to the spouse was "a bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate." 26 C.F.R. §20.2056(c)-2(d)(2).).

Related to item 9 above, it should be noted that such recognition is presumed if the transfer was pursuant to a decision of a local court on the merits in an adversary proceeding following a genuine and active contest, and then only if the court passed on the facts on which deductibility depends. A transfer pursuant to a consent decree or other settlement may or may not qualify.

Also, for payments to the spouse to qualify for the marital deduction, they must be made as a bona fide compromise of a dispute about property that otherwise would have "passed from" the decedent to the surviving spouse. *Estate of Carpenter v. Commissioner,* 52 F.3d 1266, 1273 (4th Cir. 1995); Rev.Rul. 83-107, 1983-2 Cum.Bull. 159.

If the spouse agrees or is required to transfer estate property to a third party, no marital deduction is available for the property that the spouse does not keep. *Estate of Ransburg v. United States,* 765 F.Supp. 1388 (S.D.Ind. 1990).

e. [16.31] Requirement Five: Surviving Spouse a U.S. Citizen

The surviving spouse must be a U.S. citizen in order for the marital deduction to apply. If the spouse is not a U.S. citizen, the marital deduction is available only if the property passes to certain trusts or if the spouse becomes a U.S. citizen before the filing of the estate tax return.

f. [16.32] Requirement Six: Not a Nondeductible Terminable Interest

Requirements for the marital deduction for transfers in trust to a spouse, focused primarily for transfers at death, add one more complication. Analogous rules apply to gifts made during life. The genesis of the concern is the rule that no marital deduction is allowable for a property interest that meets the definition of a "nondeductible terminable interest." 26 U.S.C. §1046(b); 26 C.F.R. §20.2056(b)-1(c). A terminable interest is an interest in property that "will terminate or fail" upon "the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency." 26 U.S.C. §2056(b)(1). Life estates, terms for years, annuities, patents, copyrights, and interests as a beneficiary of a trust are examples of terminable interests. A bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity or term for years, is not a terminable interest. 26 C.F.R. §20.2056(b)-1(b).

A terminable interest in property will be nondeductible only if (1) another interest in the same property passes from the decedent to someone other than the surviving spouse for less than full and adequate consideration in money or money's worth; and (2) by reason of this passing, that other person or his or her heirs or assigns may possess or enjoy any part of the property after the termination or failure of the spouse's interest. 26 C.F.R. §20.2056(b)-1(c)(1).

The major exception to the nondeductible terminable interest rule is with regard to a certain kind of trust now known as a qualified terminable interest property trust. To qualify for QTIP treatment, three basic requirements set forth in Code §2056(b)(7)(B)(i) must be met:

1. The property must pass from the decedent. This is a reiteration of the general "passing from the decedent" requirement in §§2056(a) and 2056(c).

2. The surviving spouse must have a "qualifying income interest for life." 26 U.S.C. §2056(b)(7)(B)(i)(II). This requirement is satisfied if the following apply:

a. The surviving spouse is entitled for life to all of the income from the entire interest or a specific portion of the entire interest. Income that is accrued and undistributed at the time of the surviving spouse's death does not have to be paid to the estate of the surviving spouse to comply with this requirement. *Estate of Howard v. Commissioner,* 910 F.2d 633 (9th Cir. 1990).

b. No one (including the trustee) has the power to appoint the QTIP property to anyone other than the surviving spouse during the lifetime of the surviving spouse. This means that not even the surviving spouse can have a lifetime power of appointment over the property, and only the spouse can be entitled to receive trust distributions during the spouse's life.

3. The decedent's executor must elect QTIP treatment on the decedent's federal estate tax return (IRS Form 706). The election, once made, is irrevocable.

The return that makes the election and does so irrevocably is the last estate tax return filed by the executor on or before the due date for the return, including extensions, or if no return was timely filed, the first estate tax return filed by the executor after the due date.

The election may be made as to only part of the qualifying property. A partial election must be made on a fractional or percentage share so the elective portion reflects its proportionate share of the increase or decrease in value of the entire property. The fraction or percentage may be defined by formula. 26 C.F.R. §20.2056(b)-7(b)(2)(i). When a partial election is made, the elected and nonelected portions may be severed during the administration of the estate (and should be prior to the filing of Form 706) and held as separate trusts. The division must be made on a fractional or percentage basis, although the separate trusts do not have to receive pro rata shares of each asset. The division may be made only if the governing instrument or local law requires that the division be according to the fair market value of the assets on the date of division. 26 C.F.R. §20.2056(b)-7(b)(2)(ii).

2. Other Special Problems Under the Terminable Interest Rule

a. [16.33] Surviving Spouse's Awards

Illinois provides the surviving spouse with an award from a decedent's estate for the support of the surviving spouse for nine months after death. Many states have similar awards or allowances to the surviving spouse for some time after the death of the first spouse or during administration of the decedent's estate. The award in Illinois qualifies for the marital deduction because it does not terminate upon the death or remarriage of the surviving spouse and is vested, although the amount is subject to review by the probate court. *Molner v. United States,* 175 F.Supp. 271 (N.D.Ill. 1959). In some states, however, the award is not vested and would

terminate upon the death or remarriage of the surviving spouse. The award does not qualify for the marital deduction under those circumstances. *See, e.g., Jackson v. United States,* 376 U.S. 503, 11 L.Ed.2d 871, 84 S.Ct. 869 (1964); Rev.Rul. 83, 1953-1 Cum.Bull. 395; *Estate of Hailey v. Commissioner,* 36 T.C. 120 (1961).

b. [16.34] Optional or Conditional Gifts to Surviving Spouse

Sometimes the surviving spouse will be given the option to accept or reject a bequest or to choose between two alternative bequests within a time period less than the six months required under Internal Revenue Code §2056 to not be considered a nondeductible terminable interest. (In a sense, every bequest is optional since a beneficiary has the right to disclaim it.) Such bequests usually qualify for the marital deduction, even if the option not selected would have been a nondeductible terminable interest. *See, e.g., Estate of Tompkins v. Commissioner,* 68 T.C. 912 (1977), *acq.,* 1982-2 Cum.Bull. 1 (marital deduction allowed when surviving spouse took option of outright cash bequest instead of right to receive set monthly payment from trust until her remarriage). Conditional bequests, however, are ones that become effective only upon the occurrence of specified conditions or when the surviving spouse has complied with specific substantive conditions. Such conditional bequests generally do not qualify for the marital deduction. See, *e.g.,* Rev.Rul. 82-184, 1982-2 Cum.Bull. 215 (cash bequest payable to surviving spouse only if she purchased new home was nondeductible terminable interest).

c. [16.35] Joint and Mutual Wills

A joint and mutual will is one that is executed by both spouses and that becomes irrevocable upon the death of the first spouse. They are becoming rare in Illinois. If the surviving spouse is legally obligated to leave the property upon the subsequent death of the surviving spouse to the beneficiaries named in the joint and mutual will, the property so passing to the surviving spouse is usually a nondeductible terminable interest. *See, e.g., Bartlett v. Commissioner,* 937 F.2d 316 (7th Cir. 1991) (applying Illinois law). If the surviving spouse is entitled to full use of the property or income interest during life, however, a qualified terminable interest property election may be available.

3. Determining the Amount of the Marital Deduction

a. [16.36] Marital Deduction Limited to Net Value

The marital deduction is limited to the net value of any deductible interest passing from the decedent to the surviving spouse. This value is computed using date of death values or alternate values if that election is made under Internal Revenue Code §2032. 26 C.F.R. §20.2056(b)-4(a).

If the property passing to the surviving spouse is subject to a mortgage or other encumbrance or an obligation imposed by the decedent, the value of the property is to be reduced by the mortgage, encumbrance, or obligation. 26 C.F.R. §20.2056(b)-4(b).

If the executor is required by the will or by local law to pay or discharge the encumbrance, mortgage, or obligation, that payment is considered an additional interest passing to the surviving spouse. *Id.*

b. [16.37] Reduction for Death Taxes

If the property passing to the spouse must pay any share of the death taxes, the amount of the marital deduction is reduced by the amount of such taxes. It is important, therefore, to make clear that taxes are to be paid from some other source.

Whether the share of the surviving spouse, either by intestacy or on renunciation, must bear the burden of the estate tax on the balance of the estate is a state law question of tax apportionment. In Illinois, the courts have determined that no taxes are to be paid from that share, as they generate no such taxes. *See Farley v. United States,* 581 F.2d 821 (Cl.Ct. 1978); *In re Estate of Gowling,* 82 Ill.2d 15 (1980).

c. [16.38] Reduction for Administration Expenses

The marital deduction also must be reduced when the property is subject to payment of debts or administration expenses.

The IRS at one time took the position that administration expenses that the executor had the discretion to pay from the marital property also required reduction of the marital deduction. This position was rejected by the Supreme Court in *Commissioner v. Estate of Hubert,* 520 U.S. 93, 137 L.Ed.2d 235, 117 S.Ct. 1124 (1997).

In response to the Supreme Court's decision in *Hubert,* the IRS issued the current version of Treas.Reg. §20.2056(b)-4(d). These regulations distinguish the treatment of estate management expenses and estate transmission expenses.

Management expenses are expenses that are incurred with the investment of estate assets or with their preservation or maintenance during a reasonable period of administration. These include investment advisory fees, custodial fees, and the like. To the extent these expenses are attributable to the principal or income of the marital share, they do not reduce the marital share, unless they are deducted under Internal Revenue Code §2053. (Double deduction under Code §§2056 and 2053 is prohibited by Code §2056(b)(9).) The value of the marital deduction must be reduced by management expenses paid from the income or principal of the marital share that are attributable to property interests other than the marital share.

Transmission expenses are expenses that would not have been incurred but for the decedent's death and subsequent estate administration. The net value of the marital share must be reduced for any transmission expenses paid from the income or principal of the marital share.

4. [16.39] Reformation Proceedings To Clarify the Marital Deduction

To the extent the construction of a real ambiguity is resolved in a way that modifies a trust to qualify for the marital deduction, the IRS will follow the court-construed document and allow a marital deduction. But if the court proceeding is merely to correct a deficiency in drafting, the IRS is not likely to follow the results and allow the marital deduction. See Tech.Adv.Mem. 9127005 (July 5, 1991) (attempt to correct provision in trust that extinguished spouse's interest

upon dissolution — provision that disqualified trust for marital deduction — could not be created by judicial reformation; here, IRS reasoned, "Reformations [to correct drafting errors] are permitted for charitable remainder deductions under section 2055(e)(3) but not for marital deductions."). *See also Estate of Aronson v. Commissioner,* 85 T.C.M. (CCH) 1561, 1573 (2003) (estate not entitled to marital deduction as qualified terminable interest property when language was not ambiguous and had only discretionary, not mandatory, right to income in surviving spouse; court "not bound to give effect to a local court order that modifies that document after the Commissioner has acquired rights to tax revenues under its terms").

F. [16.40] Charitable Deduction

The charitable deduction is allowed for gifts to public charities and private foundations and other organizations that qualify under Internal Revenue Code §2055. Outright gifts are typically without controversy as to whether they qualify. Gifts in trust are subject to more stringent rules outlined in Code §2055. Trusts may by mistake fail to comply with the charitable deduction rules set forth in that section. In those instances, a judicial reformation under Code §2055(e)(3) can cause the trust to qualify for the federal estate tax charitable deduction. To constitute a qualified reformation under Code §2055(e)(3)(B), the governing instrument can be reformed, amended, or construed to change a reformable interest into a qualified interest, if certain conditions are met. First, any difference between the actuarial value of the qualified interest and the actuarial value of the reformable interest cannot exceed five percent of the actuarial value of the reformable interest. Second, in the case of a charitable remainder interest, the non-remainder interest before and after the qualified reformation must terminate at the same time. Finally, the change must be effective as of the date of the decedent's death. 26 U.S.C. §2055(3)(3)(B).

The term "reformable interest" means any interest for which a deduction would be allowable under Code §2055(a) at the time of the decedent's death but for Code §2055(e)(2). 26 U.S.C. §2055(e)(3)(C)(i). It does not include any interest unless, before the remainder vests in possession, all payments to persons other than an organization described in Code §2055(a) are expressed either in specific dollar amounts or as a fixed percentage of the fair market value of the property. 26 U.S.C. §2055(e)(3)(C)(ii). A "qualified interest" is defined in Code §2055(e)(3)(D) as an interest for which a deduction is allowable under Code §2055(a). See, *e.g.,* Pvt.Ltr.Rul. 9211013 (Mar. 13, 1992) for an example of a qualified reformation meeting the qualified requirements.

Allowance of a charitable deduction for amounts passing to charity pursuant to a settlement agreement have been subject to challenge by the IRS but may be allowed in certain circumstances. In Tech.Adv.Mem. 201004022 (Jan. 29, 2010), the IRS originally denied a charitable deduction for payment to a charitable trust pursuant to a settlement agreement based on disposition of the decedent's residuary estate whereby, due to a scrivener's error, the residuary clause was omitted from the decedent's will. It was the IRS's position that the charity did not have an enforceable right to the payment under properly applied state law. *Id.,* citing *Commissioner v. Estate of Bosch,* 387 U.S. 456, 18 L.Ed.2d 886, 87 S.Ct. 1776 (1967), *Ahmanson Foundation v. United States,* 674 F.2d 761 (9th Cir. 1981), and *Terre Haute First National Bank v. United States,* No. TH 89-31-C, 1991 WL 496865 at *8, n.7 (S.D.Ind. Apr. 8,

1991). However, in *Palumbo v. United States,* 788 F.Supp.2d 384 (W.D.Pa. 2011), the court ruled that the estate was entitled to an estate tax charitable deduction, basing its decision in part on its finding of the intent behind Code §2055 to encourage charitable transfers (and declining to narrowly construe Code §2055).

Other issues arising in the charitable context include the permitted rescission of a charitable remainder annuity trust that did not from its inception satisfy the ten percent of the initial fair market remainder test of Code §664(d)(1)(D) (see Pvt.Ltr.Rul. 201040021 (Oct. 8, 2010)) and reformation of a charitable remainder trust to permit distribution at termination to a named private foundation rather than a public charity (see Pvt.Ltr.Rul. 201011034 (Mar. 19, 2010)). Each circumstance is highly fact-specific, and the outcomes are dependent on the particular terms of the governing instrument, the applicable state law, and the judicial process.

G. [16.41] State Estate or Inheritance Tax

Several states, including Illinois, have enacted changes to their estate tax laws to prevent loss of revenue as a result of the phaseout and elimination of the Internal Revenue Code §2011 (repealed Dec. 19, 2014, by Pub.L. No. 113-295, 128 Stat. 4051) credit for state death taxes and the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub.L. No. 107-16, 115 Stat. 38. For persons dying after 2014, Illinois imposes an estate tax at the highest marginal rate of 16 percent.

The Illinois estate tax exemption is lower than the federal exemption, such that property sheltered from estate taxes at the federal level may still generate estate taxes at the state level. Careful drafting (use of single-fund qualified terminable interest property trusts, for example, is required to avoid this result). The Illinois estate tax presently recognizes the exclusion amount of only $4 million for persons dying in 2015 or thereafter. 35 ILCS 405/2, *et seq.*

Different states have used different approaches to preserving their estate tax revenues. Because of these differences in state law, clients often change their state of domicile (permanent, legal residence) to achieve a better total estate tax result.

H. [16.42] Estate Tax Deduction for Claims and Expenses

Litigation may either give rise to an asset to be included in the gross estate or a deduction from the gross estate. Internal Revenue Code §2053 provides for the deduction from the gross estate of both administration expenses and claims against the estate. Regulations provide guidance as to the determination of the amount of expenditures pursuant to court decrees and settlements. 26 C.F.R. §20.2053-1. Deductions under Code §§2053(a) and 2053(b) must be bona fide in nature and not founded on a transfer that is essentially donative in character.

If a court of competent jurisdiction renders a final judicial decision, the decision of the court may be relied on to establish the amount of an expense or claim for deduction if the court actually passes on the facts on which the deduction depends. Thus, it is important to pay careful attention to establishing the requisite record with the court and obtaining a decree of appropriate specificity. If the court does not pass on the facts, the decree may not be relied on to establish the

amount of the claim or expenses for purposes of Code §2053(a) or §2053(b). 26 C.F.R. §20.2053-1(b)(3)(i). This provision does not require a court decree for purposes of a deduction but provides guidance as to when a decree can be relied on to establish the amount of a deduction. 26 C.F.R. §20.2053-1(b)(3)(ii).

If a court decree is rendered by consent, it may be relied on to determine the amount of a claim or expense, provided the consent decree "resolves a bona fide issue in a genuine contest." 26 C.F.R. §20.2053-1(b)(3)(iii). For this purpose, consent given by all parties who are adverse will be presumed to resolve a bona fide issue in a genuine contest. *Id.*

In the case of a settlement, a settlement may be relied on to determine the amount of a claim or expense if the "settlement resolves a bona fide issue in a genuine contest and is the product of arm's-length negotiations by parties having adverse interests with respect to the claim or expense." 26 C.F.R. §20.2053-1(b)(3)(iv).

The final regulations also clarify that for purposes of Code §§2053(a) and 2053(b), post-death events will be taken into account. 26 C.F.R. §20.2053-1(d)(2). This is at variance with the general rules with respect to the determination of the value of an asset for inclusion in the gross estate. The amount deductible is limited to the total amount actually paid, provided that a deduction will be allowed for a claim or expense not yet paid if the amount "is ascertainable with reasonable certainty and will be paid." 26 C.F.R. §§20.2053-1(d)(1), 20.2053-1(d)(4). If an amount is not paid or reasonably ascertainable before the expiration of the Code §6511(a) period of limitations, a protective claim for refund may (and ordinarily should) be filed. 26 C.F.R. §20.2053-1(d)(5). See Rev.Proc. 2011-48, 2011-42 Int.Rev.Bull. 527, and IRS Notice 2009-84, 2009-44 Int.Rev.Bull. 592, for additional guidance regarding protective claims for refund.

V. GENERATION-SKIPPING TRANSFER TAX

A. [16.43] Background

In the end result, not only could property interests be transferred among different beneficiaries than intended by the estate plan, but those beneficiaries could be in different generations. Practitioners often think of generations as mom and dad, referred to as G1, the children, referred to as G2, and the grandchildren, referred to as G3. Though more complex in application, the Internal Revenue Code provides that when property goes from G1 to G3, thereby skipping an entire generation (G2), this may result in yet another tax, the GST tax.

Congress intended this tax, first enacted in 1976 and completely rewritten in 1986, to plug certain perceived loopholes in the federal estate tax benefiting the rich.

When it applies, the GST tax is payable in addition to any other gift or estate tax on the transfer. The GST tax exemption amount and the GST tax rate applicable in years 2012 – 2016, as enacted under the American Taxpayer Relief Act of 2012, are summarized below:

Year	GST Tax Exemption*	GST Tax Rate
2012	$5,120,000	35%
2013	$5,250,000	40%
2014	$5,340,000	40%
2015	$5,430,000	40%
2016	$5,450,000	40%

*The GST tax-exemption amount is equal to the estate tax basic exclusion amount, *i.e.,* $5,000,000 indexed for inflation since 2010.

See *What's New — Estate and Gift Tax* (Dec. 2, 2015), www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Whats-New-Estate-and-Gift-Tax (case sensitive).

The GST tax applies generally to GSTs made after October 22, 1986. 26 U.S.C. §2601. However, under the effective-date rules, the GST tax does not apply to (1) a GST under a trust that was irrevocable on September 25, 1985, but only to the extent the transfer is not made out of corpus added to the trust after September 25, 1985; (2) a GST under a will or revocable trust executed before the effective date of the GST tax of a person who died before January 1, 1987; and (3) a GST under a trust included in the gross estate of, or a direct skip occurring by reason of the death of, a person who was under a mental disability at the time of the enactment of the GST tax and who did not regain his or her mental competence before death. 26 C.F.R. §26.2601-1(b).

B. [16.44] Retention of Trust's Exempt Status in the Case of Modification, Settlement, Judicial Construction, and Other Changes

For a trust that is effectively exempt from GST tax under the effective date rules (exempt trust), retention of such GST tax-exempt status in the case of modification is of great importance, given that the loss of exempt status will subject part or all of the trust to the GST tax. 26 C.F.R. §26.2601-1(b)(4) provides rules for determining when a trustee action, judicial construction, settlement agreement, or other modification with respect to an exempt trust will cause the trust to lose its exempt status. The regulations pertain only to the GST tax treatment, not to the estate, gift, or income tax treatment, of the transaction.

For a trust created after the effective date of the GST that is exempt from GST tax by virtue of the allocation of GST exemption (zero inclusion ratio trust), it is unclear whether any type of modification could cause such exempt status to be lost without also triggering a new gift or estate tax. Unlike an exempt trust, there does not appear to be either authority or policy supporting the proposition that a modification that fails to meet one of the regulations' safe harbors would affect the GST tax-exempt status of a zero inclusion ratio trust (or any other trust with an inclusion ratio less than one), but official guidance has not yet been issued on the matter. The IRS has, however, issued several Private Letter Rulings that apply the various safe harbors of the regulations for exempt trusts to such zero inclusion ratio trusts, ruling that "at a minimum," a modification that does not impact the GST status of an exempt trust will similarly not affect the GST status of a zero inclusion ratio trust. Pvt.Ltr.Ruls. 201525001 (June 19, 2015), 201418001 (May 2, 2014), 201320004 (May 17, 2013), 201322025 (May 31, 2013), 201210002 (Mar. 9, 2012), 201109004 (Mar. 4, 2011), 200902009 (Jan. 9, 2009), 200841027 (Oct. 10, 2008), 200822008 (May 30, 2008).

1. [16.45] Discretionary Distributions of Principal in Trust

A trust agreement or state law may permit a trustee to transfer the assets of one trust to another trust for one or more of the same beneficiaries, a process commonly referred to as "decanting." Section 16.4 of the Illinois Trusts and Trustees Act, 760 ILCS 5/1, *et seq.,* the Illinois decanting statute, provides for the decanting of trusts administered in Illinois under Illinois law, or governed by Illinois law with respect to the meaning and effect of their terms. 760 ILCS 5/16.4. The Illinois decanting statute is applicable to trusts existing on, or created on or after, January 1, 2013, provided that the governing instrument does not expressly prohibit use of the statute. In general, the statute provides that a trustee with the discretion to distribute principal of a trust may exercise that discretion, without beneficiary consent or court approval, in favor of a second trust. It also delineates the extent to which the terms of such second trust are permitted to deviate from the terms of the original trust, depending in large part on whether the discretion of the decanting trustee with respect to principal is "absolute" (as defined in 760 ILCS 5/16.4(a)) or somehow limited.

The regulations provide that the distribution of trust principal from an exempt trust to a new trust or the retention of trust principal in a continuing trust will not cause the new or continuing trust to be subject to the GST tax if the terms of the governing instrument of the exempt trust authorize distributions to a new trust or retention in a continuing trust without the consent or approval of any beneficiary or court, or, at the time the exempt trust became irrevocable, state law authorized distributions to a new trust or retention in a continuing trust without the consent or approval of any beneficiary or court. In addition, the terms of the new or continuing trust must not extend the time for vesting of any beneficiary interest in the trust in a manner that may postpone or suspend the vesting, absolute ownership, or power of alienation in property for a period, measured from the date the original trust became irrevocable, beyond any life in being at the date the original trust became irrevocable, plus a reasonable period of gestation. 26 C.F.R. §26.2601-1(b)(4)(i)(A). If beneficiary or court approval is required or the period of vesting is impermissibly extended, the trust may lose its exempt status. In addition, if the distribution or continuation is based on statutory authority, but the statute was not in effect when the exempt trust became irrevocable, the distribution or continuation may result in loss of exempt status. See 26 C.F.R. §26.2601-1(b)(4)(i)(E), Examples 1, 2. As the Illinois decanting statute was enacted after the effective date of the GST tax, the decanting of an exempt trust pursuant to the statute would not qualify for this discretionary distribution safe harbor, although it may qualify under the catch-all safe harbor discussed in §16.48 below. The decanting of a zero inclusion ratio trust pursuant to the Illinois decanting statute, however, may qualify under this safe harbor, provided that the original trust became irrevocable on or after January 1, 2013 (although, as noted in §10.44 above, the modification of a zero inclusion ratio trust, via decanting or otherwise, may not *need* to fall within any of the regulations' safe harbors in order for the zero inclusion ratio trust to retain its exempt status).

2. [16.46] Settlement

A court-approved settlement of a bona fide issue regarding the administration of an exempt trust or the construction of the terms of the governing instrument of an exempt trust will not cause

the trust to lose its exempt status if (a) the settlement is the product of arm's-length negotiations and (b) the settlement is within the range of reasonable outcomes under the governing instrument and applicable state law addressing the issues resolved by the settlement. Note that court approval of the settlement is required. 26 C.F.R. §26.2601-1(b)(4)(i)(B).

The GST tax regulations do not provide specific guidance as to what constitutes a bona fide issue. However, the guidance provided in the context of the marital deduction discussed in §16.30 above is helpful in this regard. A settlement that results in a compromise between the positions of the litigating parties and reflects the parties' assessments of the relative strengths of their positions is a settlement that is within the range of reasonable outcomes. Pvt.Ltr.Ruls. 201528024 (July 10, 2015), 201532008 (Aug. 7, 2014), 201123014 (June 10, 2011), 201121002 (May 27, 2011), 201051002 (Dec. 23, 2010), 200936008 (Sept. 4, 2009), 200738005 (Sept. 21, 2007), 200435008 (Aug. 27, 2004), 200112038 (Mar. 23, 2001), 200004014 (Jan. 28, 2000), 199948014 (Dec. 3, 1999).

3. [16.47] Construction

A judicial construction of a governing instrument to resolve an ambiguity in the terms of the instrument or to correct a scrivener's error will not cause a trust to lose its exempt status if the judicial action involves a bona fide issue and the construction is consistent with applicable state law that would be applied by the highest court of the state. 26 C.F.R. §26.2601-1(b)(4)(i)(C).

Construction may involve a wide range of bona fide issues, including whether adopted persons or persons conceived by means of artificial conception are within the class of beneficiaries of a trust, the effectiveness of the exercise of a power of appointment, or whether a legacy has lapsed. The issue must be bona fide, as opposed to being contrived by the parties to achieve a particular result and, under the principles stated in *Commissioner v. Estate of Bosch,* 387 U.S. 456, 18 L.Ed.2d 886, 87 S.Ct. 1776 (1967), discussed in §16.2 above, must be in accordance with the law that would be applied by the highest court of the state. The judicial construction safe harbor does not extend generally to the reformation of a trust agreement, but it does cover the correction of a scrivener's error.

If the highest court in the state has not ruled on the specific issue, clarification as to whether this element of the safe harbor has been met may necessitate the filing of a Private Letter Ruling request. Numerous Private Letter Rulings have been issued with respect to the effect of the construction of exempt trusts. In Pvt.Ltr.Rul. 200543037 (Oct. 28, 2005), the IRS ruled that a court order construing the language of a will with respect to the exercise of a limited power of appointment was a reasonable interpretation of the will consistent with applicable law that did not cause the loss of exempt status. In Pvt.Ltr.Rul. 200423006 (June 4, 2004), the IRS ruled that a reformation to correct a scrivener's error was consistent with the law that would be applied by the highest court of the state and did not cause loss of the trust's exempt status. See also Pvt.Ltr.Ruls. 201220030 (May 18, 2012), 201026014 (July 2, 2010), 201006005 (Feb. 12, 2010), 200910003 (Mar. 6, 2009), 200328026 (July 11, 2003), 200116031 (Apr. 20, 2001), 200108011 (Feb. 23, 2001), 9741040 (Oct. 10, 1997), 9644057 (Nov. 1, 1996), 9545009 (Nov. 10, 1995), 9218053 (May 1, 1992).

In Pvt.Ltr.Rul. 201051002 (Dec. 23, 2010), the IRS stated that an earlier ruling by the highest court of the state, holding that certain remainder interests were void and illegal as violating the rule against perpetuities, was in question following a later ruling by the same court, in a different case, with respect to the retroactive application of a wait-and-see rule against perpetuities since enacted by the state. The IRS ruled that the highest court of the state, under the wait-and-see rule, would now sustain the same remainder interests it had previously held void. The IRS ruled that the state's highest court would retroactively sustain the remainder interests under the wait-and-see rule even though the court did not address due-process issues presented by such retroactive application and despite the fact that a different state's highest court, which had addressed the constitutional issues raised by a similar provision in its own statute, held that the wait-and-see rule could not, as a matter of constitutional law, be applied retroactively.

4. [16.48] Other Changes

An exempt trust may be modified to change the situs of the trust or other administrative terms, to divide a single trust into multiple trusts or merge multiple trusts into a single trust, or to convert an income interest into a unitrust interest. Treas.Reg. §26.2601-1(b)(4)(i)(D) provides useful guidance as to the limitations on modifications necessary to preserve the exempt status of a trust. Specifically, a modification (including a modification that does not satisfy the requirements of safe harbors for discretionary distributions, settlements, and construction discussed in §§16.45 – 16.47 above) by judicial reformation or by nonjudicial reformation that is valid under applicable state law will not cause an exempt trust to lose its exempt status if (a) the modification does not shift a beneficial interest in the trust to a beneficiary in a generation lower than the generation of the beneficiary who held the interest before the modification and (b) the modification does not extend the time for vesting of a beneficial interest in the trust beyond the period provided in the original trust. 26 C.F.R. §26.2601-1(b)(4)(i)(D)(1).

A modification of an exempt trust will result in a shift of a beneficial interest to a lower-generation beneficiary if the modification can result in either (a) an increase in the amount of the GST or (b) the creation of a new GST. To make this assessment, "the effect of the trust instrument on the date of the modification is measured against the effect of the instrument in existence immediately before the modification. If the effect of the modification cannot be immediately determined, it is deemed to shift" to a lower-generation beneficiary. 26 C.F.R. §26.2601-1(b)(4)(i)(D)(2). By way of example, if an exempt trust for the benefit of a G2 beneficiary is modified to provide for a G3 beneficiary (see §16.43 above), the modification would result in the creation of a new GST.

The types of modifications made pursuant to this final safe harbor may include those made via decanting pursuant to a state statute enacted after the GST effective date. See 26 C.F.R. §26.2601-1(b)(4)(i)(E), Example 2. An exempt trust decanted pursuant to the Illinois decanting statute should thus retain its exempt status if the decanting falls within this safe harbor.

a. [16.49] Administrative Modifications

A modification that is administrative in nature that only indirectly causes an increase in the amount transferred is not considered a modification that results in the loss of exempt status.

Examples include modifications that lower administrative costs or income taxes. 26 C.F.R. §26.2601-1(b)(4)(i)(D)(2). Such modifications commonly occur with a change of situs.

With any change of situs, the applicable rule against perpetuities should be considered. If a change of situs results in the application of a rule against perpetuities that extends the time for vesting beyond the period under the original terms of the exempt trust, the trust will lose its exempt status. See 26 C.F.R. §26.2601-1(b)(4)(i)(E), Example 4. Modifications in fiduciary succession and provisions regarding investment or other advisers that otherwise meet the requirements of Treas.Reg. §26.2601-1(b)(4)(i)(D)(2) are considered administrative modifications that do not result in the loss of the exempt status of a trust. 26 C.F.R. §26.2601-1(b)(4)(i)(E), Example 10; Pvt.Ltr.Ruls. 201434004 (Aug. 22, 2014), 201210002 (Mar. 9, 2012), 201207001 (Feb. 17, 2012), 201025026 (June 25, 2010), 200734010 (Aug. 24, 2007), 200015002 (Apr. 14, 2000).

b. [16.50] Division and Merger

Division of an exempt trust and merger of exempt trusts will not cause loss of exempt status provided the effect of the division or merger is not to increase the amount of any GST or extend the period for vesting. Section 4.25 of the Illinois Trusts and Trustees Act provides for both the severance and consolidation of trusts governed by Illinois law. 760 ILCS 5/4.25. Severed trusts are to be held on terms and conditions that are substantially equivalent to the beneficiaries' interests in the trusts before the severance, provided that the terms of the trust before severance that would affect qualification of the trust for any special tax status must remain identical.

Consider, for example, an exempt trust established by a mother for her two daughters, *A* and *B,* that provides for discretionary distribution of trust income and principal to *A, B,* and their respective descendants and for the termination and distribution of the trust upon the death of the survivor of *A* and *B* to their then living descendants, per stirpes. Due to the differing level of requests for distributions from the trust from the two families, the trust is divided into separate trusts for the benefit of *A* and *A*'s descendants and *B* and *B*'s descendants, respectively. The trust for *A* will terminate and be distributed to *A*'s descendants upon *A*'s death, and the trust for *B* will terminate and be distributed to *B*'s descendants upon *B*'s death. The effect of the division is in fact to provide for the earlier distribution of the trust for the first deceased child. Such division will not cause the loss of the exempt status of the divided trusts. See 26 C.F.R. §26.2601-1(b)(4)(i)(E), Example 5. See also Pvt.Ltr.Ruls. 201516036 (Apr. 17, 2015), 201349002 (Dec. 6, 30, 2013), 201216010 (Apr. 20, 2012), 201205001 (Feb. 3, 2012), 201133007 (Aug. 19, 2011), 201131014 (Aug. 5, 2011), 201109004 (Mar. 4, 2011), 201050005 (Dec. 17, 2010), 201042004 (Oct. 22, 2010), 200736023 (Sept. 7, 2007), 200736002 (Sept. 7, 2007), 200708054 (Feb. 23, 2007), 200703031 (Jan. 19, 2007), 200645005 (Nov. 10, 2006), 200525003 (June 24, 2005), 200513003 (Apr. 1, 2005), 200229013 (July 19, 2002), 200047011 (Nov. 22, 2000), 200038014 (Sept. 22, 2000), 199939010 (Oct. 1, 1999), 9619047 (May 10, 1996), 9610021 (Mar. 8, 1996) (merger of trusts), 9508018 (Feb. 24, 1995), 8912038 (Mar. 24, 1989), 8726016 (Mar. 25, 1987) (partition of trusts).

c. [16.51] Total Return Trust Conversion

With the advent of modern portfolio theory and the prudent investor rule, investment for total return has become a cornerstone of fiduciary investment, subject to limitations dictated by the trustee's duty of impartiality between current income and remainder beneficiaries. Section 5.3 of the Illinois Trusts and Trustees Act provides for the conversion of a trust that describes the amount that may or must be distributed to a beneficiary to the trust's income to a total return trust. 760 ILCS 5/5.3. Distribution following conversion is based on a distribution amount, and the term "income" is deemed to mean the percentage amount (which is a percentage of the fair market value of the trust). Such a conversion of an exempt trust under a state statute does not cause loss of the exempt status of the trust. See 26 C.F.R. §26.2601-1(b)(4)(i)(E), Example 11. See also Pvt.Ltr.Ruls. 201527032 (July 2, 2015), 201320009 (May 17, 2013), 201148001 (Dec. 2, 2011), 201128018 (July 15, 2011), 201104003 (Jan. 28, 2011), 201049008 (Dec. 10, 2010), 201025030 (June 25, 2010).

VI. INCOME TAX

A. [16.52] Background

Two questions that must be considered in any controversy are (1) whether the end result will trigger the realization of income (and, if so, whether it is ordinary income or capital gain) and (2) what the income tax basis of the property will be in the hands of the parties after the end result.

To understand those consequences, the practitioner should be familiar generally with the income tax consequences to the beneficiaries of estates and trusts of receiving property. Important concepts for the practitioner to keep in mind with regard to beneficiaries of estates and trusts on income taxes are the fair-market-value basis rule, taxation of income in respect of a decedent (IRD), and taxation of interests in investment and business entities.

Beneficiaries of gifts under wills and living trusts at death typically receive property with a date-of-death (or alternate valuation date) fair-market-value income tax basis. This rule — the fair market-value basis rule — does not apply to property that is labeled under the Internal Revenue Code as IRD. IRD consists of income that a decedent was entitled to during his or her lifetime but that was not reported by the decedent as income at the time of his or her death. Common examples of IRD include accrued income for services rendered prior to death, post-death bonuses, deferred compensation payments, income from the exercise of a stock option, dividends declared and payable to a shareholder of record prior to death, and accrued but unpaid interest. See, *e.g.,* 26 C.F.R. §1.691(a)-2(b), Examples 1 – 5.

IRD is reported at the time of its receipt and is taxable to its recipient. Under Code §691(c), there is an income tax deduction for the incremental increase in the estate tax that is attributable to IRD. The deduction may be claimed only as an itemized deduction and not as a deduction from gross income in calculating adjusted gross income. But the two-percent floor imposed by Code §67 on miscellaneous itemized deductions does not apply to the Code §691 deduction. 26 U.S.C. §67(b)(7).

Expenses relating to activities of a decedent prior to death that the decedent could have deducted if paid or accrued prior to death may constitute deductions in respect of a decedent (DRD). Examples of DRD include unpaid business expenses, interest expenses, deductible taxes, depletion, and the credit for foreign taxes. See 26 U.S.C. §691(b).

When a beneficiary receives an interest in a partnership, limited liability company (LLC), or corporation, more advanced tax planning and analysis are required. In this regard, partnerships, S corporations, and LLCs are flow-through entities, and there may be tax consequences to being a partner or member of an LLC or a shareholder of an S corporation that are independent of cash flow distributed each year to the partner or shareholder. Elections by the fiduciary, a manager or general partner for an LLC or partnership, or the trustee holding S corporation stock may be required to achieve favorable tax benefits for the partner or shareholder.

Distributions from an estate or trust that carry out income earned by the estate or trust during the administration period will be subject to income tax. In this regard, see TRUST ADMINISTRATION §7.60 (IICLE®, 2014).

B. [16.53] Origin of the Claim

In the context of fiduciary litigation, questions arise whether a settlement or judgment constitutes gross income to the recipient and, if it is includable in gross income, whether it is ordinary or capital gain income or whether it is deductible as an Internal Revenue Code §162 trade or business expense or as a Code §212 production of income expense.

Under what is known as the origin-of-the-claim test, the income tax consequences of a settlement or judgment are determined based on the substance of the claim that gave rise to the settlement or judgment. *United States v. Gilmore,* 372 U.S. 39, 9 L.Ed.2d 570, 83 S.Ct. 623 (1963); *Woodward v. Commissioner,* 397 U.S. 572, 25 L.Ed.2d 577, 90 S.Ct. 1302 (1970). In *Gilmore,* the Supreme Court determined that expenses incurred with a dissolution proceeding were not deductible by the taxpayer because the expenses were not incurred for the conservation of property held for the production of income (a Code §212 deduction). In so holding, the Court stated that the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences on the fortunes of the taxpayer, are the controlling basic test of whether an expense was business or personal and, hence, whether it is deductible. 83 S.Ct. at 626 – 630.

Application of the origin-of-the-claim test requires an assessment of the "kind of transaction" out of which the litigation arose. *Boagni v. Commissioner,* 59 T.C. 708, 713 (1973) (consideration given to issues involved, nature and objectives of litigation, defenses asserted, background of litigation, and all facts pertinent to controversy). Settlements and awards based on a claim of insurance proceeds, gift, bequest, devise, or inheritance may be excluded from gross income under the origin-of-the-claim test.

Logically, the claim itself is considered the most persuasive evidence of the manner in which a settlement or judgment should be characterized. Rev.Rul. 85-98, 1985-2 Cum.Bull. 51. If a judgment or award is based on multiple claims, allocation of the judgment or award among the

claims, some of which may be taxable and some of which may not be taxable, will be required. In the case of a bona fide settlement agreement between adverse parties, an allocation under the agreement having a reasonable basis will be respected. *Paul v. United States,* 72-2 U.S.T.C. (CCH) ¶9720 (S.D.Ill. 1972); *Francisco v. United States,* 267 F.3d 303 (3d Cir. 2001).

C. [16.54] Gross Income

"Gross income" is broadly defined under the Internal Revenue Code to include all income from whatever source derived. 26 U.S.C. §61(a). Gross income specifically includes income in respect of a decedent, discussed in §16.52 above, and income carried out to a beneficiary from an interest in an estate or trust. 26 U.S.C. §§61(a)(14), 61(a)(15).

It is the taxpayer's burden to show that a settlement or award is excluded from gross income, and exclusions are narrowly construed. "Accordingly, any funds or other accessions to wealth received by a taxpayer are presumed to be gross income and are includable as such in the taxpayer's return, unless the taxpayer can demonstrate that the funds or accessions fit into one of the specific exclusions created by the Code." *Getty v. Commissioner,* 913 F.2d 1486, 1490 (9th Cir. 1990).

D. [16.55] Exclusions from Gross Income

Proceeds of life insurance are generally excluded from gross income, as is the value of property acquired by gift, bequest, devise, or inheritance. 26 U.S.C. §§101(a), 102(a). Income from property acquired by gift, bequest, devise, or inheritance is included in gross income. 26 U.S.C. §102(b). Certain compensatory awards are excluded from gross income under Internal Revenue Code §104.

1. [16.56] Insurance Proceeds

Proceeds of life insurance are almost always excluded from gross income under Internal Revenue Code §101(a). However, the proceeds of an insurance contract transferred for value are included in gross income. In addition, a settlement or award with respect to insurance proceeds converted by a third party may be subject to taxation under the origin-of-the-claim test. See Pvt.Ltr.Rul. 200528023 (July 15, 2005), involving claims with respect to corporate-owned life insurance on the lives of employees of the corporation, in which the IRS reasoned that the plaintiffs' recovery was not a recovery of the life insurance proceeds themselves, but rather a recovery for improper conversion by the company of the insurance it received, and the recovery therefore was included in gross income.

2. [16.57] Gifts and Inheritances

Under the origin-of-the-claim test, the Internal Revenue Code §102(a) exclusion of gifts, bequests, devises, and inheritances from gross income also excludes settlements and awards in compromise of a disputed claim with respect to a gift, bequest, devise, or inheritance. However, voluntary rearrangements of property interests among the parties will not be excluded.

There are numerous examples of the exclusion of settlements and awards from gross income under Code §102(a). In the seminal probate case, *Lyeth v. Hoey,* 305 U.S. 188, 83 L.Ed. 119, 59 S.Ct. 155, 159 (1938), the Court held that an heir who contested his grandmother's will on the grounds of lack of capacity and undue influence and who, as a result of a compromise of that contest, received property from the grandmother's estate that he would not have received had the will gone uncontested acquired that property "by 'bequest, devise, or inheritance' " and was therefore not liable for federal income taxes. The Court noted that the taxpayer was an heir of his grandmother under the applicable law, and that it was by virtue of his heirship that he contested the will. In the Court's view, there was no question that the taxpayer obtained the settlement because of his standing as an heir and that he made his claim and received the settlement in that capacity. 59 S.Ct. at 159 – 160.

See also Keller v. Commissioner, 41 B.T.A. 478 (1940) (settlement of beneficiary's claim under prior will was excluded from gross income); *Getty v. Commissioner,* 913 F.2d 1486 (9th Cir. 1990) (payment received by taxpayer in settlement of suit against residuary beneficiary of his father's estate was excluded from gross income as payment received in lieu of his claim to inheritance); *Vincent v. Commissioner,* 63 T.C.M. (CCH) 1776 (1992) (amount taxpayer received in settlement of lawsuit against his stepmother with respect to deed by his father during his lifetime represented payment for interest taxpayer may have acquired from his father and so constituted gift or inheritance excludable from gross income); *Marcus v. Commissioner,* 71 T.C.M. (CCH) 2823 (1996) (portion of proceeds of sale of estate asset representing date of death value of property interest was excluded from gross income as inheritance).

Conversely, when the taxpayer does not otherwise meet the burden of establishing that a payment is based on a gift, bequest, devise, or inheritance, the payment is included in gross income. In *White v. Thomas,* 116 F.2d 147 (5th Cir. 1940), the taxpayer, who was not related to the decedent, made a claim against the decedent's estate alleging that the decedent made a gift of his ranch to the taxpayer. Although there was no deed or finding of an interest by possession, the court held that the payment received by the taxpayer in settlement of the claim was not received as a gift but as a release of the claimed right and was included in gross income.

3. [16.58] Compensatory Damages and Return of Capital

While damages for personal injuries are excluded from gross income under Internal Revenue Code §104, there is no corresponding exclusion for nonpersonal injuries such as damages as a result of breach of contract or breach of fiduciary duty. Accordingly, damages for breach of fiduciary duty will be included in gross income unless they represent reimbursement for loss of investment in an asset. To the extent that compensatory damages are for waste to a trust or estate and do not exceed the basis in the property, they are a return of capital and are not included in gross income. By way of a simple example, a damage award of $1,000 with respect to a wholly worthless investment with a basis of $100 would constitute a return of capital to the extent of $100 and gross income to the extent of $900. Punitive damages in nonpersonal injury cases are always included in gross income.

In an undated IRS memorandum (available with subscription from RIA Checkpoint, https://riacheckpoint.com/app/view/toolitem?usid=c7a9f29096), the taxpayers established a trust and named a corporate fiduciary. The trust was funded with a promissory note secured by funds

in another trust. The trustee allowed the debtor to use the assets of the other trust, and the debtor defaulted on the note. The taxpayers sued the trustee for breach of fiduciary duty. Under a settlement agreement, the trustee restored the proceeds and indemnified the taxpayers against any estate tax liability. The IRS advised that the transaction should be characterized as a sale, the portion of the proceeds representing trust corpus should be treated as a return of basis (and thus escape taxation), and the remaining portion should be taxed as capital gain.

4. [16.59] Claims for Lost Tax Benefits

Fiduciary litigation frequently arises from claims for lost tax benefits made against fiduciaries and their professional advisers. The tax treatment of payments made based on such claims varies. A payment may be treated as a tax-free return of capital or as gross income.

In *Clark v. Commissioner,* 40 B.T.A. 333 (1939), *nonacq. withdrawn, acq.,* 1957-2 Cum.Bull. 3, the court determined that when a taxpayer received payment from his tax counsel to compensate for an error made in the preparation and filing of the taxpayer's return that caused the taxpayer to pay more tax than he would have owed had the correct method been used, the compensatory payment was not included in gross income. Similarly, in Rev.Rul. 57-47, 1957-1 Cum.Bull. 23, the IRS ruled that the amount the taxpayer received from her tax consultant as recompense for an error made by the tax consultant in the preparation and filing of the taxpayer's individual income tax return was not gross income, but the reimbursement of the tax preparation fee that previously had been deducted was includable in gross income. In Pvt.Ltr.Rul. 8447076 (Aug. 22, 1984), the IRS ruled that gift tax reimbursement to a client for erroneous gift tax advice was a nontaxable return of capital and not gross income.

More recently, however, the IRS has attempted to distinguish compensation for errors not included in gross income in the preparation and filing of tax returns from advice regarding the tax consequences of the transaction included in gross income. The distinctions the IRS is making are subtle and appear to be limiting the scope of *Clark, supra,* and Rev.Rul. 57-47. For example, in Pvt.Ltr.Rul. 9833007 (Aug. 14, 1998), the taxpayer who had received a taxable lottery payment sought a tax indemnity payment from his tax adviser due to the adviser's failure to advise the taxpayer to maximize his federal income tax deductions by paying his state income taxes prior to the end of the year. In determining that the payment was included in gross income, the IRS distinguished the taxpayer's circumstances from *Clark* and Rev.Rul. 57-47 on the basis that the preparers' errors in those situations caused the taxpayers to pay more than their minimum proper federal income tax liabilities based on the underlying transactions. In Pvt.Ltr.Rul. 9833007, the taxpayer's payment of additional federal income tax was not due to an error made by the attorney on the return itself but was an omission to provide advice that would have reduced the taxpayer's federal income tax liability. Thus, the IRS appears to be making a somewhat arbitrary distinction between the tax treatment of tax indemnity payments based on errors in the preparation and filing of tax returns and payments based on erroneous tax advice.

E. [16.60] Sale or Exchange

In funding a settlement or award arising from fiduciary litigation, consideration should be given to whether the funding will be considered an exchange causing income to be realized under

Internal Revenue Code §1001(a). An exchange of property constitutes a disposition of property under Code §1001(a) if the properties exchanged are materially different. 26 C.F.R. §1.1001-1; *Cottage Savings Ass'n v. Commissioner,* 499 U.S. 554, 113 L.Ed.2d 589, 111 S.Ct. 1503, 1511 (1991) (exchange of separate mortgage participation interests derived from loans made to different obligors and secured by different homes embodied legally distinct entitlements).

A non-pro rata distribution absent authority under the trust instrument or applicable law may be treated as a deemed pro rata distribution, followed by a taxable exchange. Rev.Rul. 69-486, 1969-2 Cum.Bull. 159. The holding of Rev.Rul. 69-486 was based on a finding that the trustee was not authorized by the trust instrument or local law to make an allocation of specific property in kind; the designation of specific assets to different beneficiaries was equivalent to a disposition in an amount determined under Code §§1001 and 1002. Section 4.16 of the Illinois Trusts and Trustees Act authorizes a trustee of a trust governed by the statute to make equitable division or distribution of a trust in cash or in kind, or both, and to value the property divided or distributed for purposes of the division or distribution. 760 ILCS 5/4.16.

Treas.Reg. §1.1001-1(h) (Severance of trusts), effective August 2, 2007, provides that the severance of a trust is not an exchange of property for other property differing materially either in kind or in extent if (1) an applicable state statute or the governing instrument authorizes or directs the trustee to sever the trust or (2) any non-pro rata funding of the separate trusts resulting from the severance, whether mandatory or at the discretion of the trustee, is authorized by an applicable state statute or the governing instrument. Such authority may or may not be present in a severance with fiduciary litigation. The preamble to the regulation states specifically, "No inference should be drawn with respect to the income tax consequences under section 1001 of any severance that is not described in §1.1001-1(h)(1)." 72 Fed.Reg. 42,293 (Aug. 2, 2007). See, *e.g.,* Pvt.Ltr.Ruls. 201029002 (July 23, 2010), 201011002 (Mar. 19, 2010), 200904014 (Jan. 23, 2009).

F. Deduction for Business Expenses Under Internal Revenue Code §162

1. [16.61] Treatment of Fees Incurred for Income Tax Purposes

In estate and trust controversies, substantial expenses are often incurred at both the estate and trust level and that of entities owned by the estates and trusts, such as partnerships or S corporations. Categorizing the expenses incurred as either administration expenses, subject to Internal Revenue Code §212 and categorized as a miscellaneous itemized deduction, or Code §162 business expenses, which are above-the-line deductions, is very important. Several benefits exist for the taxpayer who is able to obtain trade or business status in addition to receiving deductions for general business expenses. For example, the taxpayer can establish individual retirement accounts and Keogh plans, carryover and carryback net operating losses, and avoid limitations on investment interest.

Code §162 (trade or business expenses) provides:

(a) In general. — There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including —

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity. 26 U.S.C. §162(a).

2. [16.62] Managing One's Assets as a Trade or Business

The question for partnership and trust and estate administration is whether investment portfolio review can ever constitute carrying on any trade or business. As discussed in §16.64 below, the general rule is that merely spending time reviewing investments, even private equity investments, is not enough to constitute a trade or business for which expenses are deductible under Internal Revenue Code §162. And the difficulty is that many family entities spend considerable time protecting and enhancing their investments through either a family office arrangement or the use of numerous consultants such as investment advisors, accountants, and lawyers. Further, these investors often travel to review and determine investments in private equity.

3. [16.63] General Rules Outside the Private Investor Regime

To qualify as an allowable business expense deduction, an item must be (a) paid or incurred during the taxable year, (b) for carrying on any trade or business, (c) an expense, (d) a necessary expense, and (e) an ordinary expense. *American Stores Co. v. Commissioner,* 114 T.C. 458, 468 (2000). Whether a taxpayer is "carrying on business" so as to be entitled to deduct expenses incurred therein in computing taxable net income requires examination of the facts in each case. *United States v. Pyne,* 313 U.S. 127, 85 L.Ed. 1231, 61 S.Ct. 893, 894 (1941). *See also International Trading Co. v. Commissioner,* 275 F.2d 578 (7th Cir. 1960); *Helvering v. Highland,* 124 F.2d 556 (4th Cir. 1942).

Requirements that a taxpayer must satisfy to be engaged in a trade or business include the taxpayer's being regularly and actively involved in the activity, undertaking the activity with the expectation that he or she will make a profit, and holding himself or herself out to others as engaged in the selling of goods and services. *Gajewski v. Commissioner,* 723 F.2d 1062 (2d Cir. 1983), *cert. denied,* 105 S.Ct. 88, *reh'g denied,* 105 S.Ct. 549 (1984), *on remand,* 84 T.C. 980

(1985). The profit factor is significant for income tax purposes, only insofar as it is a means of distinguishing between an enterprise carried on in good faith as a "trade or business" and an enterprise carried on merely as a hobby or for determining whether profit and nonprofit activities of a single taxpayer may be aggregated and treated as a single integrated trade or business. *Trustees of Graceland Cemetery Improvement Fund v. United States,* 515 F.2d 763, 778 (Cl.Ct. 1975), quoting 4 A. Mertens, LAW OF FEDERAL INCOME TAXATION §25.08 (1972). *See also Brook, Inc. v. Commissioner,* 799 F.2d 833 (2d Cir. 1986).

4. [16.64] Deductibility of Managing the Family's Investments

The leading case on family office expenses and their deductibility is *Higgins v. Commissioner,* 312 U.S. 212, 85 L.Ed. 783, 61 S.Ct. 475 (1941). In *Higgins,* salaries and office expenses paid with the management of the taxpayer's investments in stocks and bonds were not deductible from gross income for income tax purposes as ordinary and necessary expenses paid in "carrying on any trade or business." 61 S.Ct. at 476, quoting former §23 of the Revenue Act of 1932. The Court reasoned that managing one's investment portfolio was not a business within the meaning of a prior version of Internal Revenue Code §162.

Specifically, in *Higgins,* the taxpayer hired associates to assist him in this endeavor. Moreover, to carry on these operations, he maintained offices in both France and the United States. The Commissioner did not dispute that the expenses incurred with respect to the taxpayer's investment activities were "ordinary and necessary" and did not question the deductibility of the items solely attributable to the real estate activities. 61 S.Ct. at 476. The Commissioner asserted that the activities relating to Mr. Higgins' stock portfolio were personal and, no matter how extensive, could never constitute a trade or business. Thus, it was the IRS's contention that the expenses were nondeductible. The Board of Tax Appeals upheld this position, and the Second Circuit affirmed.

The Supreme Court acknowledged that the phrase "trade or business" was not defined anywhere and concluded that "[t]o determine whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case." 61 S.Ct. at 478. It held that as long as the taxpayer is merely focusing on his or her own investments, as a matter of law such activities will not constitute a trade or business.

5. [16.65] A Distinction with a Difference: The Gambler

Forty-six years after *Higgins v. Commissioner,* 312 U.S. 212, 85 L.Ed. 783, 61 S.Ct. 475 (1941), the Supreme Court, in *Commissioner v. Groetzinger,* 480 U.S. 23, 94 L.Ed.2d 25, 107 S.Ct. 980 (1987), allowed full-time gambling to be considered a trade or business. The Court held that the traditional factors were to be accorded substantial weight, *i.e.,* whether the activity is pursued

a. full time;

b. in good faith;

c. with regularity;

d. for the production of income for a livelihood; and

e. not as a mere hobby. 107 S.Ct. at 987.

At first blush, *Groetzinger* appears to be authority for securities investors like Mr. Higgins to claim that they are engaged in carrying on a trade or business for purposes of federal taxation. Impliedly, the Court indicated that the *Groetzinger* decision was not intended to "overrule or cut back" the holding on *Higgins*. *Id.*

VII. [16.66] DISCLAIMER

Estate and trust controversy work may involve accusations about improper estate planning or settlement discussions that shift beneficial tax results otherwise created by the documents into negative tax results or about causing gift tax concerns with the potential shifting of property interests. The use of disclaimers by the beneficiaries (as part of a settlement, for example) can often fix the concerns raised in these situations.

One technique to get property to different beneficiaries in a tax-efficient manner is through what is known as "disclaimer planning." Qualified disclaimers under Internal Revenue Code §2518, under which the disclaimant is not treated as having received the property for estate or generation-skipping purposes, are important tax planning tools to qualify property for the marital deduction or to create a credit shelter trust if the estate plan documents are not sufficient for these purposes.

Disclaimers also can be used to correct improper (for tax purposes) charitable deduction gifts or to resolve will or trust contests or potential contests (by, in effect, shifting property interests among contesting beneficiaries). Sections 16.67 – 16.70 below highlight the potential use of disclaimers in different settings.

A. [16.67] Creating the Credit Shelter Trust

Prior to the concept informally known as "portability" under the federal gift and estate tax regime, perhaps the single greatest problem in postmortem tax planning (or, stated another way, in deficient estate planning) during the lives of a married couple was an improperly funded credit shelter trust. For example, although an estate plan may call for the creation of a credit shelter trust at the first spouse's passing, perhaps there may not be sufficient assets passing under the will or living trust to allow the transfer to the credit shelter trust of the $5.45 million exclusion amount allowable in 2016 under Internal Revenue Code §2010(c). Although portability may mitigate certain federal estate tax concerns, it does not eliminate the use of credit shelter trusts, especially in states that have state estate taxes, like Illinois, where there is no portability provision.

A disclaimer can be used in other ways as well to ensure that a credit shelter trust is created. For example, it can redirect joint tenancy property or life insurance proceeds passing outright to a

surviving spouse that is needed to fund the credit shelter trust. It also can correct a will (or living trust) that does not have a credit shelter trust because it had been set up merely to pass all of the property to the surviving spouse. The power to disclaim remains an important estate planning tool, giving the surviving spouse much needed flexibility to make postmortem planning decisions by taking into consideration the family circumstances and the federal and state estate tax regimes in effect at the time of the decedent's death.

B. [16.68] Ensuring the Marital Deduction

A disclaimer may also be appropriate to optimize the use of the marital deduction. There are a number of factors to take into account in order to determine the optimal marital deduction, including the level of the applicable exclusion amount available to the decedent, portability of the federal deceased spousal unused exclusion amount, state estate taxes, basis adjustment at the death of a decedent and relative estate and income tax rates. The practitioner may assess these various factors at the death of a married person and determine the optimal level of the marital deduction. Disclaimer may be used to position the flow of assets and to qualify trusts for the marital deduction to achieve the optimal marital deduction under Internal Revenue Code §2056(b).

C. [16.69] Qualifying Property for Charitable Deduction

Like improper credit shelter and marital deduction bequests, an estate may run afoul of qualifying for the charitable deduction. This problem is infrequent but could occur, for example, when a trust does not comply with the unitrust or annuity trust requirements of Internal Revenue Code §2055(e) and the remainder interest is to charity. A qualified disclaimer may be able to correct those errors, increasing the charitable deduction and reducing federal estate taxes. Therefore, if an income or remainder interest passes to charity, the interest should be examined to make sure it qualifies for the charitable deduction under Code §2055 and, if not, whether disclaimers could be used to correct that under-qualification.

D. [16.70] Complying with the Disclaimer Rules

Disclaimers must be done carefully to ensure that a taxable gift is not inadvertently created, which is the net effect of not complying with the federal disclaimer requirements under Internal Revenue Code §2518.

A disclaimer must be made in writing at a date not later than nine months after the transfer creating the interest (except, as noted below, as to joint tenancy interests) or nine months after the day the disclaimant attains age 21. 26 U.S.C. §2518(b)(2).

A remainder beneficiary who may not know of his or her interest cannot wait until such notice. That beneficiary must adhere to the nine-month limitation. This is a significant detriment for contingent beneficial interests. Minors have until age 21 to make that decision. 26 U.S.C. §2518(b)(2)(B).

NOTE: The statute effectively overrules *Keinath v. Commissioner,* 480 F.2d 57 (8th Cir. 1973), which held that a disclaimer by a remainderperson executed after the death of a life tenant did not constitute a taxable gift.

The regulations permit disclaimers of joint tenancy and tenancy by the entirety interests within nine months of the death of the cotenant. 26 C.F.R. §25.2518-2(c)(5), Examples 7 – 10. The disclaimer period for these interests begins at the death of one tenant rather than when the tenancy was created. The regulations now take the position generally that the portion of the property that may be disclaimed is the portion included in the deceased tenant's estate for federal estate tax purposes. For example, a surviving spouse may disclaim the interest of the deceased spouse that is included in the deceased spouse's estate under Code §2040(b) even though the surviving spouse was the original sole owner and created the joint tenancy or tenancy by the entirety by making a conveyance without consideration. 26 C.F.R. §25.2518-2(c)(5), Examples 7, 8.

The disclaimer statute also requires that the disclaimant not receive an interest in the property prior to the disclaimer, that the disclaimer be in writing, that it be delivered to the personal fiduciary, and that the disclaimant not direct where the property goes. 26 U.S.C. §2518(b). After the disclaimer, the disclaimant usually cannot retain an interest in the property disclaimed. However, a surviving spouse may disclaim even though the result may be that the property passes to a trust, such as a credit shelter trust, in which the spouse has an income interest, *e.g.,* a "B" or "family" trust. That exception is carved back and does not apply when the spouse has a power of appointment over the credit shelter trust in addition to the income interest. Therefore, if a qualified disclaimer is intended, it may be advisable for the surviving spouse to release any powers of appointment over property passing to a credit shelter trust pursuant to the disclaimer.

Illinois disclaimer rules under the Probate Act of 1975, 755 ILCS 5/1-1, *et seq.,* are more liberal than the federal rules. Essentially, if the disclaimer qualifies under the federal statutes, it will likely qualify under the Illinois disclaimer statute. See 755 ILCS 5/2-7. The disclaimer statute does not impose a time limit for making a valid disclaimer for property law purposes; hence, a valid disclaimer may be made under Illinois law that fails to be a qualified disclaimer for federal estate or gift tax purposes because it was made more than nine months after the date of the transfer.

Under Illinois law, the right of a deceased beneficiary or heir to disclaim can be exercised by a representative with leave of the court. 755 ILCS 5/2-7(a). The Illinois disclaimer statute permits disclaimers by executors without leave of the court if the will or other instrument specifically authorizes a disclaimer. *Id.*

VIII. [16.71] LITIGATION EXPENSES: DEDUCTION ELECTIONS AND *HUBERT*

How are expenses, legal and fiduciary and other, incurred in litigation treated for tax deduction purposes? Deductions with respect to medical expenses and expenses of probate administration (typically executors', attorneys', and accountants' fees) are available to the

executor on either the estate tax or income tax returns. In each case, the representative should weigh the considerations discussed in this section as to the proper place to deduct each item prior to preparing the estate tax return. Under Treas.Reg. §1.642(g)-1, these fees, under the category of administration expenses, can be taken as income tax deductions or as estate tax deductions, but not both.

Although certain rules apply as to whether it is more effective to take attorneys' fees as estate or income tax deductions, the impact of this decision on tax planning generally, and the credit shelter share specifically, is a bit subtle.

If administration expenses such as attorneys' fees are taken as income tax deductions and not estate tax deductions, the net effect generally (and pre-*Commissioner v. Estate of Hubert,* 520 U.S. 93, 137 L.Ed.2d 235, 117 S.Ct. 1124 (1997)) was to reduce the credit shelter share under all formulas.

EXAMPLE: A husband dies with a gross estate of $10.43 million in the year 2015; the attorneys' fees are $20,000 for the administration process. Because there is no estate tax, the executor, the surviving spouse, determines to take these fees as income tax deductions. The reasoning is that, as income tax deductions, they can offset the estate taxable income up to 39.6 percent, whereas as estate tax deductions, they provide no benefit. Is she correct?

The real impact is to reduce the credit shelter share by $20,000 if fees are taken as income tax deductions. The result is that when the wife dies, her estate will include an additional $20,000 plus the increase in value of this property from the husband's date of death through her date of death. This could outweigh the income tax savings depending on the wife's longevity and the existence of the estate tax. However, with increased income tax rates, reduced estate tax rates, and increased applicable exclusion amount, the likelihood that the income tax savings will be greater is higher under current law.

How, mechanically, does the decrease of the credit shelter share occur? Assume, for simplification purposes, there are no other expenses in the estate, and the estate has a credit shelter trust/qualified terminable interest property marital trust division. Assume any marital deduction formula.

From the gross estate of $10.43 million, $5.43 million passes to the credit shelter trust, and $5 million passes to the marital trust, before the effect of expenses. The taxable estate, the largest amount necessary to result in no estate tax because of the applicable credit amount, is $5.43 million, which will be offset by the applicable credit amount as to any tax due. The QTIP marital trust is allocated the remaining $5 million. If expenses were taken as estate tax deductions, the marital share would be reduced by the $20,000 in expenses paid out of the residue. However, the deductions on line 2 of Part 2 of the estate tax return (IRS Form 706) would consist of a marital deduction of $4.98 million and deductible administration expenses of $20,000 (yielding $5 million of total deductions). The taxable estate would still be $5.43 million (allocable to the credit shelter share), and the estate tax would be zero.

Then what happens to the $20,000 of expenses if not taken as estate tax deductions? When paid, they cannot be allocated against the QTIP marital trust without reducing the QTIP marital trust to $4.98 million. If so allocated, they would be an encumbrance against the marital trust, thereby disqualifying $20,000 of the marital trust. In that event, only $4.98 million would constitute a deduction on line 2 of Part 2. Since the additional $20,000 was not a deduction on the estate tax return, the taxable estate would be $5.45 million, and there would be an estate tax due on that $20,000.

Accordingly, the $20,000 must be allocated against the credit shelter share, reducing the credit shelter share from $5.43 million to $5.41 million. Note that in this example the marital deduction remains at $5 million and is not decreased to $4.98 million by the encumbrance. The taxable estate is $5.43 million, and the tax due is zero.

Therefore, a decision needs to be made whether to take administration expenses as income tax deductions, thereby reducing the credit shelter trust, or to use them as estate tax deductions, thereby preserving the credit shelter trust. It is difficult to generalize, but, in the case of estates not subject to federal estate tax, the income tax deduction would be worth more, assuming that there is taxable income. Usually, this decision will turn on the relative federal income and estate tax brackets.

One strategy that was a lot easier before *Hubert* and Treas.Reg. §20.2056(b)-4(d) was to minimize the amount of estate tax administration expenses and instead recategorize these administration expenses as trust administration expenses. As trust administration expenses, they could be used as income tax deductions and not reduce the credit shelter share other than perhaps on a proportional basis (as those expenses were allocated between the credit shelter trust and the QTIP marital trust). This was a strategic way to treat these expenses in the past.

However, the issue seems to have been raised quite a bit in the past, and the IRS issued regulations as to how to categorize administration expenses. See 26 C.F.R. §20.2056(b)-4(d). Essentially, practitioners no longer have unlimited flexibility as to how to categorize expenses as between estate administration expenses and trust expenses.

Two categories for these expenses are set forth in the regulations to Internal Revenue Code §2056. These are estate management expenses and estate transmission expenses, defined as follows:

a. "Management expenses" are those "incurred in connection with the investment of estate assets or with their preservation or maintenance during a reasonable period of administration" (*e.g.,* investment fees, custodial fees, and interest). 26 C.F.R. §20.2056(b)-4(d)(1)(i).

b. "Transmission expenses" are those "that would not have been incurred but for the decedent's death" (*e.g.,* the executor's commission, most attorneys' fees, probate fees, court hearing fees, and appraisals). 26 C.F.R. §20.2056(b)-4(d)(1)(ii).

Fees incurred in trust and estate litigation likely are transmission expenses. Therefore, if these fees are taken as income tax deductions in a no-estate tax situation (*e.g.,* the passing of the first spouse), the net effect will be to reduce the credit shelter trust funding amount by the amount of these fees.

IX. [16.72] PENALTIES

Fiduciary litigation frequently gives rise to questions regarding a fiduciary's duty to file tax returns for federal, state, and transfer tax purposes. In making these filings, the fiduciary must comply with the relevant taxing authorities in respect of those filings. Failure to comply with these authorities may trigger the imposition of penalties on both the fiduciary (as the taxpayer) and the attorney, accountant, or other advisor as the tax return preparer. The discussion in §§16.73 – 16.81 below focuses on several penalties arising from errors in filing returns under federal law, although the discussion is not comprehensive. Additional penalties may apply to filing errors under both federal and state law.

A. [16.73] Failure To File Tax Return or Pay Tax in a Timely Manner

The Internal Revenue Code imposes penalties on taxpayers both for failure to file a required return and for failure to pay the tax owed in a timely manner.

Taxpayers that fail to file an income tax, estate tax, or gift tax return will incur a 5-percent penalty, with respect to the tax that would have been owed on the return, for each month or fraction of a month the return remains past due under Code §6651(a). The sum of these monthly penalties may not exceed 25 percent. *Id.* If the taxpayer's failure to file is fraudulent, however, the applicable penalty increases to 15 percent of the tax owed, and the aggregate limitation rises to 75 percent of such tax. 26 U.S.C. §6651(f). The penalty is inapplicable if the failure to file on a timely basis was due to reasonable cause, not including willful neglect. 26 U.S.C. §6651(a).

Section 6651 imposes an additional penalty for failure to pay the tax due on a return in a timely manner. If such a failure occurs, the taxpayer is subject to a penalty equal to 0.5 percent of the tax due for each month or fraction of a month the payment is late. In the aggregate, these monthly penalties may not exceed 25 percent of the tax due. *Id.* Generally, the Secretary of the Treasury may grant the taxpayer a 6-month extension of the original tax payment due date. 26 U.S.C. §6161(a). With respect to the estate tax, however, the Secretary may extend the payment deadline for 12 months or, with reasonable cause, up to 10 years. *Id.* Finally, the penalty does not apply if the failure to pay is due to reasonable cause, not including willful neglect. 26 U.S.C. §6651(a).

For both the failure-to-file and failure-to-pay penalties, the Code penalty percentage is imposed on the net amount of tax due, which means that the tax required to be shown on the return is reduced by any part of the tax paid before the due date and by any credits that may be claimed against the tax.

B. [16.74] Accuracy-Related Penalties on Underpayments and Understatements

The Internal Revenue Code imposes penalties on taxpayers for tax understatements attributable to inaccuracies in the computation of the tax in Code §6662. Both general understatements of tax owed and undervaluations of property causing underpayments of tax trigger this penalty. The application of the inaccuracy penalty was expanded by the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub.L. No. 114-41, 129 Stat. 443; the Health Care and Education Reconciliation Act of 2010, Pub.L. No. 111-152, 124 Stat. 1029; and also the Hiring Incentives to Restore Employment Act, Pub.L. No. 111-147, 124 Stat. 71, and now applies to the eight circumstances described in §16.75 below, which include, among other items, understatements and undervaluations in income, estate, and gift tax returns. Code §6662 does not apply to an underpayment to which Code §6663 (the fraud penalty) applies and has limited application to an underpayment attributable to a reportable transaction understatement on which a penalty under Code §6662A (the accuracy-related penalty on understatements with respect to reportable transactions) applies.

The penalty amount varies with the degree of error made in the return and is generally 20 percent of the underpayment but increases to 40 percent in certain circumstances, including a "gross valuation misstatement." 26 C.F.R. §1.6662-2(c); 26 U.S.C. §6662(h). The accuracy-related penalty is coordinated with other applicable penalties under ordering rules.

The penalty amount varies with the degree of error made in the return. Generally, if an inaccuracy falling into one of the six Code §6662 categories exists, the taxpayer is subject to a penalty equal to 20 percent of the portion of the underpayment falling into that category. Even if more than one type of Code §6662 misconduct exists, however, 20 percent remains the maximum penalty imposed on the taxpayer's underpayment. 26 C.F.R. §1.6662-2(c). If the underpayment is attributable to a "gross valuation misstatement," a term defined differently for each circumstance to which Code §6662 applies, the penalty increases to 40 percent of the applicable portion of the underpayment. 26 U.S.C. §6662(h).

1. [16.75] Circumstances in Which the Code §6662 Accuracy-Related Penalty Applies

Section 6662 of the Internal Revenue Code imposes penalties on taxpayers for valuation and payment inaccuracies in eight circumstances: (a) negligence or disregard of rules or regulations; (b) any substantial understatement of income tax; (c) any substantial valuation misstatement under the income tax; (d) any substantial overstatement of pension liabilities; (e) any substantial estate or gift tax valuation understatement; (f) any disallowance of claimed tax benefits by reason of a transaction lacking economic substance or failing to meet the requirements of a similar rule of law; (g) any an undisclosed foreign financial asset understatement; or (h) any inconsistent estate basis. 26 U.S.C. §6662(b). Gross valuation understatements may exist in various circumstances. The following discussion in the fiduciary litigation context focuses on substantial understatements of income tax (see §16.76 below) and substantial estate or gift tax valuation understatements (see §16.77 below).

a. [16.76] Substantial Understatement of Income Tax

Section 6662(b)(2) of the Internal Revenue Code imposes a penalty on the portion of a taxpayer's underpayment attributable to a substantial understatement of income tax. The Code considers an understatement of income tax substantial when the amount of the understatement exceeds the greater of (1) ten percent of the tax required to be shown on the return for the taxable year or (2) $5,000. 26 U.S.C. §6662(d)(1)(A).

For purposes of this section, the term "understatement" generally means the excess of (1) the amount of tax required to be shown on the return for the taxable year over (2) the amount of tax shown on the return. 26 U.S.C. §6662(d)(2)(A). The Code reduces the underpayment derived from this calculation by excluding a portion of the understatement in two circumstances. First, the understatement is reduced by the portion of the understatement attributable to any item if the relevant facts affecting the item's tax treatment are adequately disclosed and there is a reasonable basis for such treatment by the taxpayer. *Id.* The taxpayer must be ready to prove such a reasonable basis existed, however. In *Connolly v. Commissioner,* 93 T.C.M. (CCH) 1138 (2007), a substantial understatement penalty was upheld against a taxpayer who failed to include settlement proceeds on an income tax return. The Tax Court found that although the taxpayer used a paid preparer, the substantial understatement penalty was correctly levied because the taxpayer failed to provide acceptable evidence that the preparer received notice of such settlement payments.

In addition, the Code calls for a reduction of the understatement in an amount attributable to the taxpayer's treatment of an item if substantial authority for such treatment exists. Treas.Reg. §1.6662-4(d)(3)(i) considers the substantial authority standard met "if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment," taking into account all authorities relevant to the tax treatment of the item. 26 C.F.R. §1.6662-4(d)(3)(i). To assist in making this determination, the regulations provide an evaluation of the various types of authority potentially speaking on the item's tax treatment.

b. [16.77] Substantial Estate or Gift Tax Valuation Understatement

A substantial estate or gift tax valuation understatement causes imposition of an accuracy-related penalty if the value of any property claimed on an estate or gift tax return is 65 percent or less of the correct valuation of such property. 26 U.S.C. §6662(g). In addition, an estate or gift tax valuation understatement may constitute a gross valuation misstatement, thereby increasing the Internal Revenue Code §6662 penalty from 20 percent to 40 percent, if the value of property claimed on the return is 40 percent or less of the correct valuation of the property. 26 U.S.C. §6662(h). Regardless of whether the understatement constitutes a substantial understatement or a gross misstatement, the Code does not impose a penalty on an estate or gift tax valuation understatement unless the amount of the understatement exceeds $5,000. 26 U.S.C. §6662(g).

c. [16.78] Inconsistent Estate Basis Reporting

The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub.L. No. 114-41, 129 Stat. 443 (July 31, 2015), added Internal Revenue Code §6662(b)(8), "Any inconsistent estate basis," as one of the eight circumstances for which an accuracy-related penalty may be imposed under Code §6662. Code §6662(k) was also added:

> **(k) Inconsistent basis reporting. — For purposes of this section, there is an "inconsistent estate basis" if the basis of property claimed on a return exceeds the basis as determined under section 1014(f).** 26 U.S.C. §6662(k).

These amendments to Code §6662 apply to property with respect to which an estate tax return is filed on or after August 1, 2015.

NOTE: The IRS delayed the due date for statements reporting the value of estate assets required by new Code §6035, which was enacted July 31, 2015. Under the reporting rules, statements must be furnished to the IRS and to beneficiaries within 30 days of the estate tax return's due date, so for estates that had returns due August 1, the statements were originally due by August 31, 2015. The IRS, in Notice 2016-19 (eff. Feb. 11, 2016), states that, for any statement that §6035 requires to be filed with the IRS and estate beneficiaries before March 31, 2016, the due date is postponed until March 31, 2016. This relief applies to executors of estates and other persons who are required under §6018(a) (estate returns by executors) or §6018(b) (estate returns by beneficiaries) to file a return if that return is filed after July 31, 2015.

2. [16.79] Reasonable Cause and Good-Faith Exception

If an inaccuracy falling into one of the Internal Revenue Code §6662 categories exists, a taxpayer still may avoid penalization if the taxpayer can demonstrate that reasonable cause for the underpayment exists and that the taxpayer acted in good faith with respect to the underpayment. As a general matter, whether a taxpayer's reliance on advice is reasonable in a given case hinges on the facts and circumstances surrounding that case. 26 C.F.R. §1.6664-4(c). Treas.Reg. §1.6664-4(b)(1) indicates that reasonable cause and good faith exist when the taxpayer relies on an information return, professional advice, or other facts if, under all circumstances, such reliance was reasonable. Furthermore, the Tax Court recognizes a taxpayer's reliance on advice as sufficiently reasonable to negate a Code §6662 penalty if the taxpayer can prove by a preponderance of the evidence that (a) the adviser was a competent professional who had sufficient expertise to justify reliance, (b) the taxpayer provided necessary and accurate information to the adviser, and (c) the taxpayer actually relied in good faith on the adviser's judgment. *Neonatology Associates, P.A. v. Commissioner,* 115 T.C. 43, 99 (2000).

C. [16.80] Understatement of Taxpayer's Liability by Tax Return Preparer

The Internal Revenue Code imposes a penalty on tax return preparers for their role in understating a taxpayer's liability. Under Code §6694, any tax return preparer who prepares a return or claim for refund containing an understatement of liability due to either an unreasonable tax position or willful or reckless conduct by the tax preparer is subject to penalty. Code §6694

defines "understatement of liability" for purposes of such section as "any understatement of the net amount payable with respect to any tax imposed . . . or any overstatement of the net amount creditable or refundable with respect to any such tax." 26 U.S.C. §6694(e). These penalties apply to preparers of all types of tax returns, including income, estate, gift, and GST tax.

For purposes of Code §6694, "tax return preparer" means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any tax return under the Code. 26 U.S.C. §7701(a)(36). However, a person will not be considered a preparer merely because, among other things, such person furnishes, types, or reproduces the return or prepares as a fiduciary a return or claim for refund for any person. *Id.*

If a preparer's unreasonable position with regard to the tax treatment of any item generates an understatement of liability, such preparer is subject to a penalty equal to the greater of $1,000 or 50 percent of the income derived by the preparer with respect to the return or claim for refund. 26 U.S.C. §6694(a)(1). The Code considers the preparer's position unreasonable if (1) the position is with respect to a tax shelter or a reportable transaction, and there is not a reasonable belief that the position would more likely than not be sustained on its merits; (2) the position is disclosed but there is no reasonable basis for the position; or (3) if the position is not disclosed (and is not a tax shelter), it is not supported by substantial authority. Even if the position is deemed unreasonable under the Code, the penalty will not be imposed on a tax return preparer if reasonable cause exists for the understatement and the tax return preparer acted in good faith. 26 U.S.C. §6694(a)(2).

The IRS provided some guidance for determining whether a reasonable basis for a tax treatment exists in IRS Notice 2008-13, 2008-1 Cum.Bull. 282. Notice 2008-13 allows a tax return preparer to rely in good faith and without verification on information furnished by the taxpayer, another tax return preparer, or another third party. The preparer need not independently verify the items reported in tax returns, schedules, or other third-party documents. However, the preparer may not ignore the implications of information furnished to the preparer or actually known to the tax return preparer, and the preparer must make reasonable inquiries into information furnished by another preparer or a third party if such information appears to be inaccurate or incomplete. Furthermore, the tax return preparer will not be deemed to have acted in good faith if the advice provided was facially unreasonable, if the preparer knew or should have known that the third-party advisor was not aware of all relevant facts, or if the preparer knew or should have known that the advice was no longer reliable due to changes in applicable law.

Section 6694(b) of the Code imposes an additional penalty if an understatement in the taxpayer's liability is caused by a willful attempt to understate the taxpayer's liability or a reckless or intentional disregard of the applicable rules or regulations by the preparer. If such conduct exists, the preparer must pay a penalty equal to the greater of $5,000 or 50 percent of the income derived by the preparer with respect to the return or claim for refund filed. 26 U.S.C. §6694(b). Though no reasonable cause exception exists for this penalty, the penalty incurred by the preparer for willful or reckless conduct in preparation of the return may be reduced by any penalty levied for an understatement due to an unreasonable position with respect to the same item.

D. [16.81] Penalty for Incorrect Appraisal

Section 6695A of the Internal Revenue Code imposes a penalty on a person preparing an appraisal of property used with a return or claim for refund when a substantial or gross valuation misstatement attributable to that appraisal exists. For purposes of such section, a substantial valuation misstatement exists when the value assigned to the property by the appraiser is 150 percent or more of the correct valuation of the property, and a gross valuation misstatement occurs when the value assigned by the appraiser is 200 percent or more of the correct valuation of the property. See 26 U.S.C. §662(e)(1). If either a substantial or a gross valuation misstatement exists, a penalty is imposed on the appraiser in an amount equal to the lesser of (1) the greater of ten percent of the amount of the underpayment or $1,000 and (2) 125 percent of the gross income received by the appraiser for preparation of the appraisal. 26 U.S.C. §6695A(b). The penalty may be avoided, however, if the appraiser can establish, to the satisfaction of the Secretary of the Treasury, that the value established in the appraisal was more likely than not the proper value of the property in question. 26 U.S.C. §6695A(c).

The Code §6695A penalty on appraisers may create significant liability in the fiduciary litigation setting. The Code does not limit the term "appraiser" to professional appraisers, instead imposing liability on any person who prepares an appraisal of the value of property for use with a tax return. Therefore, nonprofessionals simply estimating the value of property for purposes of a tax return, such as the executor of an estate, may be considered appraisers for purposes of this penalty.

X. TREASURY DEPARTMENT CIRCULAR NO. 230

A. [16.82] Background

No discussion of the tax aspects of fiduciary litigation, which frequently involves practice before the IRS, would be complete without reference to Treasury Department Circular No. 230 (Rev. 6-2014) (Circular 230), www.irs.gov/pub/irs-utl/revised_circular_230_6_-_2014.pdf. See also 31 C.F.R. pt. 10. Circular 230 is not new. In fact, it dates back to 1921. However, it has been substantially modified, most recently in June 2014.

Circular 230 sets forth rules relating to the authority of attorneys and others to practice before the IRS, duties and restrictions related to such practice, sanctions for violating the regulations, and disciplinary processes. Circular 230 §10.0.

B. [16.83] Scope

"Practice before the Internal Revenue Service" is very broadly defined in Treasury Department Circular No. 230 to comprehend "all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities" under the federal tax laws, including preparing and filing documents, corresponding and communicating with the IRS, and "rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and representing a client at conferences, hearings, and meetings."

Circular 230 §10.2(a)(4). Prior to September 26, 2007, "Practice before the Internal Revenue Service" did not include "rendering written advice . . . to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion," as it does presently. *Id*. For purposes of Circular 230, a fiduciary (meaning a trustee, receiver, guardian, personal representative, administrator, or executor) is considered to be the taxpayer, not a representative of the taxpayer. Circular 230 §10.7(e).

C. [16.84] Duties and Restrictions

A comprehensive discussion of the duties and restrictions relating to practice before the IRS set forth in Treasury Department Circular No. 230 is beyond the scope of this chapter. Sections 16.85 – 16.89 below briefly summarize the salient provisions of the duties and restrictions set forth in Subpart B of Circular 230.

1. [16.85] Knowledge of Client's Omission

A practitioner who has been retained by a client regarding a federal tax matter who "knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under" the federal tax laws is required promptly to advise the client of the fact of the noncompliance, error, or omission and the consequences under the Internal Revenue Code and regulations of the noncompliance, error, or omission. Treasury Department Circular No. 230 §10.21.

2. [16.86] Diligence as to Accuracy

A practitioner is required to exercise due diligence in (a) preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters; (b) determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and (c) determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service. Treasury Department Circular No. 230 §10.22(a). Except as otherwise provided in the standards with respect to tax returns and documents, affidavits, and other papers and the requirements for written advice (Circular 230 §§10.34 and 10.37), a practitioner is presumed to have exercised due diligence if the practitioner relies on the work of another person whom the practitioner exercised due care in engaging, supervising, training, and evaluating. Circular 230 §10.22(b).

3. [16.87] Best Practices for Tax Advisors

Section 10.33 of Treasury Department Circular No. 230 sets forth best practices for tax advisors in providing advice with respect to federal tax issues and in preparing or assisting with the preparation of a submission to the IRS. These best practices include (a) clear communications with the client regarding the terms of the engagement; (b) establishing and determining the relevance of facts, evaluating the reasonableness of assumptions and representations, relating the applicable law to the relevant facts, and arriving at a conclusion supported by the law and the

facts; (c) advising the client regarding the significance of the conclusions reached, including, specifically, whether a taxpayer may avoid accuracy-related penalties under the Internal Revenue Code if the taxpayer acts in reliance on the advice given; and (d) acting fairly and with integrity before the IRS. Circular 230 §10.33(a) (eff. June 21, 2005).

4. [16.88] Standards with Respect to Tax Returns and Documents, Affidavits, and Other Papers

Section 10.34 of Treasury Department Circular No. 230 sets forth standards with respect to tax returns and documents, affidavits, and other papers. Section 10.34(a) (Tax returns) is applicable to tax returns and claims for refunds filed or advice provided beginning August 2, 2011. Sections 10.34(b) (Documents, affidavits, and other papers), 10.34(c) (Advising clients on potential penalties), and 10.34(d) (Relying on information furnished by clients) are applicable to tax returns, documents, affidavits, and other papers filed on or after September 26, 2007. Circular 230 §10.34(e).

With respect to tax returns and claims for refunds, effective August 2, 2011, §10.34(a) provides that

> **[**a**] practitioner may not willfully, recklessly, or through gross incompetence —**
>
> > **(i) Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that —**
> >
> > > **(A) Lacks a reasonable basis;**
> > >
> > > **(B) Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue Code . . . ; or**
> > >
> > > **(C) Is a willful attempt[ ] by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code.** Circular 230 §10.34(a)(1)(i).

In addition, a practitioner may not willfully, recklessly, or through gross incompetence advise a client to take a position on a tax return or claim for refund or prepare a portion of a tax return or claim for refund containing a position that would be of the same character.

Section 10.34(b) provides that "[a] practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous" and "may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service," "[t]he purpose of which is to delay or impede the administration of the Federal tax laws," "is frivolous," or "contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation." Circular 230 §10.34(b).

With respect to penalties, §10.34(c) requires a practitioner to inform a client of any penalties that are reasonably likely to apply to the client with respect to a position taken on a return, if the practitioner advised the client with respect to the position of the practitioner and with respect to any document, affidavit, or other paper submitted to the IRS. In addition, the practitioner must inform the client of any opportunity to avoid the penalties by disclosure, where applicable, and of the requirements for adequate disclosure. Circular 230 §10.34(c).

Finally, for purposes of §10.34, a practitioner generally may rely in good faith, without verification, on information supplied by the client. However, a practitioner may not "ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or . . . assumption, or incomplete." Circular 230 §10.34(d).

5. [16.89] Requirements for Written Advice

Section 10.37 of Treasury Department Circular No. 230 sets forth the comprehensive practice standards applicable to practitioners who provide written advice. When providing written advice (including electronic communications) concerning one or more federal tax matters, a practitioner must

a. base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);

b. reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;

c. use reasonable efforts to identify and ascertain the facts relevant to written advice on each federal tax matter;

d. not rely on representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;

e. relate applicable law and authorities to facts; and

f. not, in evaluating a federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit. Circular 230 §10.37(a)(2).

These requirements apply to written advice concerning one or more federal tax matters. Circular 230 §10.37(d) provides that a federal tax matter is any matter concerning the application or interpretation of

a. "any existing or former internal revenue law, regulation, revenue ruling, revenue procedure, other published or unpublished guidance, or tax treaty, either in general or as applied to specific taxpayers or groups of specific taxpayers" (26 U.S.C. §6110(i)(1)(B));

b. any provision of law impacting a person's obligations under the internal revenue laws and regulations, including but not limited to the person's liability to pay tax or obligation to file returns; or

c. any other law or regulation administered by the Internal Revenue Service.

As is mentioned throughout this chapter, federal tax issues are often the subject of fiduciary litigation, and even when the subject of the litigation is not a federal tax matter, a judgment or award in a nontax matter often will have federal tax consequences. Thus, the practitioner advising a client with respect to the federal tax consequences of the end result in a fiduciary litigation matter, if rendering written advice with respect to a federal tax matter, will be subject to the detailed standards set forth in §10.37 of Circular 230. If seeking to avoid the giving of a written advice subject to these provisions, practitioners should take care to include appropriate disclosures and disclaimers in all written advice and to communicate clearly with their clients regarding the use and purpose of the written advice. However, disclosures and disclaimers no longer act to exclude such written advice from application of Circular 230. This section is applicable to written advice rendered after June 12, 2014. Circular 230 §10.37(e).

17 Family Settlement Agreements

JAMES W. HITZEMAN
Sidley Austin LLP
Chicago

The author gratefully acknowledges the substantial contributions of his partner Susan Bart to the portion of the chapter addressing recent changes to the Illinois virtual representation statute.

I. [17.1] INTRODUCTION

Family settlement agreements have a distinguished history under Illinois jurisprudence, as courts favor the settlement of disputes among members of a family by agreement rather than by resorting to law. Such agreements promote family harmony and prevent what could otherwise be protracted, divisive family disputes.

Family settlement agreements are generally employed by members of a family after the decedent's death to avoid extended litigation or to terminate existing litigation. In such cases, the agreement can be entered into before an action is filed to resolve the dispute or after an action is filed to settle such action. However, family settlement agreements can also be used before the decedent's death to avoid anticipated litigation. In fact, one of the earliest reported decisions involving the use of a family settlement agreement, *Galbraith v. McLain,* 84 Ill. 379 (1877), focused on a settlement agreement that the decedent entered into with one of his children nearly eight years before his death.

There are numerous situations in which family settlement agreements can be employed. Such agreements can be used to resolve disputes with respect to whether a person is an heir of the decedent, the division of estate assets, the payment of taxes and other estate expenses, claims against the estate, issues related to a lost will, issues of estate administration or will construction, joint tenancy property, insurance matters, and the like. The scenarios in which family settlement agreements could be employed are nearly endless.

Although family settlement agreements are greatly favored by the courts, there are important requirements that must be met as a prerequisite to the enforcement of such an agreement, not the least of which is that there must be a bona fide dispute between rival beneficiaries entering into such an agreement. The courts will not permit a family settlement agreement to be used to change a decedent's estate plan in the absence of a genuine dispute, to defeat a testamentary gift to a person who is not a party to the agreement, or to avoid legitimate claims of creditors.

There are important gift and estate tax issues that should always be considered by parties to a family settlement agreement. Those issues are not addressed in this chapter but are dealt with in Chapter 16 of this handbook.

II. [17.2] POSITIVE REQUIREMENTS FOR VALID FAMILY SETTLEMENT AGREEMENTS

While "family [settlement agreements] are especially favored on grounds of public policy upholding the honor and peace of families" (*Ham v. Marshall,* 46 Ill.App.2d 92, 196 N.E.2d 377, 380 (3d Dist. 1964)), such agreements must satisfy numerous requirements to be valid and enforceable. Because of the possibility that family settlement agreements may be used in an abusive fashion as a device to avoid a testator's or settlor's intent, the satisfaction of such requirements is subject to close scrutiny by the courts. *Fleisch v. First American Bank,* 305 Ill.App.3d 105, 710 N.E.2d 1281, 238 Ill.Dec. 179 (3d Dist. 1999). The requirements for a valid

family settlement agreement have been expressed by the courts both positively and negatively. Sections 17.3 – 17.16 below discuss what can be characterized as the positive requirements for a valid family settlement agreement.

A. [17.3] Actual Controversy

There must be an actual controversy between the parties to a family settlement agreement for the agreement to be binding and enforceable. *Wolf v. Uhlemann,* 325 Ill. 165, 156 N.E. 334 (1927). In *Wolf,* the court stated the requirement in this fashion:

> **Where there is a reasonable or substantial basis for the belief or assurance that prolonged and expensive litigation will result over the proceeds or distribution of an estate, that the estate will be materially depleted, and that the family relationship will be torn asunder, the parties interested therein are warranted in preventing such bona fide family controversy by a settlement agreement.** 156 N.E. at 340.

The reason for this requirement is evident on reflection. If there is no actual dispute among family members as to the provisions of a will, the capacity of the testator, or the like, there is no legitimate reason for an agreement that will change the testator's estate plan. In the absence of a bona fide dispute, the typical reason for an agreement is to subvert the decedent's intent. The court in *Wolf* expressed this concern as follows:

> **Undoubtedly, the members of a family are not privileged to alter the terms and provisions of a will merely for the convenience of the family or for the sole purpose of securing greater individual financial advantages than those specified in the will and intended by the testator.** *Id.*

See also Altemeier v. Harris, 403 Ill. 345, 86 N.E.2d 229 (1949); *Fleisch v. First American Bank,* 305 Ill.App.3d 105, 710 N.E.2d 1281, 238 Ill.Dec. 179 (3d Dist. 1999).

Although the typical controversy will usually have to do with how the decedent's property is to be distributed in light of competing claims to such property, a family settlement agreement can also be employed when the dispute focuses not on dispositive provisions of the instrument in question but rather on procedural issues relating to the proper implementation of the decedent's estate plan. For example, in *Weiss v. Weiss,* 113 Ill.App.3d 793, 447 N.E.2d 437, 439, 69 Ill.Dec. 220 (2d Dist. 1983), the decedent left all of his real and personal property equally to his four children, but a controversy arose in the family over issues relating to the sale of the decedent's residence. The dispute had nothing to do with the amount of the share each child of the decedent was entitled to receive, which was not controversial, but rather with an aspect of the administration of the estate. The children entered into a family settlement agreement that established the terms for the sale of the house, and the appellate court, in addressing various tangential issues, acknowledged the utility and validity of the agreement. 447 N.E.2d at 443.

B. [17.4] Binding Contract

Although Illinois courts favor the settlement of family disputes by agreement rather than by litigation, there must in fact be a legally binding contract in the first instance before the courts

will enforce the agreement. *See, e.g., Hagen v. Anderson,* 317 Ill. 173, 147 N.E. 791, 793 (1925), in which the Supreme Court held that although courts of equity favor family settlement agreements, that fact "does not afford equity jurisdiction to order specific performance where the alleged contract is not, in fact, a contract or is one not capable of performance." *Hagen* involved a purported contract for the conveyance of real estate that the Supreme Court refused to enforce on two alternative grounds. Under the first ground, the court declined to find that a contract existed because the signatories to the contract, who were agents for the real parties in interest, had no authority to enter into the contract. Under the alternative ground, the court refused to enforce the purported contract because it did not comply with the statute of frauds.

Similarly, in *Culbertson v. Carruthers,* 66 Ill.App.3d 47, 383 N.E.2d 618, 22 Ill.Dec. 810 (5th Dist. 1978), the appellate court held that the trial court's finding that there was an oral family settlement agreement was contrary to the manifest weight of the evidence and reversed the trial court. Two aspects of *Carruthers* require some amplification.

First, *Carruthers* involved a purported agreement among 12 children with respect to the disposition of real property that the children all owned as joint tenants subject to their parents' life estates. The brother who sought to enforce the alleged agreement argued, in effect, that the family settlement doctrine (*i.e.,* the policy favoring family settlements) should be applied to find the existence of a binding agreement. The court made it clear that the application of the family settlement doctrine "presupposes the existence of an agreement." 383 N.E.2d at 621. Thus, the doctrine cannot be applied to persuade a court to find an agreement when none exists. This is an important point. As much as courts favor the resolution of family disputes by settlement, the desire for a non-litigated resolution to a family dispute cannot be allowed to override the fundamental requirement that there be an agreement in the first place. Courts will not permit the policy in support of family settlement agreements to operate like a presumption in favor of such agreements when evidence of an agreement is otherwise insufficient.

Second, the court questioned, without deciding, whether the doctrine was restricted to property passing through intestacy or by will, as opposed to joint tenancy property. The author has been unable to find any subsequent Illinois decision that would limit the application of the doctrine to property passing by intestacy or by will and in any event believes that such a limitation would be unfounded given the policy behind the doctrine. There appears to be little question that family settlement agreements can be used to resolve certain trust disputes, including, for example, land trust disputes. Family settlement agreements similarly could be employed with respect to disputes involving joint tenancy property when, for example, there is a question of a joint tenant's capacity or possible undue influence or in cases in which a dispute may arise over whether a joint tenancy bank account was a true joint tenancy account or one created for convenience alone. In *In re Estate of Mank,* 298 Ill.App.3d 821, 699 N.E.2d 1103, 1105, 232 Ill.Dec. 918 (1st Dist. 1998), for example, a settlement agreement was entered into between the executor of a decedent's estate and the guardian of the decedent's brother to resolve disputes with respect to joint tenancy property. Although *Mank* did not raise any issues with respect to the family settlement agreement doctrine, and in fact the court did not even refer to the agreement as a family settlement agreement, it was in the nature of a family settlement agreement and resolved a dispute involving joint tenancy assets.

In the author's opinion, the reason the *Carruthers* court even questioned the scope of the family settlement doctrine was because the joint tenancy arrangement in the case before it was not susceptible to a legitimate legal dispute in the first instance. The parents had conveyed the land at issue to the children in joint tenancy while reserving life estates; thus, there was no question as to what interest each child possessed when the parents died. As a result, the type of bona fide dispute that is required to give rise to an enforceable family settlement agreement simply did not exist, and the *Carruthers* court could have just as easily resolved the case, and avoided the scope-of-the-doctrine question, by holding as a threshold matter that there was no bona fide dispute. The court ended up questioning whether the family settlement doctrine could be applied to disputes involving joint tenancy property when the real problem was that the joint tenancy interests before it simply were not the subject of an actual controversy. That does not mean, however, that a bona fide dispute could not arise with respect to joint tenancy property, in which case a family settlement agreement would be an appropriate dispute resolution mechanism.

C. [17.5] Consideration

Insofar as a family settlement agreement is a contract, like any other contract, such an agreement must be supported by adequate consideration. *In re Estate of McCabe,* 95 Ill.App.3d 1081, 420 N.E.2d 1024, 51 Ill.Dec. 466 (5th Dist. 1981). As discussed in §§17.7 and 17.8 below, however, as long as the actual controversy requirement is met, the author believes the consideration requirement will be met automatically.

1. [17.6] Love and Affection Inadequate

An agreement founded solely on the consideration of love and affection is unenforceable. *Lesnik v. Estate of Lesnik,* 82 Ill.App.3d 1102, 403 N.E.2d 683, 38 Ill.Dec. 452 (1st Dist. 1980). Thus, a pledge of love and affection by one party to the agreement in exchange for the second party's relinquishment of valuable property rights will not be enforceable.

2. [17.7] Mutual Concessions

Illinois courts have repeatedly found that the "mutual concessions [of the parties to the agreement] for the prevention of litigation afford[ ] a valid consideration for the agreement." *McDole v. Kingsley,* 163 Ill. 433, 45 N.E. 281, 282 (1896); *Cole v. Cole,* 292 Ill. 154, 126 N.E. 752, 757 (1920), quoting *McDole, supra. See Stipanowich v. Sleeth,* 349 Ill. 98, 181 N.E. 632, 634 (1932) ("Consideration to support the agreement in the case at bar exists in the mutual concessions of the parties thereto."). In the author's opinion, although the courts discuss the actual controversy requirement and the consideration requirement as separate elements of an enforceable family settlement agreement, it is difficult to conceive of a case in which a settlement agreement that was the product of an actual controversy would nonetheless fail for want of consideration. That is to say, the mutual concessions that support a family settlement agreement are made possible only because there is an actual controversy.

However, it is critical under Illinois law that the concessions forming the basis for the settlement agreement are made in good faith and have a reasonable basis. If a threat of litigation is made in bad faith to extort a settlement or is part of a collusive effort to defeat the decedent's

intent, the surrender of the threat is not adequate consideration. *In re Estate of McCabe,* 95 Ill.App.3d 1081, 420 N.E.2d 1024, 1027, 51 Ill.Dec. 466 (5th Dist. 1981). Illinois courts have repeatedly held that the test is whether "there is a *reasonable* or *substantial* basis for the belief or assurance that prolonged and expensive litigation will result over the proceeds or distribution of an estate." [Emphasis added.] *Wolf v. Uhlemann,* 325 Ill. 165, 156 N.E. 334, 340 (1927). For two cases that provide excellent examples of situations in which the agreement failed because there was no reasonable basis for the claim asserted to be consideration for the agreement, *see Fleisch v. First American Bank,* 305 Ill.App.3d 105, 710 N.E.2d 1281, 238 Ill.Dec. 179 (3d Dist. 1999), and *McCabe, supra.*

3. [17.8] Adequacy of Consideration

While family settlement agreements must be supported by consideration, in *Stipanowich v. Sleeth,* 349 Ill. 98, 181 N.E. 632 (1932), the Supreme Court noted that because family settlement agreements contribute to the peace and harmony of families and to the prevention of litigation, they will be supported in equity without an inquiry into the adequacy of the consideration on which they are founded. *See also Dunham v. Slaughter,* 268 Ill. 625, 109 N.E. 673 (1915); *In re Estate of Bell,* 6 Ill.App.3d 802, 286 N.E.2d 589 (1st Dist. 1972). In *Stipanowich,* a widow, who was left one quarter of her husband's estate under his will, entered into a settlement agreement with her three children that increased her share to one third and granted her certain rights and concessions with respect to homestead property. The widow subsequently sought to avoid the agreement, arguing, among other things, that the agreement was without consideration because she would have received more if she had just renounced the will. The Supreme Court rejected the widow's argument, stating that family settlement agreements would be enforced without inquiry into the adequacy of the consideration and then holding that consideration exists in the mutual concessions of the parties.

The Supreme Court's holding in *Stipanowich* that family settlement agreements will be enforced without inquiry into the adequacy of consideration might suggest to some that consideration is not a significant element of such agreements, but in the author's opinion it would be a mistake to conclude that *Stipanowich* undermines the consideration requirement. There is no doubt that consideration is still vital to the enforceability of a family settlement agreement, but the author believes consideration is best understood as a necessary byproduct of an actual controversy, and that beyond the existence of an actual controversy, the courts will not concern themselves with whether a particular party to the agreement obtained the best possible settlement (assuming there was no fraud or compulsion). The *Stipanowich* court put it this way:

> **Where the parties are competent to contract and enter into a contract fairly and understandingly, with the wisdom or folly of their contract, made for a consideration and without fraud, courts have no concern. . . . It is the general rule that inadequacy of consideration, exorbitance of price, or improvidence in a contract will not, in the absence of fraud, constitute a defense to a bill for specific performance. [**Citations omitted.**]** 181 N.E. at 634 – 635.

It is important to note that in *Stipanowich* the Supreme Court found that there was no fiduciary relationship between the widow and the other parties to the agreement. As discussed in

§17.41 below, if a fiduciary relationship exists between any parties to the family settlement agreement, a breach of that duty may be grounds for setting aside the agreement.

D. [17.9] Written Agreement

A family settlement agreement need not be in writing to be enforceable, but such an agreement should always be memorialized in writing if possible. In *Anderson v. Anderson,* 380 Ill. 488, 44 N.E.2d 43 (1942), a child of the decedent sought to enforce an oral family settlement agreement he claimed existed between him and some of his siblings. The Supreme Court upheld the trial court's denial of specific performance in part because the child failed to establish the agreement. In so holding, the court stated:

> **The law is well settled that a court of equity will not decree specific performance of a contract the existence of which depends upon parol testimony unless the proof is clear and conclusive of its existence and terms. In such case the evidence must be clear and explicit, leaving no room for reasonable doubt, and the contract and all of its terms clearly proven.** 44 N.E.2d at 48.

Because of the substantial burden of proof associated with establishing an oral family settlement agreement, it goes without saying that all such agreements ideally should be in writing. As discussed in §17.106 below, a critical advantage of a written settlement agreement, and another reason to put such agreements in writing, is that a written agreement is entitled to a presumption of validity that can be overcome only by clear and convincing evidence. *Smith v. Texaco, Inc.,* 232 Ill.App.3d 463, 597 N.E.2d 750, 173 Ill.Dec. 776 (1st Dist. 1992). Moreover, a written agreement will be much more effective in binding the successors in interest who, in the absence of a written agreement, may be more inclined to try to avoid the agreement.

E. [17.10] Reasonably Certain Terms

The terms of a family settlement agreement must be reasonably certain, equitable, and just to warrant enforcement. *Simpson v. Wrate,* 337 Ill. 520, 169 N.E. 324 (1929); *Hagen v. Anderson,* 317 Ill. 173, 147 N.E. 791, 793 (1925).

F. [17.11] Signature of All Necessary Parties

A written family settlement agreement must be signed by all parties to the agreement to be valid and enforceable. *MacAdam v. Bowen,* 369 Ill. 325, 16 N.E.2d 732 (1938). In *Bowen,* the agreement at issue by its express terms made three of the decedent's grandchildren, all of whom were under some legal disability, parties to the agreement, but the agreement was not signed by or on behalf of the grandchildren. The Supreme Court refused to uphold the agreement. *Bowen* raises the question of who is a necessary party to a family settlement agreement. This issue is discussed in §§17.23 – 17.35 below.

G. [17.12] Court Approval

Court approval is necessary for some, but not all, family settlement agreements. And although court approval is not always necessary, it may nonetheless be desirable in certain cases depending on the particular facts and circumstances.

1. [17.13] Agreements Among Adults

In *Ham v. Marshall,* 46 Ill.App.2d 92, 196 N.E.2d 377 (3d Dist. 1964), the Third District provided a succinct overview of the applicable law. In *Ham,* five of the decedent's six children and her grandchildren, all of whom were adult, entered into a settlement agreement with one of the decedent's sons concerning a claim he filed against the intestate estate. The trial court approved the agreement. Another of the decedent's children, who opposed the settlement, appealed the trial court's order approving the settlement. The Third District found that the trial court had acted improperly on procedural grounds and overturned the order but nonetheless upheld the settlement agreement because the approval of the trial court was not necessary in any event. In so ruling, the Third District observed:

> **Adults having an interest in litigation have a personal right to negotiate and settle. Persons whose rights are affected by litigation . . . have a right to buy their peace by payment for a covenant or a release. Others having a similar interest cannot prevent a settlement by those willing to agree to it. This is so commonly done that it is amazing to find competent attorneys having any doubt about it. And it is so rare that a settlement is attacked, there is paucity of authority on it.** 196 N.E.2d at 379.

The appellate court observed that whether the "dissident" heir would get the better end of the deal by not joining the settlement would depend on whether and in what amount the claim at issue was allowed because the heir was responsible for one seventh of the amount of the claim. 196 N.E.2d at 380.

Just as the dissident heir in *Ham* could not prevent the other heirs from settling, it is also true under Illinois law that a court cannot compel an interested party to accept a compromise settlement against that party's will. *Stephens v. Collison,* 274 Ill. 389, 113 N.E. 691, 694 (1916) ("we know of no rule of law or equity by which a court could compel [a party] to accept terms of settlement proposed by the other parties to the suit, no matter how much more it might, in fact, be to his and to their interests to so settle than to pursue the litigation to any possible conclusion"); *Ham, supra.*

2. [17.14] Agreements Involving Minors and Unborn Parties

Court approval of a family settlement agreement is necessary when the interests of minors or unborn contingent beneficiaries are involved. *Ham v. Marshall,* 46 Ill.App.2d 92, 196 N.E.2d 377, 380 (3d Dist. 1964). *But see In re Estate of Mayfield,* 288 Ill.App.3d 534, 680 N.E.2d 784, 223 Ill.Dec. 834 (4th Dist. 1997), discussed in §17.30 below. This general topic is discussed more fully below in §§17.26 – 17.30 below. In *Williams v. Williams,* 204 Ill. 44, 68 N.E. 449 (1903), the Supreme Court for the first time directly addressed the right of a court of chancery to sanction

a settlement agreement on behalf of a minor who, through his next friend, had brought an action to set aside his father's will. The court observed that a minor is treated as the ward of the court and is "under its special cognizance and protection" and held that a court of chancery (or any trial court) possesses the power to compromise and settle issues on behalf of a minor. 68 N.E. at 451. In so doing, "there must be a full disclosure of the facts where infants are concerned, and their best interests are the chief ends which are sought to be secured." 68 N.E. at 452.

3. [17.15] Enforcement Against Entity Not Party to Agreement

Court approval of a settlement agreement may also be necessary (not merely desirable) when the parties to the agreement contemplate enlisting further court assistance in enforcing the agreement against third parties who did not participate in the agreement. For example, in *Thorne v. Continental Illinois National Bank & Trust Company of Chicago,* 18 Ill.App.2d 163, 151 N.E.2d 398 (1st Dist. 1958), a party to a settlement agreement brought a complaint in chancery to enforce the agreement against the defendant bank, which was the trustee of two trusts in which the decedent had a two-thirds vested remainder interest. The remainder interests was the only asset of the decedent's estate and, as such, was the subject of a settlement agreement entered into by the beneficiaries under the decedent's will. The trial court approved the settlement agreement and ordered the defendant bank to comply with the terms of the agreement. The First District Appellate Court upheld the trial court's order.

4. [17.16] Desirability of Court Approval

The Third District in *Ham v. Marshall,* 46 Ill.App.2d 92, 196 N.E.2d 377, 380 (3d Dist. 1964), recognized that while court approval of the settlement was not necessary because it was an agreement among adults, it was nonetheless "desirable because the [court] order makes the contract a matter of record and thus it may protect the estate from claims of possible future assignees who have no actual notice." Presumably, what the court had in mind was a situation in which a party to a family settlement agreement attempts to transfer to an unwitting assignee an interest the beneficiary possessed under the will, which had been diminished by virtue of the agreement. If the agreement has been approved by a court and entered into the record, the other parties to the agreement should not be susceptible to a bona fide purchaser defense. Whether this protection is necessary or desirable will have to be decided on a case-by-case basis by the parties to the agreement.

A court order approving a settlement agreement will also be res judicata of the rights of the parties to the agreement and will bind the parties not only to every matter that was determined by the agreement but also to every matter that could have been raised and determined. *Jennings v. Hills,* 247 Ill.App. 98, 115 – 116 (1st Dist. 1927). Thus, court approval of the agreement may avoid subsequent disputes among parties regarding overlooked issues that could have been addressed in the agreement.

In addition, as a practical matter, court approval of a settlement agreement may also be desirable in many instances to vest in the court most familiar with the circumstances of the case continuing jurisdiction for purposes of enforcing the agreement. Of course, this would be a consideration only if for other reasons the disputed matter was already before the court.

III. [17.17] LIMITATIONS ON FAMILY SETTLEMENT AGREEMENTS

As noted in §17.2 above, in addition to various positive requirements that must be fulfilled for a family settlement agreement to be valid, there are also certain negative requirements, or limitations, that must exist for a valid agreement to be established. These so-called "negative requirements" are addressed in §§17.18 – 17.22 below.

A. [17.18] Family Settlement Agreement Cannot Terminate Trust if Continuance of Trust Is Necessary To Achieve Material Purpose

Historically, a family settlement agreement could not be employed to terminate a trust that contained a spendthrift clause or contingent beneficial interests. *Altemeier v. Harris,* 403 Ill. 345, 86 N.E.2d 229 (1949); *Breault v. Feigenholtz,* 358 F.2d 39 (7th Cir.), *cert. denied,* 87 S.Ct. 52 (1966). As discussed in §§17.47 – 17.103 below, under the Illinois virtual representation statute, §16.1 of the Trusts and Trustees Act, 760 ILCS 5/1, *et seq.,* it is now possible for parties to enter into a nonjudicial settlement agreement that terminates a trust containing a spendthrift clause or contingent beneficial interests provided that a court approves the agreement and determines that continuance of the trust is not necessary to achieve any clear material purpose of the trust. 760 ILCS 5/16.1(d)(4)(L). In this regard, the virtual representation statute provides that a court may consider spendthrift provisions as a factor in determining whether termination of a trust would defeat a material purpose of the trust, but the statute states that "a spendthrift provision is not necessarily a clear material purpose of a trust." *Id.* Although the virtual representation statute would appear to override *Altemeier* to the extent that *Altemeier* unqualifiedly prohibited the termination of a spendthrift trust by means of a family settlement agreement, it remains an important case that warrants some discussion.

In *Altemeier,* the Supreme Court for the first time considered the impact of a family settlement agreement on a will that created a trust with contingent beneficiaries and spendthrift provisions. All prior Illinois decisions involving family settlement agreements had essentially involved testate or intestate estates in which property was distributable outright, not in trust. The *Altemeier* court surveyed settled Illinois rules applicable to trust administration, including the rule that a spendthrift trust may not be destroyed or terminated by the unanimous consent of the beneficiaries (*Bennett v. Bennett,* 217 Ill. 434, 75 N.E. 339 (1905)) and held:

> [W]**e are of the opinion that the object and purpose of a trust created by a will cannot be varied or terminated unless the purpose of the trust is accomplished, nor can such a trust be terminated by unanimous consent where it contains spendthrift provisions or where contingent interests cannot be definitely ascertained.** 86 N.E.2d at 235.

Altemeier had been the law of the land since 1949 and had never been directly challenged, although, as discussed immediately above, the virtual representation statute discussed in §§17.47 – 17.103 below has loosened *Altemeier*'s prohibition on the termination of spendthrift trusts through family settlement agreements. Before the advent of the virtual representation statute, at least one commentator had questioned whether *Altemeier* invalidates any family settlement agreement that purports to set aside a will containing a spendthrift clause or contingent interests.

See Nat M. Kahn, *Family Settlement Agreements of Will Contests: Courts Have the Power To Approve Family Settlements of Will Contests of Wills That Contain Spendthrift Clauses and Contingent Interest,* 59 Ill.B.J. 160 (1970). (The author argues that the prohibition in *Altemeier* is dictum, the logical result of which would be that contests of wills containing spendthrift clauses or contingent interests or both could never be settled.) As discussed in §17.21 below, the author believes that *Altemeier,* properly understood, does not prohibit family settlement agreements involving spendthrift trusts or contingent interests when the validity of a will creating the spendthrift trust or the contingent interests has not been previously established. This is significant because the virtual representation statute does not apply to wills, so the only type of agreement that can be employed to resolve a dispute with respect to the validity of a will is a family settlement agreement, not a nonjudicial settlement agreement under the virtual representation statute.

1. [17.19] Invasion of Spendthrift Trust Principal

Although *Altemeier v. Harris,* 403 Ill. 345, 86 N.E.2d 229 (1949), prohibited a family settlement agreement that terminated a valid spendthrift trust, an agreement that approves an invasion of principal of a spendthrift trust, as opposed to its termination, is valid under Illinois common law. *Thorne v. Continental Illinois National Bank & Trust Company of Chicago,* 18 Ill.App.2d 163, 151 N.E.2d 398 (1st Dist. 1958). *Thorne* involved a family settlement agreement, one of the provisions of which contemplated the invasion of the principal of a spendthrift trust. The appellate court concluded that the family settlement agreement did not violate *Altemeier* because no contingent interests were involved and the invasion of principal did not terminate the trust at issue or render the spendthrift provision ineffectual.

A few points are worth noting in assessing *Thorne.* First, the party objecting to the family settlement agreement was Continental Illinois National Bank, as trustee of the trust subject to principal invasion. As discussed in §§17.43 – 17.46 below, fiduciaries have standing to object to family settlement agreements and should consider whether doing so is necessary if the requirements for a valid settlement agreement, whether positive or negative, are not satisfied. Second, the agreement in *Thorne* succeeded in part because there were no contingent interests. The interests of the beneficiaries of the trust subject to invasion were all vested and therefore did not trigger the prohibitions of *Altemeier.* As discussed in §§17.47 – 17.103 below, under the Illinois virtual representation statute, 760 ILCS 5/16.1, it is possible for parties to enter into a family settlement agreement when contingent trust interests are involved, although certain statutory requirements must be met for this type of agreement to be effective. Finally, at some point, an invasion of principal may be so significant that it is tantamount to the termination of a trust. Thus, there are practical limits to the *Thorne* rationale. In *Thorne,* the invasion of the trust corpus was permitted because the situation constituted an emergency as contemplated under Illinois reformation law. *See Curtiss v. Brown,* 29 Ill. 201 (1862); *Stough v. Brach,* 395 Ill. 544, 70 N.E.2d 585 (1946); *Department of Mental Health & Developmental Disabilities v. Phillips,* 114 Ill.2d 85, 500 N.E.2d 29, 102 Ill.Dec. 407 (1986). In the absence of such an emergency, the principal invasion presumably would not have been upheld under the laws then in existence. As discussed above and in more detail in §17.78 below, termination of a trust can be accomplished under the virtual representation statute provided its requirements are satisfied.

2. [17.20] Preservation of Spendthrift Clause

If the family settlement agreement preserves the spendthrift clause or incorporates a spendthrift clause substantially identical to the original clause, the agreement should be valid if all other necessary requirements are satisfied. *See Marine Bank of Springfield v. St. Joseph's Hospital (In re St. Joseph's Hospital),* 133 B.R. 453 (Bankr. S.D.Ill. 1991). This requirement, again, is substantially mitigated if the agreement is prepared under the auspices of the virtual representation statute, 760 ILCS 5/16.1.

3. [17.21] *Altemeier* Distinguished

Although under *Altemeier v. Harris,* 403 Ill. 345, 86 N.E.2d 229 (1949), a family settlement agreement could not be used to terminate a valid trust subject to a spendthrift clause or one in which there were contingent interests, the author believes the scope of *Altemeier* is not as broad as it appears at first glance. Suppose as a result of undue influence a testator makes a will that provides for the creation at the testator's death of a spendthrift trust for one of the testator's three children — the one who exercised undue influence — with contingent interests in favor of that child's two adult children (the grandchildren of the settlor). At the testator's death, the two disinherited children bring an action to set aside the invalid will. The trial court determines that the interests of all minor and unborn contingent beneficiaries are represented under the doctrine of virtual representation. If the testator's three children and the two grandchildren wanted to enter into a family settlement agreement under which the estate would be distributed 40 percent outright to the child guilty of undue influence and 30 percent outright to each of the other two children (to reflect the uncertainties of litigation), would *Altemeier* invalidate such an agreement? Although the will at issue contemplates the creation of a trust that would contain a spendthrift clause and contingent interests, the author does not think the agreement would be invalid under *Altemeier* because there is a difference between an agreement that terminates a valid spendthrift trust (*Altemeier*) and one that voids a testamentary trust created (or to be created) under a will that is invalid from the outset.

An understanding of the facts of *Altemeier* is critical to an appreciation of this distinction. In *Altemeier,* the will at issue was challenged in 1909 and upheld following a jury trial. In 1923, the trustees under the will filed a construction suit that was resolved by the Supreme Court in 1925. Over 20 years later, the trustees filed yet another construction suit, which gave rise to the family settlement agreement ultimately set aside by the court. In framing the issue before it, the Supreme Court stated:

> **We have allowed an appeal to this court in this cause for the purpose of reviewing the extent to which a family settlement agreement may change the provisions of a will, especially when the corpus of the estate is placed in the hands of trustees with active duties, and where the ultimate beneficiaries at the time of the entering of the decree are either unknown or uncertain, *and where there has been previous litigation upon which decrees have been entered concerning the validity and meaning of the will.*** **[**Emphasis added.**]** 86 N.E.2d at 232.

In *Altemeier,* there was no issue as to the validity of the will creating the trust whose governing provisions became the subject of the final construction suit. And in framing the issue, the Supreme Court identified the validity of the will as an important factor in its analysis.

If the original will contest in 1909 had ended in a family settlement agreement that set aside the will, the author believes that as long as the agreement otherwise satisfied the requirements for a valid family settlement agreement, such an agreement should have been enforceable despite the existence of contingent interests. This distinction is what seems to be at the heart of the article by Nat M. Kahn referred to in §17.18 above and in this author's opinion is a persuasive distinction. See Nat M. Kahn, *Family Settlement Agreements of Will Contests: Courts Have the Power To Approve Settlements of Wills That Contain Spendthrift Clauses and Contingent Interest,* 59 Ill.B.J. 160 (1970). The author does not believe it should be necessary in the example cited above for the parties to be forced to litigate the dispute to a conclusion just because the invalid will creates a spendthrift trust with contingent interests.

The analysis of the First District Appellate Court in *Tree v. Continental Ill. Nat. Bank & Trust Co. of Chicago,* 346 Ill.App. 509, 105 N.E.2d 324 (1st Dist. 1952), supports the author's position even though the court ultimately concluded that the settlement before it was not valid because there was not a bona fide dispute over the meaning of the will at issue. In *Tree,* one of the actions brought by the plaintiff was an action to construe the decedent's will and to declare those provisions of the will creating a testamentary trust invalid. The plaintiff was a cotrustee of the trust, which was a spendthrift trust in which the plaintiff's descendants held contingent interests — the classic *Altemeier* scenario. A family settlement agreement resolving the dispute was approved by the trial court. The plaintiff's co-fiduciary, Continental Illinois National Bank and Trust Company, objected to the agreement and appealed. One argument made by the bank on appeal was "that a family settlement agreement cannot be employed . . . to overturn the clear intent of the testator in the creation of the spendthrift trust." 105 N.E.2d at 327. The appellate court addressed this argument as follows:

> **If the trust provisions in the instant will violate the rule of perpetuities, or if there is substantial doubt as to its validity, then there is merit in plaintiff's position that the instant family settlement agreement, which the law favors . . . should be confirmed. [**Citations omitted.**]** 105 N.E.2d at 329.

As mentioned above, the court set aside the agreement because it was not the product of a legitimate dispute as to the validity of the trust, but the court acknowledged that a family settlement agreement would have been appropriate had there been a valid basis for such an agreement, even though the trust at issue was a spendthrift trust with contingent interests.

The author recognizes that in *Breault v. Feigenholtz,* 358 F.2d 39 (7th Cir.), *cert. denied,* 87 S.Ct. 52 (1966), the Seventh Circuit, in upholding *Altemeier,* rejected *Tree* to the extent that the *Tree* court suggested a trust could be abrogated under the family settlement doctrine if there was substantial doubt as to its validity. The author, however, disagrees with that portion of the Seventh Circuit's analysis in *Breault* and believes that the analysis in *Tree,* which articulates the distinction advanced by the author here, is the better view. Under this view, family settlement

agreements can be employed in a wider range of circumstances, thereby advancing the public policy interests served by the family settlement agreement doctrine. *Breault* is not binding on the Illinois courts and does not foreclose adoption of the views expressed by the author. 14 I.L.P. *Courts* §85 nn.33, 34 (1968) (and cases cited therein).

B. [17.22] Family Settlement Agreement Cannot Be Used Merely To Change Testator's Intent

As discussed in §17.3 above, a family settlement agreement cannot be employed merely for securing greater financial benefits for the parties to the agreement than those afforded by the will or trust. *Wolf v. Uhlemann,* 325 Ill. 165, 156 N.E. 334, 340 (1927); *In re Estate of McCabe,* 95 Ill.App.3d 1081, 420 N.E.2d 1024, 51 Ill.Dec. 466 (5th Dist. 1981); *Fleisch v. First American Bank,* 305 Ill.App.3d 105, 710 N.E.2d 1281, 238 Ill.Dec. 179 (3d Dist. 1999). This is really just the negative expression of the requirements that a bona fide dispute must exist for a resulting family settlement agreement to be valid.

IV. [17.23] NECESSARY PARTIES

As discussed in §17.11 above, a family settlement agreement must be signed by all the parties to the agreement, which naturally leads to the question of who those parties are. In general, any person whose rights may be adversely affected by the agreement should be made a party to the agreement. *In re Estate of McCabe,* 95 Ill.App.3d 1081, 420 N.E.2d 1024, 51 Ill.Dec. 466 (5th Dist. 1981).

A. [17.24] Interested Parties

All parties who have a beneficial interest under the instrument at issue, or who would have a beneficial interest if the instrument were set aside, should be parties to the settlement. *In re Estate of McCabe,* 95 Ill.App.3d 1081, 420 N.E.2d 1024, 51 Ill.Dec. 466 (5th Dist. 1981). In the case of an intestate decedent, the decedent's heirs will, of course, be necessary parties. For testate decedents, both legatees and heirs will be necessary parties. Creditors, too, will be necessary parties unless satisfaction of their debt is otherwise provided for. *Robertson v. Yager,* 327 Ill. 346, 158 N.E. 709 (1927).

B. [17.25] Third-Party Nonfamily Members

A beneficiary under a will whose interest is affected by the family settlement agreement must be made a party to the agreement even if the beneficiary is not a family member. In *In re Estate of McCabe,* 95 Ill.App.3d 1081, 420 N.E.2d 1024, 51 Ill.Dec. 466 (5th Dist. 1981), the decedent's three children were the only parties to a family settlement agreement that excluded the decedent's business partner, who was given an option under the decedent's will to purchase the decedent's interest in a partnership. The appellate court, in overturning the agreement principally for lack of consideration, noted that the agreement also excluded a necessary party. *See also Green v. Myers,* 106 Ill.App.3d 541, 436 N.E.2d 43, 62 Ill.Dec. 461 (1st Dist. 1982) (retirement fund was necessary party to family settlement agreement).

What the cases reflect is that family settlement agreements are not strictly limited to agreements among family members alone and can apply when nonfamily members are involved. For example, if a third party sought to enforce a contract to make a will, an agreement between the decedent's family and the third party would undoubtedly fall within the family settlement doctrine. Although the family settlement doctrine extends to agreements that involve nonfamily members, in *Stein v. LaSalle Nat. Bank,* 328 Ill.App. 3, 65 N.E.2d 216 (1st Dist. 1946), the court, in rejecting a settlement agreement that terminated a spendthrift trust, found it noteworthy that it was not confronted with a family dispute. Thus, it appears that some parties to the agreement must be family members to be assured that the agreement falls within the family settlement doctrine.

C. [17.26] Minors and Unborn Parties

When the interests of minor or other incompetent beneficiaries are affected, or the interests of unborn contingent remainderpersons are implicated, such interests must be properly represented for the agreement to be valid. The interests of minors and unborn contingent remainderpersons are generally represented either by court-appointed attorneys or through the doctrine of virtual representation, the applicability of which generally must be established by a court. (The author uses the word "generally" advisedly because of the decision in *In re Estate of Mayfield,* 288 Ill.App.3d 534, 680 N.E.2d 784, 223 Ill.Dec. 834 (4th Dist. 1997), discussed in §17.30 below. Outside the dissent in *Mayfield,* the author is not aware of any specific judicial pronouncement that the doctrine of virtual representation can be based only on findings of a court, but this proposition is implicit in the rationale of the many Illinois cases that have discussed the doctrine.) The virtual representation statute, 760 ILCS 5/16.1, discussed in §§17.47 – 17.103 below, permits certain agreements pertaining to trusts that are binding on minors and unborn contingent remainderpersons in the absence of court approval.

1. [17.27] Guardian ad Litem or Next Friend

Different rules on representation for purposes of a family settlement agreement apply depending on whether the party at issue is a minor or a person not in being. See §§17.28 and 17.29 below.

a. [17.28] Persons Not in Being

Section 2-501 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.,* contains specific provisions for the appointment of a guardian ad litem (GAL) to represent the interests of persons not in being. 735 ILCS 5/2-501. The appointment of a GAL is at the discretion of the court. "[T]he court *may, whenever it may deem it necessary* for the proper and complete determination of such cause, appoint some competent and disinterested person as guardian ad litem of such person or persons not in being." [Emphasis added.] *Id.*

b. [17.29] Minors

Section 2-502 of the Code of Civil Procedure, 735 ILCS 5/2-502, states that guardianships for minors (as opposed to unborn parties) shall be governed by §11-13 of the Probate Act of 1975,

755 ILCS 5/1-1, *et seq*. Section 11-13(d) of the Probate Act states in turn that the guardian of the estate of a minor shall appear for and represent the minor "in all legal proceedings unless another person is appointed for that purpose as representative or next friend." 755 ILCS 5/11-13(d). As in the case of persons not in being under 735 ILCS 5/2-501, §11-13(d) of the Probate Act leaves it to the court's discretion to determine whether to appoint a guardian ad litem or next friend for a minor.

The above-referenced provisions of the Code of Civil Procedure and the Probate Act do not supplant the common-law doctrine of virtual representation, which is discussed in §17.30 below. Thus, a court may either appoint a GAL or next friend for a minor or unborn party or waive such appointment after finding that the doctrine of virtual representation is applicable.

2. [17.30] Common-Law Virtual Representation

Illinois has long recognized the doctrine of virtual representation, which applies not only to persons not in being, but also to minors and takers of contingent interests. In *Easton v. Hall,* 323 Ill. 397, 154 N.E. 216, 225 (1926), the Supreme Court described the doctrine of virtual representation as follows:

> **The general rule that the interest of parties not before the court will not be bound by the decree is subject to the exception of the case, where a party, though not before the court in person, is so far represented by others that his interest receives actual and efficient protection. The doctrine is especially applicable where the persons who are not before the court are only possible parties not in being, and where the interest of all parties requires a decree which will completely and finally dispose of all the subject-matter of the litigation. In such cases the doctrine of representation has been recognized, by which, if persons are before the court who have the same interest and are equally certain to bring forward the entire merits of the question so as to give the contingent interests effective protection, the court will render a complete decree, which will be binding upon the contingent interests in reversion or remainder.**

See also Feen v. Ray, 109 Ill.2d 339, 487 N.E.2d 619, 93 Ill.Dec. 794 (1985); *Ludwig v. Sommer,* 53 Ill.App.2d 72, 202 N.E.2d 337 (3d Dist. 1964); *Village of Lansing v. Sundstrom,* 379 Ill. 121, 39 N.E.2d 987, 989 (1942) ("rule that beneficiaries of a trust are necessary parties to an action . . . to foreclose their interests . . . is subject to the exception that such beneficiaries are not necessary parties if their interests are so far represented by others that they receive actual and efficient protection"); *Weberpals v. Jenny,* 300 Ill. 145, 133 N.E. 62 (1921). Cases involving the application of the doctrine when contingent interests exist include *Longworth v. Duff,* 297 Ill. 479, 130 N.E. 690 (1921), *Gunnell v. Palmer,* 370 Ill. 206, 18 N.E.2d 202 (1938), and *McFall v. Kirkpatrick,* 236 Ill. 281, 86 N.E. 139 (1908). Cases applying the doctrine to minor parties include *City of Danville v. Clark,* 63 Ill.2d 408, 348 N.E.2d 844 (1976), and *McCampbell v. Mason,* 151 Ill. 500, 38 N.E. 672 (1894).

The common-law doctrine of virtual representation applies in the context of litigation and requires a court finding that the requirements for application of the doctrine apply. It is implicit in the holdings of the virtual representation cases that whether the doctrine of virtual representation applies depends on a determination of the court that all the elements of the doctrine have been satisfied.

Even though the common-law doctrine of virtual representation applies in the context of litigation, a 1997 Fourth District Appellate Court decision extended the doctrine to a written agreement. In *In re Estate of Mayfield,* 288 Ill.App.3d 534, 680 N.E.2d 784, 223 Ill.Dec. 834 (4th Dist. 1997), the appellate court held that an agreement signed by the plaintiffs' father (Charles) when they were either minors or not in being was binding on the plaintiffs even though there was no finding at the time of the agreement that the doctrine of virtual representation applied, and no guardian ad litem was appointed to represent the interests of minors and unborn parties. The facts of the case are somewhat convoluted, but simply put, it involved a family settlement agreement entered into in 1963 after admission of a joint and mutual will on the death of the first parent of Charles to die. The agreement prohibited Charles and his heirs from contesting the joint will at the subsequent death of Charles' mother. The agreement was filed with the probate court and was recited in the executor's final account, which the probate court approved in 1964. Charles predeceased his mother, who died 31 years later in 1995, having never changed the will. Following the mother's death, Charles' children filed a petition to contest her will on the basis of undue influence. The trial court dismissed the petition.

The appellate court analyzed Illinois law concerning the power to bind future beneficiaries and held:

> **There is a question whether section 6-12 of the [**Probate**] Act or the doctrine of family settlement agreements applies directly to this case. Nevertheless, the applicable policies are clear. Where a parent and children have a common right or interest, where there is no conflict between the parent and any child, where the parent effectively protects the rights of the children, the parties should be able to make a full and lasting settlement of their dispute. The alternative, an additional 35 years of family strife, cannot be considered to be in anyone's best interests.**
>
> **We conclude, in the facts of this case, that Charles had the power to bind his children as well as himself not to contest [**his mother's**] will.** 680 N.E.2d at 788 – 789.

The dissent noted "that the common law rule of virtual representation applies to litigation and resulting judgments and not to agreements to settle disputes" and that the majority's ruling could cause injustices in many instances if a party purporting to represent minors and unborn parties promoted his or her own interests and agenda at the expense of the minors and unborn parties. 680 N.E.2d at 790 (Green, J., dissenting). The dissent also observed that, if the common-law doctrine of virtual representation were as expansive as the majority made it, it would not have been necessary for the Illinois legislature to enact the virtual representation statute, 760 ILCS 5/16.1.

The author believes the concerns raised by the dissent are legitimate and that the scope and impact of *Mayfield* must be assessed very carefully. The appellate court apparently (and understandably) felt strongly that the mother's failure to change her will in the 31 years preceding her death undercut the plaintiffs' claim of undue influence, a claim that their father, Charles, had not raised when his own father died. In light of the fact that the children were not represented by a GAL and the probate court made no assessment of whether the requirements for virtual representation had been satisfied, what the appellate court did, in effect, was make a retroactive finding that Charles virtually represented his children and unborn descendants in a non-litigation context and therefore had the power to make an agreement binding on them. One might view *Mayfield* as announcing a new rule that would permit the settlement of certain estate (but not trust) disputes involving the rights of minors and unborn parties without the appointment of a GAL or prior court approval.

As the author noted in an earlier version of this chapter, based on the literal language of *Mayfield,* the rule would be limited to situations in which (a) the party to the agreement representing the minors and unborn parties is a parent of the minors and unborn parties, (b) the parent and children have a common interest, and (c) the parent effectively protects the rights of the children. A 2014 Illinois decision, discussed below, supports this limited application of *Mayfield.* As the *Mayfield* dissent pointed out, the majority's rule was a departure from settled Illinois law, under which one might have expected the plaintiffs' position to be sustained. The dissent also recognized, however, that given the facts before the court, the decision probably produced the right result.

Parties contemplating a family settlement agreement implicating the rights of minors and unborn parties should not read *Mayfield* as endorsing agreements that ignore those interests because the *Mayfield* court was very careful to establish that these interests had, in fact, been adequately represented. Nor should such parties read *Mayfield* as obviating the necessity of trial court approval of such agreements, even though the probate court in *Mayfield* did not directly approve of that agreement. The author believes that many courts would be hesitant to make an after-the-fact determination that the elements of virtual representation were satisfied and, in so doing, foreclose a subsequent challenge to a family settlement agreement by parties who were minors or unborn at the time the agreement was entered into and were not represented by a GAL. Best practice would certainly suggest that in estate matters that are to be resolved by agreement of the parties, either minors and unborn parties be represented by a GAL or the agreement be submitted to a court for approval to foreclose later challenges by such parties when they attain the age of majority.

There has been one decision in Illinois since *Mayfield* in which a party attempted to rely on *Mayfield* to excuse the failure to give notice to certain necessary parties. In *In re Estate of Ostern,* 2014 IL App (2d) 131236, 23 N.E.3d 391, 387 Ill.Dec. 699, two children of a ward, who were guardians of her person and estate, sought to modify the ward's estate plan to, among other things, cut out a third child (Kimberly) who had been convicted of financial exploitation of the ward, as well as that child's descendants. At the time the two children filed their petition, the ward had a will and an irrevocable trust under which Kimberly was a beneficiary, provided that if she predeceased the ward, her share would be distributable to her descendants per stirpes. Under the financial exploitation statute, a person convicted of such exploitation was deemed to

predecease the ward, which in this case meant that Kimberly's children would potentially become remainder beneficiaries of the irrevocable trust. The petitioners gave notice of the proceeding to Kimberly, but did not give notice to her two children. Evidently Kimberly did not contest the petition to modify the ward's estate plan, and the trial court approved the petition. After the ward's death, Kimberly's two children filed a petition to set aside the trial court's judgment pursuant to 735 ILCS 5/2-1401. The trial court denied the petition, and Kimberly's children appealed.

One of the arguments raised by the appellees in the appeal was that the notice they gave to Kimberly was sufficient under the Illinois virtual representation statute, 760 ILCS 5/16.1(a)(2), which is discussed in detail in §§17.47 – 17.103 below. The court noted, however, that because Kimberly was deemed to have predeceased the ward, she could not be a primary beneficiary of the irrevocable trust for purposes of the virtual representation statute. The appellees further argued that the virtual representation standard applied based on *Mayfield.* The court found, however, that under *Mayfield* the virtual representation standard was met only (a) when a child and a parent have a common right or interest, (b) when there is no conflict between the parent and the child, and (c) when the parent effectively protects the rights of the child. The court concluded that *Mayfield* was distinguishable because Kimberly and her children did not have a common interest (as Kimberly had no interest in the irrevocable trust due to the financial exploitation statute) and did not actually protect the rights of her children, as she raised no objection to the petition. The court's strict application of *Mayfield* is consistent with the author's earlier interpretation of *Mayfield.*

The appellees' virtual representation argument failed for another reason, related to the *Ostern* court's initial holding that Kimberly was not a primary beneficiary at all. Kimberly's children were adults, not minors, unlike the plaintiffs in *Mayfield,* who were minors when their father entered into the agreement that was found to be binding on them. Under the virtual representation statute, a primary beneficiary who has legal capacity cannot be represented by any other primary beneficiary. If Kimberly's children were beneficiaries of the irrevocable trust due to her disqualification as a beneficiary under the financial exploitation statute, the simple answer is that they were primary beneficiaries and could not be represented by anyone else.

It is interesting to note, as discussed in §17.54 below, that under the Illinois virtual representation statute, a parent can now represent a minor beneficiary, a beneficiary with a disability, or an unborn beneficiary for purposes of a nonjudicial settlement agreement (assuming there is no guardian of the estate or person), provided there is no conflict of interest between the parent and the beneficiary. To some extent, this aspect of the virtual representation statute could be viewed as at least a tacit endorsement of the outcome in *Mayfield*, in which the minor and unborn descendants were found to have been effectively represented by a parent who had no conflict of interest. However, the virtual representation statute contains numerous safeguards to ensure adequate protection of minors, unborn parties, and persons with a disability that were not present in *Mayfield* and would not be available in a *Mayfield*-type scenario in which a will, not a trust, is at issue.

D. [17.31] Fiduciary

Depending on the circumstances, a fiduciary may or may not be a necessary party to a family settlement agreement. See §§17.32 – 17.35 below.

1. [17.32] Nominated Executor

A nominated executor under a will is not a necessary party to a family settlement agreement. If the settling parties are all adults and there are no contingent interests, an agreement can be reached without the participation of the nominated fiduciary. In *Hall v. Hall,* 125 Ill. 95, 16 N.E. 896 (1888), for example, the children and surviving spouse of the decedent, who died testate, entered into a settlement agreement under which the decedent's will was set aside, and the estate was distributed by agreement under Illinois intestacy law. Similarly, in *Stipanowich v. Sleeth,* 349 Ill. 98, 181 N.E. 632 (1932), an objection was made to a family settlement agreement on the grounds that it lacked a necessary party, namely, the nominated corporate executor of the will. The family entered into a settlement agreement without ever probating the decedent's will. In rejecting this objection, the Supreme Court held:

> **The party thus alleged to be necessary is the Canton National Bank. . . . The contention is without merit. This proceeding was brought to enforce an agreement which was calculated to, and did, supersede the will, which was never probated.** 181 N.E. at 635.

See also Dunham v. Slaughter, 268 Ill. 625, 109 N.E. 673 (1915); *Cole v. Cole,* 292 Ill. 154, 126 N.E. 752, 757 (1920) (effect of family settlement agreement was to set aside will). As discussed in §17.33 below, if a decedent's property cannot be transferred unless a representative is appointed, it may be necessary to probate the decedent's estate to effect the settlement.

2. [17.33] Acting Executor or Administrator

An appointed executor or administrator will often be a party to a family settlement agreement for practical reasons, but a family settlement agreement can be entered into after the appointment of the representative and be valid even when the representative is not a party to the agreement. The practical considerations that weigh in favor of including the representative in the agreement have to do with the fact that the representative may be needed to effect the transfer of property titled in the decedent's sole name in accordance with the terms of the settlement agreement. *See McDole v. Kingsley,* 163 Ill. 433, 45 N.E. 281 (1896). An executor or administrator would be a necessary party to a family settlement agreement if the dispute involved procedural aspects of estate administration and the fiduciary would be expected to implement some administrative procedure in accordance with the agreement. *See, e.g., Weiss v. Weiss,* 113 Ill.App.3d 793, 447 N.E.2d 437, 69 Ill.Dec. 220 (2d Dist. 1983) (family settlement agreement, signed by executor, addressed issues pertaining to sale of decedent's home).

Although the executor is not always a necessary party to the agreement, the executor may nonetheless have standing to contest the agreement. See the discussion in §§17.43 – 17.46 below on fiduciary considerations with respect to family settlement agreements. For that reason, too,

parties may be well advised to seek out the cooperation and participation of the executor if there is any reason to believe the executor may be opposed to the agreement.

3. [17.34] Intestate Estate

Heirs of an intestate decedent can enter into a family settlement agreement that settles the estate and arranges for distribution of the estate assets without the appointment of an administrator. *People ex rel. McKee v. Abbott,* 105 Ill. 588 (1882); *Osgood v. McKee,* 343 Ill. 470, 175 N.E. 786 (1931). This is permissible, however, only if (a) the decedent had no debts or the heirs provide for payment of such debts and (b) no minors or unborn parties have vested or contingent interests in the estate. If the parties to the agreement do not possess all the interests or are not all sui generis, there can be no agreement without the appointment of an administrator and effective representation of the interests of parties who are not sui generis.

4. [17.35] Trustees

It follows from the author's analysis of *Altemeier v. Harris,* 403 Ill. 345, 86 N.E.2d 229 (1949), in §§17.18, 17.19, and 17.21 above that in the case of a trust under a will, even if it is a spendthrift trust, parties can enter into a family settlement agreement without the participation of the nominated trustee if the basis for the settlement is the purported invalidity of the will. If an agreement can be reached in those circumstances without the participation of the nominated but not-yet-appointed executor, it follows that it should not be necessary to include the nominated trustee under the will as a party to the agreement.

In the case of an existing, funded irrevocable trust whose validity is not in question, whether the trustee is a necessary party to a family settlement agreement will depend on a number of factors.

As a preliminary matter, it is important to note that Illinois common law limits the rights of beneficiaries to terminate trusts by agreement. *See Altemeier, supra,* and the discussion in §17.19 above. For a full discussion of this area of law, see John T. Brooks and Jena L. Levin, Ch. 8, *Termination of the Trust,* TRUST ADMINISTRATION (IICLE®, 2014). If, however, a trust is already terminating by its own terms, and there is an issue as to who the proper distributees are, it should be possible to resolve that dispute through a family settlement agreement. The trustee should not be a necessary party to a settlement agreement if all parties having an actual or potential beneficial interest are adequately represented. If some of those parties are minors or unborn, it generally will be necessary to submit the matter to a court, and in many cases the trustee takes the lead role in doing so. As discussed in §§17.26 and 17.30 above, under the virtual representation statute, 760 ILCS 5/16.1, court approval of such an agreement may not be necessary. The guiding principle here is that whether or not a trustee is a necessary party to a settlement agreement, the well-counseled trustee will require, as a condition of any agreement, adequate fiduciary protections, including releases and indemnifications when warranted. If the parties do not provide such protections voluntarily as part of the settlement agreement, the trustee can force the issue in court, so all parties generally are better off if the trustee is an integral part of the settlement proceedings, whether or not the trustee signs the agreement as a party. In many

cases in which existing or potential beneficiaries of a trust are in dispute, a trustee will not take any action without a court order, so it may not be possible for an agreement to be reached outside of court.

For example, suppose a trust has terminated and is distributable to the settlor's grandchildren, all of whom are adults, but one of whom is illegitimate. A dispute arises over whether the illegitimate grandchild is a beneficiary. Under the principles set forth in *Ham v. Marshall,* 46 Ill.App.2d 92, 196 N.E.2d 377 (3d Dist. 1964), discussed in §§17.13, 17.14, and 17.16 above, the grandchildren should be able to agree among themselves as to the distribution of the trust property and would not need court approval or the trustee's approval of the settlement. (Although *Ham* involved a probate estate and not a trust, the author believes the principles applicable in *Ham* should apply in the trust context when the trust is terminating.) If for some reason the trustee objected to the settlement, the beneficiaries should be able to bring an action to enforce the settlement. For that reason, the trustee technically would not be characterized as a necessary party to such an agreement. That is to say, the beneficiaries do not need the trustee to sign the agreement for it to be enforceable. The trustee is, however, entitled to have its accounts approved and to be protected in implementing any settlement, so the parties will need to provide those protections even though the trustee is not a necessary party.

If parties avail themselves of the virtual representation statute, discussed in §§17.47 – 17.103 below, the trustee by statute is a necessary party to any such agreement.

V. [17.36] ENFORCEMENT OF FAMILY SETTLEMENT AGREEMENTS

Family settlement agreements are enforced through specific performance. In *Anderson v. Anderson,* 380 Ill. 488, 44 N.E.2d 43, 47 (1942), the Illinois Supreme Court held:

> **The rule is well established . . . that courts of equity look favorably upon the settlement of disputes among members of a family by agreement, and will readily interpose for its specific performance unless there is some insuperable bar to prevent.**

See also Dunham v. Slaughter, 268 Ill. 625, 109 N.E. 673 (1915); *Weiss v. Weiss,* 113 Ill.App.3d 793, 447 N.E.2d 437, 69 Ill.Dec. 220 (2d Dist. 1983); *In re Estate of Swanson,* 102 Ill.App.3d 104, 429 N.E.2d 892, 57 Ill.Dec. 775 (3d Dist. 1981). Family settlement agreements can also be enforced through imposition of a constructive trust. Although the author was not able to find an Illinois case directly on point, this remedy has been employed in other jurisdictions. *See, e.g., Khasigian v. Arakelian,* 180 Cal.App.2d 10, 4 Cal.Rptr. 148 (1960).

Factors that can constitute insuperable bars to the enforcement of a family settlement agreement are discussed in §§17.37 – 17.42 below.

A valid family settlement agreement acts as a bar to subsequent attempts by parties to the agreement to litigate matters covered by the agreement. *Weiss, supra,* 447 N.E.2d at 443; *Swanson, supra,* 429 N.E.2d at 894.

VI. [17.37] GROUNDS FOR SETTING ASIDE FAMILY SETTLEMENT AGREEMENTS

Sections 17.2 – 17.22 above discuss various positive and negative requirements of family settlement agreements. The failure of a family settlement agreement to satisfy all such applicable requirements can result in its invalidity. Sections 17.38 – 17.42 below identify additional grounds recognized under Illinois law for setting aside a family settlement agreement.

A. [17.38] Fraud

A family settlement agreement will be set aside if it is the product of fraud, whether in the inducement or in the execution of the agreement. *Hagen v. Anderson,* 317 Ill. 173, 147 N.E. 791, 793 (1925); *In re Estate of Swanson,* 102 Ill.App.3d 104, 429 N.E.2d 892, 57 Ill.Dec. 775 (3d Dist. 1981); *In re Estate of McCabe,* 95 Ill.App.3d 1081, 420 N.E.2d 1024, 1026, 51 Ill.Dec. 466 (5th Dist. 1981) (family settlement "agreement must be impartial in every respect and must be obtained without fraud or deception"), quoting *Wolf v. Uhlemann,* 325 Ill. 165, 156 N.E. 334, 340 – 341 (1927).

B. [17.39] Incapacity

If a party to the agreement lacks capacity, the agreement will be set aside. In the case of a minor, this is an issue if the minor does not have appropriate representation through a proper legal representative, or the minor's interests are not otherwise protected through application of the doctrine of virtual representation. *See In re Estate of Stubbs,* 32 Ill.App.2d 150, 177 N.E.2d 242 (2d Dist. 1961). See also the discussion of *In re Estate of Mayfield,* 288 Ill.App.3d 534, 680 N.E.2d 784, 223 Ill.Dec. 834 (4th Dist. 1997), in §17.30 above.

C. [17.40] Compulsion or Duress

A family settlement agreement will fail if it is the product of compulsion or duress. *See McDole v. Kingsley,* 163 Ill. 433, 45 N.E. 281 (1896); *In re Estate of Stubbs,* 32 Ill.App.2d 150, 177 N.E.2d 242 (2d Dist. 1961).

D. [17.41] Breach of Fiduciary Duty

If a family settlement agreement is obtained in breach of a fiduciary duty, the agreement may be set aside. *Mayrand v. Mayrand,* 194 Ill. 45, 61 N.E. 1040 (1901); *Engelbrecht v. Engelbrecht,* 323 Ill. 208, 153 N.E. 827 (1926); *Christensen v. Christensen,* 327 Ill. 448, 158 N.E. 706 (1927); *Eichhorst v. Eichhorst,* 338 Ill. 185, 170 N.E. 269 (1930). This becomes an issue because a decedent often appoints a child or other relative as executor, and such an appointment can create problems if the family wants to enter into a family settlement agreement. An executor is a fiduciary with respect to estate beneficiaries, and the existence of a fiduciary relationship imposes special duties on the fiduciary in his or her dealings with beneficiaries. In *Mayrand* and *Christensen,* the widow entered into a family settlement agreement with a child of the decedent who was acting as executor. In each case, the widow was not fully advised of her rights, including

her right to a spouse's award, and was not advised of the extent of the estate. In each case, the agreement was set aside because the decedent's child-executor breached a fiduciary duty owed to the widow to give her sufficient information so she could enter into the agreement and execute releases with full understanding of her rights and the effect of the agreement.

In *Eichhorst,* the Supreme Court, under similar facts, held:

> **It was the duty of plaintiffs [**children of the decedent, three of whom were executors**], and good faith required them . . . to explain to the [**widow**] fully the extent of her husband's estate, what a widow's award was, and the probable value of both her interest in the estate and the widow's award. . . . It is the settled rule in this state that transactions of parties between whom a fiduciary relation exists are prima facie voidable on grounds of public policy. [**Citations omitted.**]** 170 N.E. at 272.

The lesson of *Eichhorst* and cases of similar ilk is that parties who enter into a family settlement agreement when acting in a fiduciary capacity must be very careful not to overreach and must be mindful of the obligations their fiduciary status imposes on them. Otherwise, the agreement may be unenforceable. If the validity of the agreement is later challenged, a party occupying a fiduciary status with respect to another party to the agreement cannot claim the benefit of the agreement unless that party shows by clear and convincing evidence that he or she acted in perfect good faith and did not abuse the confidence reposed in him or her. *Mayrand, supra,* 61 N.E. at 1041.

Parties to family settlement agreements should also be aware that a fiduciary relationship may exist regardless of whether the party in question is an executor or trustee. A fiduciary relationship can exist between parties to the agreement, none of whom is a court-appointed representative. The only relevant inquiry will be whether a fiduciary relationship existed in fact and whether there was a breach of a related duty. *Id.*

E. [17.42] Mistake of Fact or Law

Equity may withhold a decree for specific performance of a family settlement agreement if the agreement is the product of a mistake of fact or law. *Cole v. Cole,* 292 Ill. 154, 126 N.E. 752, 757 (1920); *Wilkonson v. Yovetich,* 249 Ill.App.3d 439, 618 N.E.2d 1120, 188 Ill.Dec. 550 (1st Dist. 1993) (plaintiffs unsuccessfully sought rescission of family settlement agreement due to mistake).

VII. [17.43] FIDUCIARY CONSIDERATIONS

Sections 17.44 – 17.46 below explore the considerations relevant to a duly appointed executor, administrator, or trustee when faced with a family settlement agreement. Of course, a fiduciary who is merely nominated, but never appointed, under an instrument that is set aside by a family settlement agreement should have no exposure to liability for any action or omission, although a nominated (but not duly appointed) fiduciary, as discussed in §17.46 below, will have standing to appeal from an order approving a family settlement agreement.

A. [17.44] Potential Liability for Acting Fiduciary

A duly appointed fiduciary should take great care to be satisfied that a family settlement agreement is valid because the fiduciary who complies with an invalid agreement could be liable to parties harmed by the agreement. For example, in *Wolf v. Uhlemann,* 325 Ill. 165, 156 N.E. 334, 341 (1927), the Supreme Court recognized that the Northern Trust Company, as trustee under the decedent's will, had a legitimate interest in ensuring that unborn contingent remainderpersons were properly represented in the trial court proceeding to approve a family settlement agreement because, if they were not adequately represented, Northern Trust might be called on in the future to pay damages to such remainderpersons.

B. [17.45] Duty To Defend Decedent's Intent

In addition to protecting against personal liability, Illinois courts have held that the fiduciary has not just a right but a duty to challenge a family settlement agreement if the fiduciary believes the agreement improperly thwarts the intentions of the decedent. *Altemeier v. Harris,* 335 Ill.App. 130, 81 N.E.2d 22 (2d Dist. 1948), *aff'd,* 403 Ill. 345 (1949); *Tree v. Continental Ill. Nat. Bank & Trust Co. of Chicago,* 346 Ill.App. 509, 105 N.E.2d 324 (1st Dist. 1952) (rejecting appellee's claim that bank had no right to appeal trial court's approval of family settlement agreement); *Stein v. LaSalle Nat. Bank,* 328 Ill.App. 3, 65 N.E.2d 216 (1st Dist. 1946); *Glaser v. Chicago Title & Trust Co.,* 333 Ill.App. 550, 77 N.E.2d 844 (1st Dist. 1948). This right exists even if a co-fiduciary opposes the appeal. *Tree, supra,* 105 N.E.2d at 328. In many cases, an impartial fiduciary, whether duly appointed or just nominated, may be the only party in a position to prevent a bad-faith agreement designed to subvert a decedent's intentions. However, there are unanswered questions concerning the scope of the duty referred to in the appellate court's decision in *Altemeier.* For example, if an agreement on its face appears valid and the rights of minors and unborn parties are represented, but the fiduciary suspects a conspiracy of fraud among the parties to the agreement, does the fiduciary have a duty to challenge the agreement? And whether or not the fiduciary has an ethical, if not legal, duty in that case, if all parties to the agreement are adequately represented, as a practical matter, who can sue the fiduciary if the fiduciary does not fulfill its duty? Other than referring to the duty, Illinois courts have not yet addressed the scope of the duty.

C. [17.46] Standing To Appeal

A fiduciary has standing to appeal from a trial court order approving a family settlement agreement. *Wolf v. Uhlemann,* 325 Ill. 165, 156 N.E. 334 (1927); *Altemeier v. Harris,* 335 Ill.App. 130, 81 N.E.2d 22 (2d Dist. 1948), *aff'd,* 403 Ill. 345 (1949); *In re Estate of McCabe,* 95 Ill.App.3d 1081, 420 N.E.2d 1024, 51 Ill.Dec. 466 (5th Dist. 1981); *Tree v. Continental Ill. Nat. Bank & Trust Co. of Chicago,* 346 Ill.App. 509, 105 N.E.2d 324 (1st Dist. 1952). In *McCabe,* for example, the nominated, but not appointed, executors of the decedent's will appealed from the trial court order approving the family settlement agreement. The Fifth District Appellate Court sided with the nominated executors and held that the agreement was invalid for lack of adequate consideration, remanding the case to the trial court to proceed with the probate of the will. Unlike the appellees in *Tree,* the appellees in *McCabe* never challenged the standing of the nominated executors to appeal from the trial court's order, and the appellate court did not unilaterally raise

the issue. The author believes that an acting or nominated fiduciary should have standing to appeal a trial court order approving a family settlement agreement. If a fiduciary has a duty in the first place to challenge an agreement that thwarts a decedent's intent, it seems a logical corollary that the fiduciary should have standing to appeal a trial court order erroneously approving such an agreement.

An interesting issue related to this topic is whether the nominated or acting fiduciary is or should be entitled to recover legal fees from the estate or trust that is the subject of the agreement. The author did not find any Illinois cases that address the issue, but it seems incontrovertible that if the fiduciary succeeds in contesting a family settlement agreement at the trial court or appellate level, the fiduciary would be entitled to recover fees from the estate as an expense of administration. But what if the fiduciary is unsuccessful? Can the fiduciary claim that the fiduciary should nonetheless recover fees from the estate or trust assets because the fiduciary had a duty to challenge the agreement? If fiduciaries have such a duty, but not an unqualified right to reimbursement of legal fees for honoring that duty, it is probably not reasonable to think that fiduciaries will contest anything but the most egregious or deficient family settlement agreements, such as an agreement in which the rights of minors or unborn parties are not represented or when a valid spendthrift trust is set aside. These issues await the attention of Illinois courts.

VIII. [17.47] ILLINOIS' VIRTUAL REPRESENTATION STATUTE

Effective January 1, 2010, Illinois replaced the former version of 760 ILCS 5/16.1, which was enacted in August 1993 (1993 Statute) with a new virtual representation statute (2010 Statute). The 2010 Statute in turn was substantially amended effective January 1, 2015 (2015 Statute), as discussed below. (A subsequent amendment, effective July 27, 2015, revised various "disability"-related terms, but did not make any substantive changes to the 2015 Statute.)

The 2010 Statute, like the 1993 Statute, permitted certain beneficiaries and trustees to enter into agreements that would bind all beneficiaries of the trust, including minors and unborn parties. But the 2010 Statute expanded the scope of the virtual representation statute so that it could be applied to more trusts, including spray trusts and dynasty trusts having minor or unborn beneficiaries, and permitted a wider range of options, such as modification of certain unambiguous terms of a trust and termination of a trust under certain circumstances. The special feature of the virtual representation statute throughout its evolution continues to be that court approval of such agreements generally is not necessary as long as the statutory requirements are satisfied, although in some cases court approval may be necessary or desirable. Section 16.1, including the most recent amendments, applies to all existing and future trusts, judicial proceedings, or agreements entered into after August 16, 1993, the original effective date of the statute (760 ILCS 5/16.1(e)), subject to a specific carveout of certain trusts set forth in §3(2) of the Trusts and Trustees Act, as discussed in §17.102 below. 760 ILCS 5/3(2).

As mentioned above, significant amendments to the Illinois virtual representation statute went into effect January 1, 2015. The 2015 Statute provides greater certainty as to what matters

can be resolved by a nonjudicial settlement agreement between the trustee and the beneficiaries. The 2015 Statute also expands the ways in which minor beneficiaries, beneficiaries with disabilities, or unborn beneficiaries can be represented for purposes of entering into a nonjudicial settlement agreement.

Section 17.48 below provides a general overview of the features of the statute that took effect January 1, 2010, as modified by the 2015 amendments. Sections 17.49 – 17.103 below address the operation of §16.1 and conclude with a brief examination of the relationship between family settlement agreements and the virtual representation statute. The 2015 Statute (as was true of the 2010 Statute) is quite a bit more layered than the 1993 Statute and involves many more levels of analysis, particularly because it permits modifications of a trust, which in some instances will require an understanding of whether, under Illinois common law, a court could properly have approved such a modification. A full discussion of all of the areas of law that impact or are impacted by the 2015 Statute is beyond the scope of this chapter, although every effort is made to identify the central features of the statute.

A. [17.48] A Brief Comparison of the 2015 Statute, the 2010 Statute, and the 1993 Statute

In discussing the 1993 Statute, 760 ILCS 5/16.1 (1993), in the first edition of this volume, the author noted that the 1993 Statute had been subject to criticism because it would not apply if a minor or unborn person was a primary beneficiary. The 1993 Statute applied only if all beneficiaries who were currently entitled or eligible to receive trust income or principal, and all beneficiaries who would be entitled to a portion of the principal if they survived to the final date of distribution (assuming non-exercise of all powers of appointment), were adults and not incapacitated. The requirement under the 1993 Statute that all primary beneficiaries be adults and not incapacitated placed a significant limitation on its applicability. For example, the 1993 Statute did not apply to the typical spray trust that would permit discretionary distributions to a class that did or could include a minor or unborn party and did not apply to a trust in which the remainder vested in a minor or unborn beneficiary, such as a generation-skipping trust, which is a very common estate planning vehicle. The 2010 Statute eliminated the aforementioned shortcomings of the 1993 Statute by permitting a minor or unborn primary beneficiary to be represented in a virtual representation agreement as discussed more fully in §§17.49 – 17.66 below. The 1993 Statute also did not permit virtual representation agreements to be used to accelerate termination of a trust or to modify an express term of a trust, whereas the 2010 Statute did, as does the 2015 Statute under specified circumstances.

The 2010 version of §16.1 imported a much broader application of the concept of virtual representation and expressly authorized the use of virtual representation agreements to achieve a wide range of nonjudicial settlements. A clear goal of the statute, as recently amended, continues to be to encourage private, out-of-court settlements of disputes and other matters affecting trusts to avoid the expense and delay associated with court proceedings. The 2015 Statute preserves the core terms of the 1993 and 2010 Statutes (which added provisions from the Uniform Trust Code, particularly §§111, 304, and 411), subject to certain material modifications discussed below.

As discussed in more detail in §17.49 – 17.103 below, the 2015 Statute clarifies and modifies the types of matters that can be addressed in a nonjudicial settlement agreement. Specifically, the 2015 Statute

1. clarifies that the nonexclusive list of types of matters that can be dealt with in a nonjudicial settlement agreement is a safe-harbor list, available without the necessity of satisfying the requirement that it be a modification that a court could approve;

2. provides that a nonjudicial settlement agreement may address the validity of terms of the trust (760 ILCS 5/16.1(d)(4)(A) (2015));

3. provides that a nonjudicial settlement agreement that grants an administrative power or resolves property questions can do so only to the extent such change does not conflict with a material purpose of the trust (760 ILCS 5/16.1(d)(4)(D), 5/16.1(d)(4)(E) (2015));

4. clarifies that a nonjudicial settlement agreement may deal with removal or appointment of a trustee, trust advisor, investment advisor, or trust protector, including a plan of succession for such offices (760 ILCS 5/16.1(d)(4)(F) (2015));

5. clarifies that a change of place of administration may also change the law governing administration (760 ILCS 5/16.1(d)(4)(H) (2015)); and

6. clarifies that disputes that may be resolved by a nonjudicial settlement agreement must be bona fide disputes (760 ILCS 5/16.1(d)(4)(J) (2015)).

To have an effective nonjudicial settlement agreement under §16.1, the agreement must be executed by all necessary parties, including the trustee and all beneficiaries whose consent or joinder would be required to achieve a binding settlement were the settlement to be approved by a court. It will often be the case that the necessary parties include minors and unborn beneficiaries who, but for a virtual representation statute, could not be effectively represented in the absence of a court proceeding in which the court would either have to appoint a guardian ad litem for the minor and unborn parties or make a finding that common-law virtual representation applied, but in either case court involvement would become necessary. Section 16.1 enables parties to enter into nonjudicial settlement agreements that will be binding on minors, unborn parties, and persons with a disability without court involvement as long as the requirements of the statute are met.

Broadly speaking, the 2015 Statute contemplates two types of virtual representation. The first is individual representation under §§16.1(a)(1), 16.1(a)(4), 16.1(a)(5), and 16.1(a)(6). Under this type of representation, a person (the representative) may represent and bind a minor, a person with a disability, an unborn person, or a person whose identity or whereabouts are unknown, provided that the representative party has no conflict of interest with the represented party and provided, in the case of representatives who are not a guardian, agent, or parent of the person, that they share a substantially similar interest with respect to the particular question or dispute giving rise to the virtual representation agreement. Under the rules for individual representation under

the 2015 Statute discussed in §§17.51 – 17.58 below, a guardian, agent, or parent is permitted to represent a minor beneficiary or a beneficiary with a disability, which was generally not the case under the 2010 Statute.

The second type of virtual representation is class representation under §16.1(a)(2). Under §16.1(a)(2), if all primary beneficiaries of a trust are adult and not incapacitated (or have representatives under §16.1(a)(1) who are adults and have legal capacity), they may represent and bind all other persons who have a successor, contingent, future, or other interest in the trust. The term "primary beneficiary" is defined in §16.1(a)(3)(A) and, as discussed more fully in §17.61 below, includes current beneficiaries and "presumptive remainder beneficiar[ies]." 760 ILCS 5/16.1(a)(3)(A) (2015). This type of class representation is also different from the type of class representation that existed under the 2010 Statute. Under the 2010 Statute, there was both primary beneficiary class representation and presumptive remainder beneficiary class representation. The 2015 Statute merges those forms of class representation into a single, more intuitive form of class representation.

Not surprisingly, as yet, there have been no Illinois cases construing the 2015 Statute or the aspects of the 2010 Statute that were preserved in the 2015 Statute, so the author's analysis in §§17.49 – 17.103 below does not have the benefit of the insights of the Illinois judiciary.

B. [17.49] Rules for Representation of Beneficiaries Under the 2015 Statute

760 ILCS 5/16.1(a) (2015) permits certain individual beneficiaries who cannot represent themselves to be represented by other specified persons (under §16.1(a)(4), §16.1(a)(5), or §16.1(a)(6)) or by other specified beneficiaries (under §16.1(a)(1)).

1. [17.50] Beneficiaries Who May Be Represented

Five types of beneficiaries may be represented under 760 ILCS 5/16.1(a) (2015), *i.e.,* (a) a minor beneficiary, (b) a beneficiary with a disability, (c) an unborn beneficiary, (d) a person whose identity is unknown and is not reasonably ascertainable, and (e) a person whose location is unknown and is not reasonably ascertainable. A "minor" is defined in 755 ILCS 5/11-1 as a person who has not attained the age of 18 years.

The 2010 Statute provided for representation of a beneficiary who was "disabled" but did not define "disabled." 760 ILCS 5/16.1 (2010). In addition, the 2010 Statute provided for class representation if all presumptive remainder beneficiaries were either adults and not disabled or had representatives. It was unclear whether "disabled" meant having a legal disability, in which case an adult who was not adjudicated disabled but who lacked capacity to understand the effect of a nonjudicial settlement agreement might not be "disabled" and therefore might not be eligible to be represented by another beneficiary with a "substantially identical" (now "substantially similar") interest. 760 ILCS 5/16.1(a) (2010); 760 ILCS 5/16.1 (2015).

The 2015 Statute eliminates questions about the definition of a "disabled" person by substituting "has legal capacity" for "not disabled." 760 ILCS 5/16.1(a) (2010); 760 ILCS 5/16.1 (2015). The following new definitions of "person with a disability" and "legal capacity" appear in the 2015 Statute:

> **(C) "Person with a disability" as of any date means either a person with a disability within the meaning of Section 11a-2 of the Probate Act of 1975 or a person who, within the 365 days immediately preceding that date, was examined by a licensed physician who determined that the person lacked the capacity to make prudent financial decisions, and the physician made a written record of the physician's determination and signed the written record within 90 days after the examination.**
>
> **(D) A person has legal capacity unless the person is a minor or a person with a disability.** 760 ILCS 5/16.1(a)(3) (2015).

The Illinois guardianship statute, §11a-2 of the Probate Act of 1975, defines "person with a disability" to include an adult who

> **(a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental illness or developmental disability is not fully able to manage his person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his estate as to expose himself or his family to want or suffering, or (d) is diagnosed with fetal alcohol syndrome or fetal alcohol effects.** 755 ILCS 5/11a-2.

Thus it is clear under the 2015 Statute that a person whom a physician has determined lacks the capacity to make prudent financial decisions, but who has not been adjudicated a person with a disability, may be represented by an agent, a parent, or another beneficiary with a substantially similar interest and no conflict of interest with respect to a particular question or dispute that parties seek to resolve under the virtual representation statute.

2. [17.51] Representation of Individual Beneficiaries

The 2010 Statute permitted certain individual beneficiaries who could not represent themselves to be represented by other specific beneficiaries. The 2010 Statute also provided that certain classes of beneficiaries could represent other classes of beneficiaries. The 2015 Statute now sets forth a hierarchy of representation under which non-beneficiaries, as well as beneficiaries, may represent minor beneficiaries, beneficiaries with a disability, or unborn beneficiaries.

a. [17.52] Guardian Represents Beneficiary

If a beneficiary is a minor, has a disability, or is unborn, under the 2015 Statute, the court-appointed guardian of the estate of the beneficiary, or if none, the guardian of the person for the beneficiary, represents the beneficiary. 760 ILCS 5/16.1(a)(4) (2015). The language of §16.1(a)(4) is mandatory in this regard. So if a minor, a person with a disability, or an unborn person is represented by a guardian, the guardian is required to represent the beneficiary under the statute. As discussed more fully in §17.53 below, although a guardian is the first person to be identified in the hierarchy set forth in the statute, an agent under a property power of attorney in

many instances will take precedence over a guardian for purposes of representing a beneficiary with a disability under the statute. A minor or unborn beneficiary cannot have an agent under a power of attorney for property, as only an adult can execute such a power, so in that case the guardian, if any, will always take precedence under the 2015 Statute.

b. [17.53] Agent May Represent Beneficiary/Principal

The 2015 Statute allows an agent under a power of attorney for property to represent an adult beneficiary with a disability if the agent has authority to act with respect to the particular question or dispute and does not have a conflict of interest with respect to the particular question or dispute. 760 ILCS 5/16.1(a)(4) (2015). An agent is deemed to have such authority if the power of attorney grants the agent the power to settle claims and to exercise powers with respect to trusts and estates, even if the powers do not include powers to make a will, to revoke or amend a trust, or to require the trustee to pay income or principal. *Id.*

An Illinois Statutory Short Form Power of Attorney for Property under the Illinois Power of Attorney Act, 755 ILCS 5/1-1, *et seq.,* should give an agent the power to enter into a nonjudicial settlement agreement. The Illinois Power of Attorney for Property authorizes the agent to enter into "estate transactions," which are defined in the statute to include authorization to "assert any interest in and exercise any power over any trust, estate or property subject to fiduciary control . . . and, in general, exercise all powers with respect to estates and trusts which the principal could if present and under no disability." 755 ILCS 45/3-4(n). Although the statute provides that an agent may not revoke or amend a trust revocable or amendable by the principal (*id.*), a modification of a trust by a nonjudicial settlement agreement arguably should not be considered to be a trust amendment, particularly insofar as the modification does not change the disposition of property under the trust.

As discussed in §17.52 above, if an adult beneficiary with a disability has an agent under a property power of attorney that qualifies under the statute, for purposes of virtual representation the agent should take precedence over any guardian that may be appointed for the person with a disability. The 2015 Statute provides that "[a]bsent a court order pursuant to the Illinois Power of Attorney Act directing a guardian to exercise powers of the principal under an agency that survives disability, an agent under a power of attorney for property who" has authority under §16.1(a)(4) to represent the principal/beneficiary with a disability "takes precedence over a court appointed guardian unless the court specifies otherwise." 760 ILCS 5/16.1(a)(4) (2015). Under the 2015 Statute, this rule applies to all agencies, "whenever and wherever" executed. *Id.* Thus, in the absence of a court order authorizing a guardian to exercise an agent's authority, the agent has priority under the statute. As a practical matter, it would probably be atypical to have a situation in which a person with a disability who has an agent would also end up having a court-appointed guardian. Ordinarily, appointment of a guardian is sought precisely because there is no agent in place. The author suspects that in most cases there will either be an agent or a guardian, but not both, in which case the hierarchy between the two will not be at issue.

Whereas the 2015 Statute mandates that a guardian act on behalf of a person with a disability, the same is not true for an agent, who may, but is not required to, act. This is consistent with the Illinois Power of Attorney Act (and probably all other states' power of attorney statues), which does not require that an agent exercise authority under the power of attorney.

c. [17.54] Parent May Represent Child

Under the 2015 Statute, if there is no guardian or agent authorized to act, a parent may represent a minor beneficiary, a beneficiary with a disability, or an unborn beneficiary if there is no conflict of interest between the child and the parent. 760 ILCS 5/16.1(a)(5) (2015). The parent need not have any interest in the trust. If both parents are qualified to represent the child and the parents disagree, the parent who is a lineal descendant of the settlor of the trust or, if none, the parent who is also a beneficiary of the trust is entitled to represent the child. *Id.* Unlike in the case of a guardian, a parent, like an agent, is not required to act on behalf of the beneficiary.

d. [17.55] Representation by Beneficiary with Substantially Similar Interest

Under the 2010 Statute, if a "minor, disabled, or unborn" beneficiary was not represented by a guardian of the estate or a guardian of the person, the minor, disabled, or unborn beneficiary could be represented by another beneficiary with a substantially identical interest and no conflict of interest. 760 ILCS 5/16.1 (2010). Under the 2015 Statute, a minor beneficiary, a beneficiary with a disability, or an unborn beneficiary may be represented by another beneficiary with a substantially similar interest and no conflict of interest only if such beneficiary is not already represented by a guardian, agent, or parent. 760 ILCS 5/16.1(a)(1) (2015). Note that the 2015 Statute requires only that the interests of the represented beneficiary and the representing beneficiary be "substantially similar," not "substantially identical," which was the standard under the 2010 Statute. 760 ILCS 5/16.1(a)(1) (2015); 760 ILCS 5/16.1 (2010). Both the determination of whether the beneficiaries have substantially similar interests and the determination of whether there is a conflict of interest should be made with respect to the particular matter being addressed. See Uniform Trust Code §304, cmt. A presumptive remainderperson may be able to represent alternative remainderpersons with respect to approval of the trustee's account, for example, but not with respect to interpretation of the remainder provision of the trust. "Substantially similar" does not require identical interests. For example, if trusts for the settlor's grandchildren are the presumptive remainder beneficiaries, but the terms of the trusts vary as to whether income distributions are required, the age for withdrawal, and the extent of any power of appointment granted to the beneficiary, the grandchildren's interests may still be substantially similar as to matters other than the construction of the specific trust terms defining the grandchildren's interests. The comments to the Uniform Trust Code indicate that a conflict of interest might arise by virtue of the terms of the trust itself or because of interests or dynamics outside the trust, such as a prior relationship with a trustee or other beneficiaries. *Id.*

e. [17.56] Charity May Represent Itself

Both the 2010 Statute and the 2015 Statute provide that the Illinois Attorney General may represent charities or charitable purposes that are not specifically named or otherwise represented. 760 ILCS 5/16.1(c) (2010); 760 ILCS 5/16.1(c) (2015). The 2015 Statute now explicitly states that a charity that is specifically named as a beneficiary may act for itself. 760 ILCS 5/16.1(c) (2015). The 2015 Statute, like the 2010 Statute, states that the Illinois Attorney General reserves the right to file an action or take other steps that it deems advisable at any time to enforce or protect the general public interest as to a trust that provides a beneficiary interest or expectancy for one or more charities or charitable purposes, whether or not a specific charity is named. *Id.*

f. [17.57] Representative May Represent Other Beneficiaries

If a minor beneficiary, beneficiary with a disability, or unborn beneficiary (Beneficiary 1) is not represented by a guardian, agent, or parent, under the 2015 Statute (as was the case under the 2010 Statute) Beneficiary 1 can be represented by another beneficiary (Beneficiary 2) with a substantially similar interest and no conflict of interest. 760 ILCS 5/16.1(a)(1) (2015). What was not clear under the 2010 Statute was whether Beneficiary 1 could be represented by Beneficiary 2's representative (*e.g.,* Beneficiary 2's guardian). The 2015 Statute makes it clear that Beneficiary 1 can be represented by Beneficiary 2's guardian, agent, or parent, provided that Beneficiary 1 and Beneficiary 2 have substantially similar interests and no conflict of interest. 760 ILCS 5/16.1(a)(6) (2015).

g. [17.58] 2015 Statute's Elimination of 2010 Statute's Primary Beneficiary Class Representation

As alluded to above, the 2010 Statute provided for two types of class representation. First, if all primary beneficiaries of a trust were adults who were not disabled or were represented, the primary beneficiaries as a class could represent all other beneficiaries who would become primary beneficiaries only by reason of surviving a primary beneficiary. 760 ILCS 5/16.1(a)(2) (2010). Second, if all presumptive remainder beneficiaries were adults who were not disabled or were represented, the presumptive remainder beneficiaries as a class could represent all other beneficiaries who had successor, contingent or other future interests in the trust. 760 ILCS 5/16.1(a)(3) (2010).

Under the 2015 Statute, a binding nonjudicial settlement agreement requires the consent of all "interested persons." 760 ILCS 5/16.1(d)(2) (2015). "Interested persons" includes all persons and parties whose consent or joinder would be required in order to achieve a binding settlement were the settlement to be approved by the court. 760 ILCS 5/16.1(d)(1) (2015). Thus, a binding nonjudicial settlement agreement requires that all successor, contingent, or other future beneficiaries be represented, not just the beneficiaries who would become primary beneficiaries by reason of surviving a primary beneficiary. Consequently, in almost all cases the class of presumptive remainder beneficiaries would need to consent to the nonjudicial settlement agreement, and as they would represent all beneficiaries with more remote interests, there would be no need to rely on primary beneficiary representation. The 2015 Statute eliminates what was known under the 2010 Statute as primary beneficiary class representation because it is unnecessary and causes confusion. (Under the 2015 Statute, as discussed in §§17.59 – 17.66 below, class representation still exists when all primary beneficiaries, as newly defined, or their representatives, are adult and have legal capacity, so the consolidated form of class representation that survives under the 2015 Statute could be thought of as primary beneficiary class representation, but to avoid confusion, it is referred to simply as class representation.)

C. [17.59] Class Representation

In addition to individual representation, as discussed in §§17.49 – 17.58 above, the 2015 Statute provides for class representation.

1. [17.60] Primary Beneficiaries

Under the 2015 Statute, if all primary beneficiaries of a trust have legal capacity *or* have representatives under 760 ILCS 5/16.1(a)(1) (2015) who have legal capacity, they may represent and bind all other persons who have a successor, contingent, future, or other interest in the trust. 760 ILCS §16.1(a)(2) (2015).

a. [17.61] Definition of "Primary Beneficiary"

A "primary beneficiary" is defined in 760 ILCS 5/16.1(a)(3)(A) (2015) to be a

> **beneficiary . . . who . . . is either: (i) currently eligible to receive income or principal from the trust, or (ii) a presumptive remainder beneficiary.**

This definition of "primary beneficiary" is similar to what it was in the 2010 Statute. Under this definition, potential appointees under a power of appointment are not considered primary beneficiaries. It should be noted that, technically speaking, an unborn individual cannot be a primary beneficiary until the unborn individual comes into being, so although in some places in this chapter reference is made to an unborn primary beneficiary, that is a bit of a misnomer, and what is meant is that the unborn individual is someone who, upon coming into being, would be a current beneficiary or presumptive remainder beneficiary. This conclusion derives from the fact that the definition of "primary beneficiary" refers to persons currently eligible to receive income or principal, or in the case of a "presumptive remainder beneficiary," which is discussed in §17.63 below, a person who would be eligible to receive a distribution if the trust terminated on the date of determination, both of which presuppose that the person must be in being at the date of determination in order to be a primary beneficiary. This distinction is evident in the examples in §17.64 below of presumptive remainder beneficiaries, in which the living descendants of *A* are presumptive remainder beneficiaries, but not the unborn descendants of *A*.

b. [17.62] Examples

Assume all beneficiaries are adults with capacity.

EXAMPLE 1: Income to *A* for life, then remainder to *B* if *B* is then living; otherwise, to *B*'s then living descendants. *A* is a current beneficiary and therefore a primary beneficiary. *B* is what might be called a first-line remainder beneficiary and therefore a primary beneficiary.

EXAMPLE 2: Income to *A* for life, then remainder to such of *A*'s descendants as *A* shall appoint in *A*'s will and, in default of appointment, to *B*. *B* is still a primary beneficiary. The potential appointees are not primary beneficiaries.

EXAMPLE 3: Income to *A* for life, then income to *A*'s child *B* for life, then, upon *B*'s death, remainder to *A*'s then living descendants. *A* is a primary beneficiary, but *B* is not. The author believes *B* is not a primary beneficiary (during *A*'s lifetime) even if after *A*'s death principal could be distributed to *B* at the trustee's discretion because *B* will not have survived to the final date of

distribution. *B,* however, is a necessary party to any agreement. See §17.70 below. *A*'s descendants other than *B* are presumptive remainder beneficiaries and, therefore, primary beneficiaries.

EXAMPLE 4: Discretionary principal and income to *A* for life, then to *A*'s then living descendants, to be held in trust until they reach age 25 or, if *A* has no living descendants, to Charity *X*. *A* is a primary beneficiary. *A*'s living descendants are also primary beneficiaries. Charity *X* would not be a primary beneficiary even if *A* currently has no descendants because Charity *X* would not be eligible to receive principal merely by surviving to the final date of distribution; rather, *A* would also have to die without descendants.

EXAMPLE 5: Discretionary income and principal to *A*'s descendants. Upon the expiration of a rule against perpetuities period, remainder to *A*'s then-living descendants or, if none, to Charity *X*. None of *A*'s descendants are measuring lives for purposes of the rule against perpetuities. All of *A*'s living descendants are primary beneficiaries. Charity *X* is not a primary beneficiary.

2. Presumptive Remainder Beneficiaries

a. [17.63] Definition of "Presumptive Remainder Beneficiary"

Under 760 ILCS 5/16.1(a)(3)(B) (2015),

> **"Presumptive remainder beneficiaries" means a beneficiary of a trust, as of the date of determination and assuming nonexercise of all powers of appointment, who either: (i) would be eligible to receive a distribution of income or principal if the trust terminated on that date, or (ii) would be eligible to receive a distribution of income or principal if the interests of all beneficiaries currently eligible to receive income or principal from the trust ended on that date without causing the trust to terminate.**

It is important to keep in mind that under this definition, a beneficiary who succeeds to an income interest in a trust can be a presumptive remainder beneficiary, which is a bit counterintuitive. See Example 3 in §17.64 below.

b. [17.64] Examples

Assume all beneficiaries are adults with capacity unless otherwise specified.

EXAMPLE 1: Income to *A* for life, then remainder to *B* if *B* is then living; otherwise, to *B*'s then living descendants. *B* is a living first-line remainder beneficiary and therefore a presumptive remainder beneficiary. As long as *B* is living, *B*'s descendants are not presumptive remainder beneficiaries. *A* and *B* can represent *B*'s descendants whether living or unborn.

EXAMPLE 2: Income to *A* for life, then remainder to such of *A*'s descendants as *A* shall appoint in *A*'s will and, in default of appointment, to *B*. *B* is still a presumptive remainder beneficiary. The potential appointees are not presumptive remainder beneficiaries. *A* and *B* can represent all other contingent beneficiaries.

EXAMPLE 3: Income to *A* for life, then income to *A*'s child *B* for life; then, upon *B*'s death, remainder to *A*'s then living descendants. *B* is a presumptive remainder beneficiary (and a primary beneficiary) because *B* would be eligible to receive trust income if the interests of all beneficiaries currently eligible to receive income or principal (*A*) ended without causing the trust to terminate. *A*'s descendants now living other than *B* are also presumptive remainder beneficiaries. *A, B,* and *A*'s descendants now living can represent all contingent remainder beneficiaries.

EXAMPLE 4: Discretionary principal and income to *A* for life; then remainder to *A*'s then living descendants, to be held in trust until they reach age 25 or, if *A* has no living descendants, to Charity *X*. *A*'s descendants now living are presumptive remainder beneficiaries. If *A* has no descendants now living, *X* is a presumptive remainder beneficiary.

EXAMPLE 5: Discretionary income and principal to *A*'s descendants; upon the expiration of a rule against perpetuities period (21 years after the death of *A*'s descendants living when the trust was created), to *A*'s then living descendants or, if none, to Charity *X*. *A*'s descendants who were living when the trust was created are not presumptive remainder beneficiaries, but any of *A*'s descendants born after creation of the trust who are now living are presumptive remainder beneficiaries. Charity *X* is not a presumptive remainder beneficiary unless *A* has no descendants now living.

EXAMPLE 6: Income to *A* for life, then remainder to *B* outright if *B* has attained age 25; otherwise, to be held in a discretionary trust for *B* until *B* attains age 25. If *B* is over age 25, *B* is a presumptive remainder beneficiary. Even if *B* is under age 25, *B* is still a presumptive remainder beneficiary. The analysis is the same even if *A* has a power of appointment and *B* is only a taker in default.

EXAMPLE 7: Income to *A* for life, then income to *A*'s child *B* for life; upon *B*'s death, remainder to *A*'s then living descendants; *A* has only one child living, *B,* and two grandchildren, *C* and *D*. *B* is a presumptive remainder beneficiary (and a primary beneficiary) because *B* would be eligible to receive trust income if the interests of all beneficiaries currently eligible to receive income or principal (*A*) ended without causing the trust to terminate. *C* and *D* are presumptive remainder beneficiaries (and primary beneficiaries) because they would be eligible to receive principal if the trust terminated on that date. Unborn grandchildren of *A* would not be presumptive remainder beneficiaries but can be represented by the class of primary beneficiaries.

EXAMPLE 8: Discretionary income and principal to *A;* upon *A*'s death, income and principal are distributable to *A*'s descendants per stirpes on the same terms; the trust is an Illinois perpetual trust. *A*'s descendants now living are presumptive remainder beneficiaries (and therefore primary beneficiaries).

EXAMPLE 9: Discretionary income and principal to *A*'s descendants from time to time living; if *A* has no descendants living, remainder to Charity *X;* the trust is an Illinois perpetual trust. The only presumptive remainder beneficiary is Charity *X*. That might strike many as an unintended consequence under the statute. Apart from that, query whether Charity *X* would want to have any involvement with a virtual representation agreement given the potentially attenuated nature of its interest.

3. [17.65] Individual and Class Representation Overlap

Although the forms of virtual representation under the statute can be divided into individual and class representation, overlap between the two will not be uncommon. As discussed in §17.60 above, class representation under 760 ILCS §16.1(a)(2) (2015) applies if all primary beneficiaries have legal capacity or have "representatives in accordance with . . . subsection (a) who have legal capacity," so in some cases class representation will be achieved because there is at least one primary beneficiary or one presumptive remainder beneficiary who is adult and has legal capacity that can represent minor or unborn primary or presumptive remainder beneficiaries, provided there is a substantial identity of interest and no conflict of interest.

4. [17.66] Individual vs. Class Representation

As discussed in §§17.53 and 17.54 above, for individual representation by an agent or parent to apply, there must be no conflict of interest. As discussed in §17.55 above, for individual representation by another beneficiary to apply, there must be a substantial similarity of interest with respect to the particular question or dispute and no conflict of interest. By contrast, in the case of class representation, there is no requirement that there be a substantially similar interest and no conflict of interest between the represented beneficiary and the primary beneficiaries. In both individual and class representation, no requirement exists under 760 ILCS 5/16.1 (2015) that the representation be effective, although one might expect that to be the case more often than not when individual representation applies, because the absence of a conflict of interest in the case of an agent or a parent and the presence of a substantially similar interest in the case of a representative beneficiary should mean that the representative will be acting in the best interests of the represented beneficiary. Even so, a virtual representative is not a fiduciary. The statute defines who the parties are that may legally bind the trust and its beneficiaries and, in §16.1(a)(7), states that the action or consent of the party who may represent and bind a beneficiary in accordance with the statute is binding on the person represented. 760 ILCS 5/16.1(a)(7) (2015).

D. [17.67] Representation of Charity

Under 760 ILCS 5/16.1(c) (2015), if a trust contains a beneficial interest or expectancy for a charity or a charitable purpose that is not specifically named or otherwise represented, the Illinois Attorney General can represent and bind such charity or charitable purpose with respect to any question or dispute. The statute states expressly that it is declarative of existing law in this regard. *Id.* A charity may not be specifically identified when, for example, the trust instrument permits the trustee to distribute property to charities selected by the trustee. This subsection of the statute further provides that notwithstanding any other provision of the statute, the Attorney General has the authority to file an action or take any other steps the Attorney General deems advisable to enforce or protect the general public interest with respect to any trust that contains a charitable interest, even if the charity is specifically named. *Id.* It was implicit under the 2010 Statute that a charity specifically identified in the trust could represent itself in an agreement under the statute. The 2015 Statute now explicitly states that a charity that is specifically named as a beneficiary may act for itself. *Id.*

E. [17.68] Nonjudicial Settlement Agreements

The 2015 Statute, like the 2010 Statute, expressly permits interested persons or their representatives as determined under the virtual representation rules to "enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust." 760 ILCS 5/16.1(d)(2) (2015); 760 ILCS 5/16.1(d)(2) (2010). Under the 2010 Statute, a nonjudicial settlement agreement was valid only to the extent that such agreement could be properly approved under the applicable law by a court of competent jurisdiction. 760 ILCS 5/16.1(d)(3) (2010). This aspect of the statute would have required resort to Illinois common or statutory law depending on the nature of the agreement in question to determine whether the agreement could be approved by a court under such law.

The 2010 Statute then listed 11 matters (excluding termination of a trust) that could be resolved by a nonjudicial settlement agreement. 760 ILCS 5/16.1(d)(4) (2010). The 2010 Statute also provided that modifications were valid only to the extent that the terms and conditions of the modification could be properly approved under applicable law by a court of competent jurisdiction. 760 ILCS 5/16.1(d)(3) (2010). It was unclear in light of §16.1(d)(3) of the 2010 Statute whether matters listed in §16.1(d)(4) were subject to the additional requirement that the modification be one that could be properly approved under applicable law by a court of competent jurisdiction. Given the sparse and restrictive Illinois law on trust modifications, imposing the requirement that the modification be one that could be properly approved by a court created uncertainty about what matters could be addressed in a nonjudicial settlement agreement and might have needlessly restricted nonjudicial settlement agreements.

The 2015 Statute deleted §16.1(d)(3) of the 2010 Statute to make clear that the 11 matters listed in the 2015 Statute, 760 ILCS §§16.1(d)(4)(A) – 16.1(d)(4)(K) (2015), are safe-harbor matters that can be addressed in a nonjudicial settlement agreement without any inquiry into whether the modification could have been approved by a court. The 2015 Statute then adds as an additional matter that can be addressed by a nonjudicial settlement agreement "[a]ny other matter involving a trust to the extent the terms and conditions of the nonjudicial settlement agreement could be properly approved under applicable law by a court of competent jurisdiction." 760 ILCS 5/16.1(d)(4)(M) (2015).

1. [17.69] Binding Effect

An agreement entered into in accordance with the virtual representation statute is final and binding on all beneficiaries as if ordered by the court. 760 ILCS 5/16.1(d)(6) (2015).

2. [17.70] Interested Persons

Under the 1993 Statute, the primary beneficiaries could enter into a virtual representation agreement without the involvement of any other beneficiaries. 760 ILCS 5/16.1 (1993). Under the 2010 Statute, however, for an agreement to be binding, it had to be signed by all "interested persons" or their representatives as determined under the virtual representation rules. 760 ILCS 5/16.1(d)(1) (2010). That requirement continues under the 2015 Statute, which expanded the definition of "interested person." Under the 2015 Statute, " 'interested persons' means the trustee

and all beneficiaries, or their respective representatives determined after giving effect to the preceding provisions of [§16.1], whose consent or joinder would be required in order to achieve a binding settlement were the settlement to be approved by the court." 760 ILCS 5/16.1(d)(1) (2015). In light of the expansion of divided trusteeship under directed trust statutes, under which persons other than the trustee may have some of the powers traditionally exercised by a trustee, the 2015 Statute expanded the definition of "interested person" to include "a trust advisor, investment advisor, distribution advisor, trust protector or other holder, or committee of holders, of fiduciary or nonfiduciary powers, if the person then holds powers material to a particular question or dispute to be resolved or affected by a nonjudicial settlement agreement." *Id.*

Given the definition of "interested persons," resort to Illinois common law or possibly statutory law would be necessary to determine the identity of the necessary parties to an agreement under the statute. In general, it would seem that a party having an interest under the trust that could be affected by the agreement would have to be considered an interested person. Consequently, one would expect that current trust beneficiaries (those currently eligible to receive a distribution of income or principal) and presumptive remainder beneficiaries would be necessary parties to any agreement. Because the statute expressly permits representatives of interested parties to stand in for interested parties, the virtual representation principles set forth in §§16.1(a) and 16.1(c) would apply in determining whether the interested persons requirement has been satisfied. It is important to keep in mind that the current trustee must be a party to the agreement. Therefore, a corporate fiduciary, for example, cannot be removed without its consent.

3. [17.71] Matters Expressly Subject to Agreement Under the 2015 Statute

Under the 2015 Statute, matters that may be resolved by nonjudicial settlement agreement include, but are not limited to, the following 12 matters, excluding termination of a trust, which is discussed separately in §17.78 below:

(A) Validity, interpretation, or construction of the terms of the trust.

(B) Approval of a trustee's report or accounting.

(C) Exercise or nonexercise of any power by a trustee.

(D) The grant to a trustee of any necessary or desirable administrative power, provided the grant does not conflict with a clear material purpose of the trust.

(E) Questions relating to property or an interest in property held by the trust, provided the resolution does not conflict with a clear material purpose of the trust.

(F) Removal, appointment, or removal and appointment of a trustee, trust advisor, investment advisor, distribution advisor, trust protector or other holder, or committee of holders, of fiduciary or nonfiduciary powers, including without limitation designation of a plan of succession or procedure to determine successors to any such office.

(G) Determination of a trustee's compensation.

(H) Transfer of a trust's principal place of administration, including without limitation to change the law governing administration of the trust.

(I) Liability or indemnification of a trustee for an action relating to the trust.

(J) Resolution of bona fide disputes related to administration, investment, distribution or other matters.

(K) Modification of terms of the trust pertaining to administration of the trust.

* * *

(M) Any other matter involving a trust to the extent the terms and conditions of the nonjudicial settlement agreement could be properly approved under applicable law by a court of competent jurisdiction. 760 ILCS 5/16.1(d)(4) (2015).

Although more could be said about each of the matters described above, for purposes of this chapter, the discussion in §17.72 – 17.77 below focuses on the changes brought about by the 2015 Statute and the substance of a few of the safe harbors.

a. [17.72] Validity

The 2010 Statute listed as a matter that could be resolved by a nonjudicial settlement agreement "interpretation or construction of the terms of the trust." 760 ILCS 5/16.1(d)(4)(A) (2010). The 2015 Statute added "validity" as an appropriate matter for a nonjudicial settlement agreement. 760 ILCS 5/16.1(d)(4)(A) (2015).

b. [17.73] Approval of a Trustee's Accounts

Sometimes, the language of the governing trust instrument will contain provisions that ensure that the trustee is adequately and promptly protected by rendering accountings. When the trust instrument is silent, or not comprehensive in scope, the Trusts and Trustees Act acts as a backstop and makes an account binding on the beneficiaries who receive the account unless an action against the trustee is commenced within three years, except in the case of fraudulent concealment. 760 ILCS 5/11. The relief afforded by the statute may not be entirely satisfactory to a trustee. For one thing, the provisions of the Act protect the trustee only from claims from beneficiaries who receive the account and not from claims from unborn or unascertained beneficiaries. In addition, it is unclear in the author's opinion whether current accounts are binding on a remainder beneficiary of a trust if the remainder beneficiary was not receiving the current accounts. Finally, a trustee may not want to wait three years to enjoy finality with respect to its accounts. The settlement provisions of the 760 ILCS 5/16.1(d)(4)(B) (2015) permit the trustee to achieve immediate protection against all claims, including any from unborn or unascertained beneficiaries, and may also obviate the need to provide the account to certain remote or contingent beneficiaries.

c. [17.74] Grant of Power and Questions Relating to Property

The 2010 Statute permitted a nonjudicial settlement agreement to grant to a trustee any necessary or desirable administrative power or to resolve questions relating to property or an interest in property held by the trust. 760 ILCS 5/16.1(d)(4)(D), 5/16.1(d)(4)(E) (2010). The breadth of these two areas arguably was restricted by the requirement, deleted in the 2015 Statute, that the modification be one that could have been approved by a court. 760 ILCS 5/16.1(d)(3). In order to protect the settlor's intent, the 2015 Statute added a requirement that any modification that grants the trustee an administrative power or resolves a question relating to property must not conflict with a clear material purpose of the trust. 760 ILCS 5/16.1(d)(4)(D), 5/16.1(d)(4)(E) (2010).

The RESTATEMENT (THIRD) OF TRUSTS comments on what is a material purpose:

> **Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to a beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple intended beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.** RESTATEMENT (THIRD) OF TRUSTS §65, cmt. d (2003).

d. [17.75] Trustees and Other Fiduciaries

The 2010 Statute permitted a nonjudicial settlement agreement to address "resignation or appointment of a trustee." 760 ILCS 5/16.1(d)(4)(F) (2010). The 2015 Statute expanded this category as described in §17.48 above. 760 ILCS 5/16.1(d)(4)(F) (2015). The 2015 Statute applies not just to trustees, but also to trust advisors and protectors, regardless of whether they hold their powers in a fiduciary capacity. Further, the 2015 Statute makes it clear that the nonjudicial settlement agreement not only can address the immediate succession of fiduciaries, advisors, and protectors, but also can designate procedures for future fiduciary succession. *Id.*

e. [17.76] Change of Law Governing Administration

The 2010 Statute permitted a nonjudicial settlement agreement to transfer a trust's principal place of administration. 760 ILCS 5/16.1(d)(4)(H) (2010). Depending on the particular facts, it can be unclear whether transferring a trust's principal place of administration changes the law governing administration of the trust. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§271, 272 (1971). The 2015 Statute specifically permits the nonjudicial settlement agreement to change the law governing administration of the trust. 760 ILCS 5/16.1(d)(4)(H) (2015).

f. [17.77] Resolution of Disputes or Issues Related to Administration, Investment, or Distribution

The "[r]esolution of bona fide disputes related to administration, investment, distribution or other matters" (760 ILCS 5/16.1(d)(4)(J) (2015)) is a broad category of matters that can be addressed by a nonjudicial settlement agreement and that is not found in the Uniform Trust Code. Permitting administrative matters to be addressed is consistent with Illinois caselaw that freely permits administrative modifications. Permitting investment issues to be addressed may reflect an intent to give broader authority to modify outdated investment language or restrictions in a trust document. What is meant by "distribution" issues is unclear, as that term is not defined in the 2015 Statute. Illinois common law does not permit changes to dispositive trust provisions in the absence of an emergency. *Curtiss v. Brown,* 29 Ill. 201 (1862). Therefore, the inclusion of distribution matters in the itemized list may be meant to address administrative and construction issues related to distributions, such as principal and income allocations, or the calculation of a unitrust amount.

The 2015 Statute clarifies that these disputes must be bona fide. 760 ILCS 5/16.1(d)(4)(J) (2015). Thus, an artificially manufactured "dispute" will not serve as the basis for modifying a trust under the virtual representation statute.

4. [17.78] Trust Termination

Under both the 2010 Statute and the 2015 Statute, unlike the 1993 Statute, termination of a trust is permissible, but it requires court approval. 760 ILCS 5/16.1(d)(4)(L) (2010), 5/16.1(d)(4)(L) (2015). Court approval must be obtained before or within 60 days after the effective date of the agreement, and the court must conclude that continuance of the trust is not necessary to achieve any clear material purpose of the trust. The court may then order that, upon termination, the trust property is to be distributed as agreed by the parties to the agreement or otherwise as the court determines equitable consistent with the purpose of the trust. 760 ILCS 5/16.1(d)(4)(L) (2015).

Under long-standing Illinois law, a trust cannot be terminated by agreement unless, among other things, the purpose of the trust has been substantially accomplished. *Guttman v. Schiller,* 39 Ill.App.2d 58, 187 N.E.2d 315, 319 (1st Dist. 1963). The standard for termination set forth in the statute is a different one, as it permits termination if "continuance of the trust is not necessary to achieve any clear material purpose of the trust." 760 ILCS 5/16.1(d)(4)(L) (2015). In the 2012 edition of this chapter, the author noted that a significant question under the statute was whether the standard for termination effectively supplanted the common-law standard and that statutory clarification of that question was desirable. The 2015 Statute suggests that the common-law standard has been supplanted, as the 2010 standard was carried over to the 2015 Statute. However, the 2015 Statute provides some clarification regarding "material purpose" and states that the "court may consider spendthrift provisions as a factor in making a decision under this subdivision, but a spendthrift provision is not necessarily a clear material purpose of a trust, and the court is not precluded from modifying or terminating a trust because the trust instrument contains a spendthrift provision." *Id.* Thus, under the 2015 Statute, the standard for termination

continues to be defined by the material purpose test, and the existence of a spendthrift provision in the trust does not automatically preclude termination of the trust but is a factor to be considered in applying the material purpose test.

5. [17.79] Court Approval May Be Obtained

760 ILCS 5/16.1(d)(5) (2015) provides that any interested person may request the court to approve any part or all of the nonjudicial settlement agreement, including whether any representation is adequate and without conflict of interest, provided that the petition for such approval must be filed before, or within 60 days after, the effective date of the agreement. This authorizes a limited court petition seeking only (a) confirmation that a party to the agreement had a substantially similar interest to and no conflict of interest with another person who was not a party and/or (b) confirmation that the agreement would be properly approved by the court. One question that naturally arises given this provision of the statute is whether parties to an agreement should wait 60 days after the effective date of the agreement before implementing the terms of the agreement to avoid the risk of a petition for approval being filed but denied. If the terms of the agreement are time sensitive (for example, in the case of a particular investment), it may not be advisable or even possible to wait 60 days to implement the agreement. There may be a number of practical solutions to dealing with that possibility. One solution might be to add a provision to the agreement whereby the parties waive the right to petition the court, which presumably would be enforceable, although such a provision might implicate public policy concerns. Another possibility would be to make the agreement contingent on court approval in the first instance, so that none of the obligations are triggered until the court has approved the agreement (*i.e.,* found that there is a substantial similarity of interest and no conflict of interest and/or that the agreement would be properly approved by the court). To the extent that part of the appeal of the statute is being able to achieve a binding resolution without having to go to court, that appeal is somewhat diminished, but the scope of the court's review will be limited as discussed above. If neither of these solutions is desirable, the parties could of course decide to go forward with implementation of the agreement before the 60 days has passed and take their chances. If a party to a virtual representation agreement is concerned about the existence of substantially similar interests or a conflict of interest, or whether the agreement is one that could be properly approved by a court, it seems likely that such concern will arise before the agreement is executed, so the parties will have had an opportunity to consider how best to deal with the concern. If, however unlikely, the concern does not arise until after the agreement is signed, it seems reasonable that the statute would provide a mechanism whereby that concern can be addressed. Parties to an agreement just need to be aware of these issues.

6. [17.80] Opinion of Counsel

The virtual representation statute permits, but does not require, the trustee to obtain and rely on an opinion of counsel on any relevant matter, including that (a) any agreement proposed to be made does not conflict with a material purpose of the trust or could be properly approved by the court under applicable law, (b) in the case of a proposed trust termination, the continuance of the trust is not necessary to achieve a material purpose of the trust, (c) there is no conflict of interest between a representative and the person represented with respect to the particular question or dispute, or (d) the representative and the person represented have substantially similar interests

with respect to the particular question or dispute. 760 ILCS 5/16.1(d)(7) (2015). The 1993 Statute contemplated that the trustee could obtain the opinion of counsel that a proposed agreement in that case was "not clearly contrary to the express terms of the trust instrument." 760 ILCS 5/16.1(d) (1993). This was the relevant inquiry under the 1993 Statute in light of 760 ILCS 5/3, which contains the general principle that the provisions of the Trusts and Trustees Act apply only to the extent not inconsistent with the terms of the governing instrument. The interplay between §3 of Act and the virtual representation provisions of §16.1 are addressed in §17.81 below.

In the 2002 edition of this chapter, and in the context of the 1993 Statute, the author questioned why an attorney would render an opinion under §16.1(d) (now §16.1(d)(7)). The author's reasoning at the time was that if a trustee was concerned about whether a proposed agreement was contrary to the express terms of the instrument and would enter into the agreement only if counsel provided an opinion that such agreement was not clearly contrary to the express terms of the trust instrument, it seemed to the author very likely that there was a real issue as to whether the agreement was valid under §3 of the Trusts and Trustees Act. In that case, the author was concerned that an attorney who rendered an opinion under §16.1(d) of the 1993 Statute would be insuring or indemnifying his or her trustee client, when the better advice would seem to be that the trustee not enter into the agreement at all. The author expects that the types of opinion that a trustee would solicit under the current version of §16.1(d)(7), such as whether the agreement could properly be approved by a court, would not raise as much concern for the attorney or at least should be more susceptible to qualification, which might afford greater protections to the attorney.

7. [17.81] Section 3(1) of the Trusts and Trustees Act

Section 3(1) of the Trusts and Trustees Act provides:

> **A person establishing a trust may specify in the instrument the rights, powers, duties, limitations and immunities applicable to the trustee, beneficiary and others and those provisions where not otherwise contrary to law shall control, notwithstanding this Act. The provisions of this Act apply to the trust to the extent that they are not inconsistent with the provisions of the instrument.** 760 ILCS 5/3(1).

The 1993 Statute did not permit modifications of unambiguous provisions of a trust, even if the provisions dealt only with matters of trust administration. In light of §3(1) of the Trusts and Trustees Act, it could be argued with respect to the 2015 Statute (as was the case with the 2010 Statute) that if the trust states that it is irrevocable and unamendable and does not expressly permit the application of a statute permitting modification, the application of the modification provisions of the virtual representation statute would be inconsistent with the provisions of the trust. In prior editions of this chapter, the author explored possible responses to this argument, but, as discussed in §17.85 below, a new section of the 2015 Statute (760 ILCS 5/16.1(f) (2015)) appears to refute any arguments based on §3(1) of the Trusts and Trustees Act to eliminate modifications under the statute.

Even though the preamble-based arguments do not appear to survive enactment of the 2015 Statute, no court has yet considered the issue, so it may be worthwhile to reiterate the responses

to the preamble-based arguments discussed in the prior editions of this chapter before enactment of the 2015 Statute. The primary response to the preamble-based arguments, setting aside the 2015 Statute, seems to be that the modification provisions of the virtual representation statute are specifically intended to permit the nonjudicial modification of otherwise irrevocable trust provisions and that this specific intention should not be undermined by the general preamble statement contained in §3(1) of the Act. Under this argument, the modification provisions should be found to be inconsistent with the trust only if the trust expressly prohibits modification that is otherwise permitted under applicable law, which is what is now required under the 2015 Statute.

An alternative argument that might be made in reliance on §3(1) is that the modification provisions cannot be used to change an express provision of a trust because that too would be inconsistent with the terms of the trust. The response to this argument would seem to be that the appropriate analysis is whether a nonjudicial modification is inconsistent with the provisions of the instrument, and that it should not be found to be inconsistent merely on the basis that the trust states that it is irrevocable and unamendable. Rather, inconsistency should be found only if the trust states something to the effect of "no provisions of law permitting modification of trusts shall apply to this trust." The analysis should not be whether the modification provisions of the statute permit a change that is inconsistent with a particular provision of the trust.

Finally, one might argue that even if the statutory modification provisions are not inconsistent with the trust, as argued above, they cannot be used to modify an express provision of the trust because of the first sentence of the preamble, which states that the trust provisions control. One response to that argument is that the integrity of the express trust provisions is protected by permitting only modifications that could be made by a court. This restriction permits construction and administrative modifications generally but would permit modification of dispositive provisions only under extreme circumstances. As discussed more fully in §§17.87 – 17.89 below, the advantages afforded by the statute are substantial, and there is strong public policy in favor of such statutes as evidenced by developments nationwide. The legislature clearly intended for the statute to operate in a manner that will enable parties to achieve the intended benefits, so a liberal construction of the statute might be expected.

F. [17.82] Total Return Trust Conversion by Agreement

Under the Illinois total return trust statute, the trustee and beneficiaries of a trust can agree to convert the trust to a total return trust without court approval. 760 ILCS 5/5.3(b).

1. [17.83] 1993 Statute and 2010 Statute

Section 5.3 of the Trusts and Trustees Act, when first enacted, allowed an income trust to be converted to a total return trust by agreement of the trustee and all primary beneficiaries. 760 ILCS 5/5.3(b) (2002). However, at that time under the 1993 Statute, if any of the primary beneficiaries were minors, persons with a disability, or unborn persons, virtual representation could not be applied, and the trust could not be converted without going to court. With the changes brought about by the 2010 Statute, which, among other things, eliminated the requirement that primary beneficiaries be adult and not under any legal disability, that problem was eliminated. 760 ILCS 5/16.1 (2010).

2. [17.84] 2015 Statute

760 ILCS 5/5.3(b), which was amended most recently effective January 1, 2015, now provides that a conversion to a total return trust may be accomplished by agreement between the trustee and all primary beneficiaries (either individually or by their respective representatives under the individual representation provisions of 760 ILCS 5/16.1 (2015)). It should be noted that the parties required for a unitrust conversion may differ from the parties required for a nonjudicial settlement agreement. For a nonjudicial settlement agreement, all interested parties must be represented, which, under the expanded definition of "interested persons," could include, for example, a distribution advisor. See 760 ILCS 5/16.1(d) (2015). Although a distribution advisor may well be considered an interested party with respect to a unitrust conversion, the unitrust conversion statute, read literally, permits conversion with the agreement of the trustee and the primary beneficiaries alone.

G. [17.85] Trusts Subject to Statute

The 2015 Statute includes a new section providing that the statute shall be construed as pertaining to the administration of a trust, and therefore expressly states that it applies to a trust that is either administered in Illinois or governed by Illinois law with respect to the meaning and effect of its terms. 760 ILCS 5/16.1(f) (2015).

The new section further provides that a trust may, by express language making specific reference to §16.1, prohibit the application of the virtual representation statute and then provides examples of language that will achieve such prohibition. *Id.* The inclusion of this language in the 2015 Statute is significant as it presumably negates the preamble-based arguments described in §17.81 above that might once have been necessary to marshal in defense of modifications made in accordance with the statute.

H. [17.86] Application of Amendatory Act

The 2015 Statute also includes a new section dealing with the scope of the application of the amendments instituted by the 2015 Statute. 760 ILCS 5/16.1(g) (2015). The section provides that the changes brought about by the 2015 Statute apply to all trusts in existence on January 1, 2015, that are subject to the statute, or any created after that date. The section further provides that changes are applicable to (1) judicial proceedings, which is defined to include proceedings not just before a court or administrative tribunal, but also arbitration and mediation proceedings; and (2) nonjudicial matters, including nonjudicial settlement agreements.

I. [17.87] Advantages of Statute Outweigh Risks

Although virtual representation involves a risk that in some cases a beneficiary's interest may not in fact be represented as effectively as it would have been in a court proceeding with a guardian ad litem, the magnitude of this risk seems relatively small compared to the advantages of allowing a broad use of virtual representation.

1. [17.88] Economic Harm to Trust

A system that requires a judicial proceeding, service of process on all beneficiaries, and possibly appointment of one or more guardians ad litem to make even noncontroversial administrative changes to a trust harms the trust and beneficiaries either by imposing an unnecessary expense on the trust or by discouraging changes that would improve the administration of the trust.

2. [17.89] Public Policy Effect of Virtual Representation Statutes

More than 80 percent of U.S. jurisdictions have adopted statutes expanding traditional virtual representation to new applications. Further, it appears that 60 percent of U.S. jurisdictions have adopted nonjudicial settlement agreement statutes authorizing the interested parties to a trust (determined after giving effect to virtual representation principles) to resolve disputes, questions, and operating difficulties in trust administration by private agreement without resort to judicial proceedings unless a party chooses to request court approval. The widespread adoption of such statutes recognizes the public policy benefits of streamlining proceedings, reducing costs, and achieving finality in resolving trust administration issues. See Susan T. Bart and Lyman W. Welch, *State Statutes on Virtual Representation — A New State Survey,* 35 ACTEC J. 368, 375 (2010).

J. [17.90] Applying the Statute

The considerations in §§17.91 – 17.101 below should be helpful in applying 760 ILCS 5/16.1 (2015).

1. [17.91] Determine Governing Law or Situs of Administration

Determine either that (a) Illinois law governs the trust or (b) the trust is being administered in Illinois, thus permitting use of the Illinois virtual representation statute.

2. [17.92] Identify Issue To Be Resolved

Identify in detail the particular questions, operating difficulties, or disputes to be resolved.

3. [17.93] Categorize Issues and Identify Degree of Risk

Categorize the issues to separate administrative matters from substantive matters and to identify the degree of risk inherent in the modification.

4. [17.94] Review Trust Document Provisions

Examine the trust document to identify any language expressly dealing with modification of the trust document (*e.g.,* trust protector language) or with the particular matters at issue (*e.g.,* special provisions regarding approval of accountings).

Next, examine the trust document to determine current and future economic interests of various divergent classes of beneficiaries. All persons and parties in interest whose consent or joinder would be required to achieve a binding settlement were the settlement approved by a court must be considered:

a. Study known information about the names, ages, addresses, and family relationships of all beneficiaries.

b. Identify beneficiaries who are minors, unborn, and of unknown identity or location.

c. Identify beneficiaries who are (or arguably may be) persons with a disability.

d. Check whether any beneficiaries have court-appointed guardians of the estate or person.

e. Identify any gaps in information about beneficiaries that can readily be gathered, and determine a plan of action for marshaling that information.

5. [17.95] Examine Information About Trust Assets, Investments, and Distributions

Examine basic information about trust assets, investment asset allocations, and mandatory and discretionary distribution history.

6. [17.96] Identify Necessary Parties

Identify who are necessary parties to any judicial action or proceeding after giving effect to the Illinois virtual representation statute.

a. [17.97] Categorize Beneficiaries

Categorize various beneficiaries according to the terms of their respective beneficial interests and identify beneficiaries who are unborn, minors, persons with a disability, or of unknown identity (when possible) or location.

b. [17.98] Identify Potential Representatives

Identify potential representatives for primary beneficiaries who cannot represent themselves.

In that regard, determine whether the proposed representative (if the proposed representative is another beneficiary) has a substantially similar interest with respect to the matter at issue.

Then determine whether the proposed representative (if the proposed representative is another beneficiary) and the represented beneficiary have any potential economic conflicts of interest based on the terms of the trust.

c. [17.99] Consider Representation of Charities

If a charity is a necessary party to the agreement, determine whether the charity must be represented by the Illinois Attorney General either because the charity is not specifically identified or because the charity is identified but not represented. If the charity is specifically named and able to represent itself, determine whether the Illinois Attorney General should be informed of the agreement.

d. [17.100] Seek Settlor's Consent

Though the settlor's consent is not required under 760 ILCS 5/16.1 (2015), when there is uncertainty about whether the proposed modification is one that an Illinois court could order, the settlor's consent may help to establish that the modification should be permitted. Therefore, if the settlor of the trust is living and able, consider asking the settlor to sign the agreement not as a party but to consent as settlor to the agreement entered into by the trustee and beneficiaries.

e. [17.101] Identify Other Potential Necessary Parties

If the trust provides for trust protectors, advisors, or others who are given powers to veto or direct the trustee or other powers affecting the terms or administration of the trust, determine whether those parties hold powers that are material to the particular question or dispute to be resolved or affected by a nonjudicial settlement agreement, because if they are, they are interested persons and must be a party to the agreement.

K. [17.102] Certain Exempt Trusts

A noteworthy limitation on the scope of 760 ILCS 5/16.1 (2015) is contained within §3(2) of the Trusts and Trustees Act, which addresses §16.1's applicability. 760 ILCS 5/3(2). That section states that the provisions of the Act, and therefore of the virtual representation statute, do not apply to (1) land trusts; (2) voting trusts; (3) security instruments, such as a trust deed or mortgage; (4) liquidation trusts; (5) escrows; (6) instruments under which a nominee, custodian for property, or paying or receiving agent is appointed; or (7) *Totten* trusts. *See In re Totten,* 179 N.Y. 112, 71 N.E. 748 (1904). Disputes among family members involving those types of trust relationships cannot be settled under the virtual representation statute but should be eligible for settlement under the family settlement doctrine if the instrument creating the trust at issue or other applicable law does not prohibit such a settlement.

L. [17.103] Relationship to Family Settlement Doctrine

It is evident from the discussion in §§17.47 – 17.102 above that 760 ILCS 5/16.1 (2015) does not supplant the family settlement doctrine, as there will be situations (although fewer than under the 1993 Statute) in which the virtual representation statute will have no application, and settlement among disputing family members will be achievable only under the traditional, common-law family settlement doctrine. For example, §16.1 obviously has no application to will contests as it is limited by its own terms to agreements involving trusts. The statute similarly cannot be employed to resolve disputes involving joint tenancy property, life insurance, or other

non-trust assets. Finally, there will be situations in which the statute is applicable but the requirements for virtual representation cannot be satisfied, *e.g.,* when there is no adult primary beneficiary, in which case virtual representation cannot be employed. It goes without saying that those limitations have no application to the family settlement doctrine.

At the same time, the virtual representation statute extends beyond the common-law family settlement doctrine because it (1) permits agreements among trust beneficiaries who may have no familial relationship, (2) does not always require an actual controversy as a prerequisite to its application, and (3) loosens the stricter requirements associated with the family settlement doctrine that historically have required court approval in all cases in which the rights of minors and unborn parties are involved. Thus, the possible applications of the virtual representation statute and the family settlement doctrine do intersect, and the statute may eliminate the procedural complexities of certain family settlement agreements that would otherwise require court approval, but neither takes the place of the other.

IX. [17.104] MISCELLANEOUS CONSIDERATIONS

Sections 17.105 – 17.111 below discuss certain miscellaneous issues relevant to family settlement agreements.

A. [17.105] Statute of Limitations

The statute of limitations for an action based in breach of a family settlement agreement is ten years. 735 ILCS 5/13-206. Under Illinois law, a family settlement agreement is a written contract, subject to the applicable limitations statute under §13-206. *Harvey v. Connor,* 85 Ill.App.3d 1061, 407 N.E.2d 879, 880, 41 Ill.Dec. 381 (1st Dist. 1980).

B. [17.106] Burden of Proof

Under the general law of Illinois with respect to settlements, a presumption of validity arises by the mere existence of an agreement that is legal and binding on its face. *Smith v. Texaco, Inc.,* 232 Ill.App.3d 463, 597 N.E.2d 750, 754, 173 Ill.Dec. 776 (1st Dist. 1992). A party to such an agreement can overcome that presumption only by presenting clear and convincing evidence that the agreement was the product of fraud in the inducement or execution, mutual mistake, or mental incompetency.

C. [17.107] Standard on Review

A trial court's finding of whether a valid family settlement agreement existed will be sustained unless it is against the manifest weight of the evidence. *Culbertson v. Carruthers,* 66 Ill.App.3d 47, 383 N.E.2d 618, 22 Ill.Dec. 810 (5th Dist. 1978).

D. [17.108] Death of Party to Agreement

A party to a family settlement agreement may die before the agreement is implemented in its entirety. To ensure that the agreement is binding on the successors in interest to the deceased

party, it is appropriate to include a clause that binds successors in interest. In *Cole v. Cole,* 292 Ill. 154, 126 N.E. 752, 757 (1920), a party to a family settlement agreement attempted to avoid the agreement by arguing that the death of another party to the agreement would prevent the implementation of the agreement. The agreement contained the following language:

> **[**T**]he said parties to this agreement shall do and perform all things necessary to carry into effect this agreement and perfect the title in each other in and to the shares, respectively, so to be designated and allotted by [**the parties**].** 126 N.E. at 759.

Based on the foregoing language, the Illinois Supreme Court held the agreement was binding on the deceased party's successors in interest. It is common in contemporary agreements to see language that expressly makes the agreement binding on the parties, as well as on their personal representatives, assigns, and successors in interest.

E. [17.109] Written Modifications to Agreement

Another clause that parties are well advised to include in a family settlement agreement is a clause that permits modifications or amendments to the agreement only if in writing and signed by all the parties. *Wilkonson v. Yovetich,* 249 Ill.App.3d 439, 618 N.E.2d 1120, 1126, 188 Ill.Dec. 550 (1st Dist. 1993). In *Wilkonson,* certain parties to a family settlement agreement claimed the agreement had been modified in their favor. The agreement stated "that it 'contains the complete understanding among the parties and cannot be modified except by written agreement of all parties.'" *Id*. Because there was no such written agreement evidencing the alleged modification, the appellate court rejected the claim.

F. [17.110] Arbitration Clause

A clause in a family settlement agreement submitting some matter covered by the agreement to arbitration, such as a valuation issue, does not provide grounds for setting aside the agreement, even if the arbitration is not successful. *McDole v. Kingsley,* 163 Ill. 433, 45 N.E. 281, 283 (1896). While parties to a family settlement agreement would be well advised to avoid a mechanism such as an arbitration clause that could later lead to unresolved issues, such clauses will not impair the validity or enforceability of the agreement.

G. [17.111] Joint and Mutual Will

Under Illinois law, a joint and mutual will is considered to be a type of family settlement agreement. *Orso v. Lindsey,* 233 Ill.App.3d 881, 598 N.E.2d 1035, 1040, 174 Ill.Dec. 403 (5th Dist. 1992); *In re Estate of Bell,* 6 Ill.App.3d 802, 286 N.E.2d 589 (1st Dist. 1972). By virtue of such characterization, such wills enjoy in the eyes of Illinois courts the special favor afforded family settlement agreements. The author notes that characterizing joint and mutual wills as a type of family settlement agreement is liberal given the requirement that family settlement agreements must be predicated on an actual controversy. Presumably, many joint and mutual wills are executed for purposes of convenience and not because of the existence of an actual controversy. Nonetheless, in the author's opinion, the policy behind the characterization is understandable and not troublesome.

18 Attorneys' Fees: An Assessment of the Current Standards for Fee Awards

LOUIS S. HARRISON
EMILY J. KUO
Harrison, Held, Carroll and Wall, LLP
Chicago

I. OVERVIEW

A. [18.1] Reasonableness as Universal Benchmark

The nearly universal benchmark for attorneys' fees in trusts and estates is whether they are "reasonable." "A trustee can properly incur and pay expenses that are reasonable in amount and appropriate to the purposes and circumstances of the trust and to the experience, skills, responsibilities, and other circumstances of the trustee." RESTATEMENT (THIRD) OF TRUSTS §88 (2007).

"In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." Uniform Trust Code §1004 (2010). The Uniform Trust Code has been adopted in 30 states and the District of Columbia.

The reasonableness standard also typically applies to probate estates. "If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred." Uniform Probate Code §3-720 (2010). Nineteen states have adopted the Uniform Probate Code or a substantially similar code.

Illinois has not adopted the Uniform Trust Code or the Uniform Probate Code, but offers the same "reasonableness" standard. 760 ILCS 5/4.09 (authorizing trustees in Illinois "[t]o appoint attorneys, auditors, financial advisers and other agents and to pay reasonable compensation to such appointees"); 755 ILCS 5/27-2(a) (providing in Probate Act of 1975, 755 ILCS 5/1-1, *et seq.,* that "[t]he attorney for a representative is entitled to reasonable compensation for his services").

B. Procedure for Payment of Fees

1. [18.2] Generally

An engagement letter between the attorney and the executor is recommended, though not required. The right to compensation "must rest on the terms of an express or implied contract of employment," and when the agreement with the executor is not in writing, the terms of the attorney's compensation could be more susceptible to dispute at the hearing on the attorney's fee petition. *Estate of Healy v. Tierney,* 137 Ill.App.3d 406, 484 N.E.2d 890, 892, 92 Ill.Dec. 159 (2d Dist. 1985). The engagement letter should set forth the professionals who will work on the project, their hourly rates, and what is expected in terms of payments (but see discussion below for the ultimate veto power of the court over any agreed-on fee).

Nonetheless, the court will not be held to the terms of the engagement letter in awarding attorneys' fees from the estate. *See In re Estate of Bitoy,* 395 Ill.App.3d 262, 917 N.E.2d 74, 86 – 87, 334 Ill.Dec. 477 (1st Dist. 2009) (holding retainer agreement to be irrelevant to determination of reasonable fee within meaning of Probate Act of 1975). The Rules of

Professional Conduct will limit what the attorney can actually recover when enforcing the fee agreement and what the attorney can require in the engagement letter. *See Wildman, Harrold, Allen & Dixon v. Gaylord,* 317 Ill.App.3d 590, 740 N.E.2d 501, 511, 251 Ill.Dec. 420 (1st Dist. 2000) (holding in breach of contract action that attorney's compensation pursuant to express contract must still satisfy reasonableness standard under Rule 1.5(a) of the Illinois Rules of Professional Conduct and affirming reduction of fees by more than 23 percent).

In the past, engagement letters might have sought a guaranty from the fiduciary or the beneficiaries of any fee amounts not awarded in court. *Cf. Rubinkam v. MacArthur,* 302 Ill.App. 71, 23 N.E.2d 348, 351 (1st Dist. 1939) ("where an attorney intends to hold an executor . . . personally responsible for his fee, good faith toward the client would seem to dictate that the attorney should so inform the client at the time the latter seeks his services"). However, Illinois attorneys are no longer permitted to recover their probate fee shortfalls from the fiduciary, the beneficiaries, or any other person. Illinois State Bar Association Advisory Opinion on Professional Conduct No. 13-01 (Jan. 2013) (opining that "if a legal fee is deemed excessive by a probate court, it likewise is excessive under the Rules of Professional Conduct," and holding that Illinois "lawyer may not enter into an agreement intended to provide fees to the lawyer in excess of the amount found reasonable by a probate court").

The executor and the attorney both have a fiduciary duty to the beneficiaries. *See, e.g., In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 1280, 111 Ill.Dec. 639 (1st Dist. 1987). Accordingly, any agreement entered into between the attorney and the executor also needs to have the best interests of the beneficiaries in mind. The engagement letter should acknowledge that the attorney represents the beneficiaries, as well as the executor, and that the attorney will assist the executor only to the extent that his or her representation protects and enhances the beneficiaries in the administration process.

The permissible terms of an engagement letter may be further limited by the express provisions of the trust or will. The governing document might contain a safe-harbor fee schedule or amount, a methodology for determining fees, or a ceiling on fees.

In the guardianship context, advance court approval of an engagement letter could be difficult to obtain. However, the courts will sometimes preapprove a range of fees and attorney hours as reasonable for specific projects (such as estate planning) with the final fee amount still subject to court approval. The preapproval serves both to notify the court of the project being undertaken as well as to give the practitioner reassurances that the fees and hours expected to be incurred are not substantially outside the realm of what the court foresees approving for that project and that the court agrees that the undertaking itself is in the ward's best interest.

There is one tax concern with regard to the timing of attorneys' fees during the administration period. Fees may constitute a deduction for income tax purposes. Accordingly, to the extent that it is possible, fees should be paid only in a year in which they can be used as deductions. Fees emanating from administration expenses cannot be rolled over from one year to the next but can be carried out as deductions to beneficiaries in the tax year the estate terminates.

2. [18.3] Initiation of Payment Process

In independent administration, the attorney may send the invoice directly to the executor. If the executor believes that the beneficiaries will agree to the fees, the executor can pay the invoice out of estate funds. Alternatively, the independent executor can wait until formal (*i.e.,* at the time of the filing of the annual account or final report) or informal (*i.e.,* upon receipt of the beneficiaries' consent) approval of the invoice to pay it. Although fees are at risk in both independent and supervised administration, the courts tend not to become involved in an analysis of the fee amount in independent administration if all parties are in agreement. If the independent executor opts to wait, the attorney may seek immediate payment by filing a fee petition.

In supervised administration, the court always becomes involved in determining the reasonableness of the attorneys' fees. Therefore, it is prudent, though not always followed in practice, to procure payment of fees via the filing of a fee petition. *See, e.g., In re Estate of Thomson,* 139 Ill.App.3d 930, 487 N.E.2d 1193, 1200, 94 Ill.Dec. 316 (4th Dist. 1986) (remanding appellant's objections to accounting for reconsideration based in part on payment of attorneys' fees without fee petition when "the statute clearly contemplates that the representative will seek court approval," but implying that fees could still be approved on remand).

3. [18.4] Notice to Beneficiaries

In independent administration, the executor may pay fees without prior notice to the beneficiaries and without court approval. The beneficiaries receive ex post notice via the payment entry in the executor's accounting, of which the beneficiaries receive notice prior to the executor's discharge.

However, if a petition for attorneys' fees is filed in independent or supervised administration, the beneficiaries and all parties of record are entitled to notice of the petition.

4. [18.5] Interim Fees

Before the close of independent administration, the executor may pay interim attorneys' fees, and attorneys need not petition the court for prior approval. However, as with any fee payment, it is advisable to ascertain informally whether beneficiaries are likely to object since the Probate Act of 1975 gives beneficiaries the right to petition for a hearing on any estate administration matter; no matter when the fees are paid, the beneficiaries eventually will see that payment. See 755 ILCS 5/28-5. Should the attorneys' fees be paid without beneficiary approval and later reduced upon hearing, the overpayment will have to be refunded to the estate.

In supervised administration, interim fees can be allowed upon petition. *See In re Estate of Marks,* 74 Ill.App.3d 599, 393 N.E.2d 538, 542 – 543, 30 Ill.Dec. 502 (1st Dist. 1979) (denying challenge to interim fees based solely on desire to save time and efficiency); *In re Estate of Breault,* 63 Ill.App.2d 246, 211 N.E.2d 424, 429, 432 (1st Dist. 1965) (holding that attorney was entitled to reasonable compensation on petition for partial fees even though outcome of litigation was still in question).

5. [18.6] Burden of Proof

In actions for attorney fee approval, the burden of proof rests on the attorney to establish his or her case. *Estate of Healy v. Tierney,* 137 Ill.App.3d 406, 484 N.E.2d 890, 893, 92 Ill.Dec. 159 (2d Dist. 1985). The court is not bound by the petitioning attorney's own opinion of the reasonableness of his or her fee. When an interested party raises objections to the fee, the petition "require[s] proof like any other claim . . . similar to cases where attorney's fees are the subject of a court order against an opposing party." *Id.*

6. [18.7] Evidence

Illinois practice is that an attorney must submit "detailed time records . . . to support the hours claimed" on a fee petition. *Estate of Healy v. Tierney,* 137 Ill.App.3d 406, 484 N.E.2d 890, 893, 92 Ill.Dec. 159 (2d Dist. 1985). For a further discussion of how to present time records, see §18.12 below.

The court also will review other evidence if submitted, such as

a. correspondence exhibits (*Healy, supra*);

b. summaries of the types of estate assets requiring valuation and collection and the difficulty of the tasks undertaken (*In re Estate of Enos,* 69 Ill.App.3d 129, 386 N.E.2d 1147, 1149 – 1150, 25 Ill.Dec. 483 (5th Dist. 1979)); and

c. credentials of the attorneys whose time was incurred, results achieved by each project undertaken, and tax benefits to the estate from the work done (*In re Estate of Marks,* 74 Ill.App.3d 599, 393 N.E.2d 538, 542 – 543, 30 Ill.Dec. 502 (1st Dist. 1979)).

Typically, a practitioner will identify these areas in the body of the fee petition as part of the narrative. However, a better practice is to admit these items into evidence through both oral and written evidence at the actual fee petition hearing. Focusing the court's attention on the particularities and difficulties of each administration or litigation matter is the most strategic way to maximize payment.

Further, the courts are willing to review the evidence of experts in determining "the reasonable worth and value of the services rendered." *Healy, supra,* 484 N.E.2d at 893. However, the court is not governed entirely by the opinion of expert witnesses as to the value of services provided. *See Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 707, 15 Ill.Dec. 916 (1st Dist. 1978).

II. STATUTORY STANDARD FOR FEES

A. [18.8] The Statute

The Probate Act of 1975 provides that "[t]he attorney for a representative is entitled to *reasonable* compensation for his services." [Emphasis added.] 755 ILCS 5/27-2(a). Illinois courts have the ultimate discretion as to the amount, if any, of fees to be paid from the estate.

This rule was clearly enunciated by *Estate of James,* 10 Ill.App.2d 232, 134 N.E.2d 638, 641 – 642 (3d Dist. 1956), in which the court, answering the argument that it did not have the power to set the fee of the attorney, stated:

> **This is not the law. The right of the Probate Court to allow an executor or administrator credit in his account for reasonable attorney's fees . . . is undoubted, but the amount paid for attorney's fees is to be determined by the court in exercise of judicial discretion.**

See also In re Estate of Halas, 159 Ill.App.3d 818, 512 N.E.2d 1276, 1284, 111 Ill.Dec. 639 (1st Dist. 1987) (stating that "determination as to what constitutes reasonable compensation is a matter peculiarly within the discretion of the probate court").

Contractual provisions between an executor and the estate attorney that attempt to override the judicial authority to determine the appropriateness of attorneys' fees will be ignored, at least as to payment of attorneys' fees from the estate.

B. [18.9] Factors Cited in Applying the Statute

Courts interpret the term "reasonable" with wide latitude, meaning they do fairly much what they want. The commonly cited factors impacting the size of attorneys' fees awarded include

1. the size of the estate;
2. the work done;
3. the skill evidenced by the work;
4. the time expended;
5. the success of the efforts involved;
6. the degree of good faith; and
7. the efficiency with which the work was done.

See, e.g., In re Estate of Coleman, 262 Ill.App.3d 297, 634 N.E.2d 314, 316, 199 Ill.Dec. 475 (2d Dist. 1994); *In re Estate of Shull,* 295 Ill.App.3d 687, 693 N.E.2d 489, 492, 230 Ill.Dec. 360 (4th Dist. 1998); *In re Estate of Venturelli,* 54 Ill.App.3d 997, 370 N.E.2d 290, 295, 12 Ill.Dec. 667 (3d Dist. 1977).

The court may also consider the existence of a contingent-fee arrangement with the client in determining a reasonable level of fees, but the contingent fee will not necessarily act as a floor or ceiling on the award. *See Rath v. Carbondale Nursing & Rehabilitation Center, Inc.,* 374 Ill.App.3d 536, 871 N.E.2d 122, 129 – 130, 312 Ill.Dec. 722 (5th Dist. 2007).

Note that the Illinois Rules of Professional Conduct of 2010 (RPC) impose separate limitations on what can be charged to clients, citing the following criteria:

> **(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
>
> **(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
>
> **(3) the fee customarily charged in the locality for similar legal services;**
>
> **(4) the amount involved and the results obtained;**
>
> **(5) the time limitations imposed by the client or by the circumstances;**
>
> **(6) the nature and length of the professional relationship with the client;**
>
> **(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and**
>
> **(8) whether the fee is fixed or contingent.** RPC 1.5(a).

The cases do not specify the weight to be accorded each of the factors, nor do they evince an understanding of how these variables interplay with one another. Nevertheless, a recitation of the factors in the petition for attorneys' fees accompanied by each factor's applicability in the particular case is a prudent approach.

These factors more likely would apply to enforcement by an attorney of fees pursuant to an express (oral or written) contract versus fee petition cases against an estate. *See, e.g., Wildman, Harrold, Allen & Dixon v. Gaylord,* 317 Ill.App.3d 590, 740 N.E.2d 501, 251 Ill.Dec. 420 (1st Dist. 2000).

C. [18.10] Interpretation of These Standards: Generally

An attorney should reference the standards noted in §18.9 above when completing the fee petition, as well as provide specific details, to prevail on a fee petition. Courts generally will

delve into the substance and hear evidence as to what work was being performed. There is uncertainty as to prevailing in any fee petition, regardless of the facts.

Some pitfalls to avoid are illustrated by *In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 111 Ill.Dec. 639 (1st Dist. 1987). In *Halas,* the petitioner's fees were reduced from $957,099.05 to $535,000 based on several factors. First, the record demonstrated bad faith on the petitioner's part, including the failure to notify beneficiaries of a reorganization of estate stock that affected the estate's rights as was ordered by the probate court, the payment of the petitioner's fees out of estate funds without prior authorization from the executors, and delays in transferring files to a successor attorney upon the petitioner's termination. 512 N.E.2d at 1281 – 1282.

Second, the court reduced the fees based on inefficiencies arising out of having 41 different attorneys involved on the case, which the court found to result "in duplication of effort, over-conferencing, and extra review time of the work done by other individuals." 512 N.E.2d at 1284. For example, the petitioner sent multiple attorneys to court appearances that were routine enough to be handled by one or two attorneys. 512 N.E.2d at 1285.

Third, research that appeared to be unnecessary did not merit compensation. The court held that inexperienced associates had been educated at the expense of the estate. In particular, attorneys may not recover fees for researching "problems which should be within the general knowledge of experienced practitioners, and which [do] not involve complex or novel matters." 512 N.E.2d at 1284.

Fourth, the work done and the time expended were not adequately supported in the attorneys' time records. Narratives for hundreds of hours listing only "work on estate" did not provide enough detail to the court. 512 N.E.2d at 1285. Further, notations of conference time were missing details as to which persons attended, what topics were discussed, and what conclusions were reached. The court held that although records may be substantiated ex post, contemporaneous records are entitled to greater weight. *Id*.

III. RHETORIC ASIDE, WHAT ARE THE COURTS REALLY DOING?

A. [18.11] Emphasis on Hours: Generally

The practice in most localities in Illinois is to determine attorneys' fees based on time records. *See In re Estate of Coleman,* 262 Ill.App.3d 297, 634 N.E.2d 314, 316, 199 Ill.Dec. 475 (2d Dist. 1994) (stating "[t]he amount of time expended by a party requesting a fee is the most important factor in determining reasonable compensation" and reducing fees for services as executor performed by attorney from $80,000 to $15,967.50); *In re Estate of Weber,* 59 Ill.App.3d 274, 375 N.E.2d 569, 571, 16 Ill.Dec. 696 (3d Dist. 1978) (noting time expended as shown by detailed time record is greatest factor in determining attorneys' fees). A fee petition must therefore set forth the number of hours expended and the hourly rate claimed.

B. [18.12] Descriptions in Time Records

The necessity of adequate time records cannot be overemphasized. *See Flynn v. Kucharski,* 59 Ill.2d 61, 319 N.E.2d 1, 4 (1974) ("the time expended in such a case is not to be relegated to a secondary or minor position; it is a highly significant factor in determining the fee," and attorneys' preference for contingent fee over hourly fee "does not excuse their failure to keep adequate records"), *abrogated on other grounds by Brundidge v. Glendale Federal Bank, F.S.B.,* 168 Ill.2d 235, 659 N.E.2d 909, 914, 213 Ill.Dec. 563 (1995).

In examining an attorney's time records, a court will consider the lack of itemized time entries and the inconsistency of (untimed) attorney diary entries with the total hours claimed. *In re Estate of Coleman,* 262 Ill.App.3d 297, 634 N.E.2d 314, 316, 199 Ill.Dec. 475 (2d Dist. 1994). *Cf. In re Estate of Saperstein,* 24 Ill.App.3d 763, 321 N.E.2d 328, 336 – 337 (1st Dist. 1974) (upholding fee award despite absence of time records).

If an attorney fails to keep time records, the court may choose to hear testimony about the work performed and then "approximate the amount of time such tasks should require by using its particular knowledge of probate matters." *In re Estate of Weeks,* 409 Ill.App.3d 1101, 950 N.E.2d 280, 287, 351 Ill.Dec. 124 (4th Dist. 2011) (reducing attorneys' fees from $170,000 to $75,000 based on inference, from work described in testimony, that work should have required no more than 300 hours at hourly rate of $250).

The widely cited case *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 430, 115 Ill.Dec. 899 (1st Dist. 1987), endorses a line-by-line review of an attorney's time records. The court denied fees that it concluded were related to the "review and organization of file documents . . . office conferences and memoranda . . . redrafts, revisions and corrections." 518 N.E.2d at 430 – 431. Furthermore, although the lack of detail in time records did not forfeit fees, the court expressed disapproval of the aggregation of all time on a given day into a single time entry in lieu of the breakdown of each task performed by the attorney and noted that the lack of detail made review difficult. *Id.*

Practitioners have attempted to distinguish the *Kaiser* standards on the grounds that *Kaiser* involved the application of a fee clause in a lease against the party filing the action. In other words, they have argued that a higher level of scrutiny and detail is appropriate when the attorney's incentives run against the payor's interests, but that such a close examination is not necessary when the attorney's and the payor's interests run more in tandem. *See, e.g., Wildman, Harrold, Allen & Dixon v. Gaylord,* 317 Ill.App.3d 590, 740 N.E.2d 501, 508, 251 Ill.Dec. 420 (1st Dist. 2000). *Wildman* noted in dicta, with regard to *Kaiser,*

> **an additional policy consideration in cases involving "fee-shifting" provisions is that the attorney for the successful litigant has no individual right to seek payment from the losing party. Stricter scrutiny by the trial court is warranted in these circumstances because the attorney submitting billing statements for approval by the trial court has no fiduciary relationship with the party ultimately liable for payment of the fees.** *Id.*

However, this argument has been rejected in recent years, and *Kaiser* continues to be cited by the courts with great favor. *See In re Estate of Bitoy,* 395 Ill.App.3d 262, 917 N.E.2d 74, 84 – 85, 334 Ill.Dec. 477 (1st Dist. 2009). The story told by the time records will be more important than the actual categories of work performed. *Oxford Bank & Trust v. Chicago Title Land Trust Co.,* 2012 IL App (2d) 120150-U, ¶¶10 – 18 (rejecting defendant's interpretation of *Kaiser* as holding that all time for review and organization of documents, office conferences and memoranda, and redrafts, revisions, and corrections of drafted documents is per se improper, and instead holding that such time can be allowed if sufficient reasons are established for this work); *McClain v. Chicago Title Insurance Co.,* 2015 IL App (1st) 133971-U, ¶¶23 – 26, 63 (holding that time records were sufficiently detailed to demonstrate reasonable fee, in context of contingency-fee arrangement being used as basis for damage award, when records showed date of work performed, basic description of work performed, hours that were expended, and rate charged and were combined with testimony regarding work performed).

A case decided around the same time as *Kaiser, supra, In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 1285, 111 Ill.Dec. 639 (1st Dist. 1987), held that a reduction in fees for inefficiency was proper in "the absence of sufficiently detailed descriptions in the time records." However, the court did not mention or insist on the high standard of task-by-task time entries within a single day. Rather, the court indicated that details such as "the identification of persons attending, topics discussed, or conclusions reached" would be useful in evaluating conference time. *Id.*

C. Necessity of Benefiting the Estate

1. [18.13] Generally

Attorneys' fees will not be payable out of the estate if the work is not in the interest of or of benefit to the estate. *See In re Estate of Minsky,* 59 Ill.App.3d 974, 376 N.E.2d 647, 651, 17 Ill.Dec. 501 (1st Dist. 1978).

The assessment of the benefit to the estate may be determined by the outcome of litigation. For example, a failed attempt to remove trustees does not benefit the trust, and the petitioner cannot have attorneys' fees reimbursed by the trust estate. *See Laubner v. JP Morgan Chase Bank, N.A.,* 386 Ill.App.3d 457, 898 N.E.2d 744, 754, 325 Ill.Dec. 697 (4th Dist. 2008). *Accord In re Estate of Riordan,* 351 Ill.App.3d 594, 814 N.E.2d 597, 600 – 601, 286 Ill.Dec. 609 (3d Dist. 2004) (finding no benefit to estate and reversing fee award to heirs who unsuccessfully tried to remove executor, when beneficiaries' interests with regard to claim by executor were already protected by appointment of special administrator).

2. [18.14] Representation of Fiduciary Individually vs. Representative

No fees will be allowed for representation of a fiduciary's individual interest. Courts will compare what was accomplished against the time records to make sure that fees charged match the work an attorney puts into a particular estate. For example, in *In re Estate of Dyniewicz,* 271 Ill.App.3d 616, 648 N.E.2d 1076, 1083, 208 Ill.Dec. 154 (1st Dist. 1995), the court refused to allow fees when the attorneys initially maintained that they represented the coguardians

individually but later attempted to backtrack by claiming a benefit to the guardianship estate. *Cf. In re Estate of Stafford,* 2013 IL App (5th) 120545-U, ¶¶25 – 26 (upholding attorneys' fees awarded to executor, even though all claims in second amended complaint at issue were directed against executor in her individual capacity only, such as fraud and conversion, due to value to estate arising from ultimate release of claims).

Further, the representative must provide the services anticipated in the correct capacity. A guardian of the person who provides estate-related guardianship services will not be allowed to have those fees reimbursed. *In re Estate of Goffinet,* 318 Ill.App.3d 152, 742 N.E.2d 874, 252 Ill.Dec. 336 (4th Dist. 2001).

Attorneys representing fiduciaries who are performing poorly, whether that malfeasance is tantamount to negligence or fraud, could have a problem with obtaining fees. *See In re Estate of Devoy,* 231 Ill.App.3d 883, 596 N.E.2d 1339, 1343, 173 Ill.Dec. 460 (5th Dist. 1992) (reversing award of attorneys' fees because attorney did not inform court of breaches of fiduciary duty). Moreover, an attorney may have a duty to take steps toward the removal of a negligent administrator. *Id.*

If a fiduciary defends a losing interpretation of a document, especially if that interpretation benefits the fiduciary's personal interest over that of other beneficiaries, attorneys' fees are at risk. *See Fifth Third Bank, N.A. v. Rosen,* 2011 IL App (1st) 093533, ¶46, 957 N.E.2d 956, 354 Ill.Dec. 362 (reversing fee award to trustee who "incurred attorney fees in defense of her own conduct in distributing the trust assets, not for the management and protection of the trust").

D. [18.15] Hourly Rate

Some courts will limit an attorney to the standard rate in the relevant jurisdiction. *In re Estate of Coleman,* 262 Ill.App.3d 297, 634 N.E.2d 314, 31, 199 Ill.Dec. 475 (2d Dist. 1994) (reducing hourly rate from $200 to $150, even though $200 rate requested was lower than petitioner's normal hourly fee, because $150 was standard rate in jurisdiction, while not reducing hourly fee further for petitioner's inexperience in probate matters). For the practitioner, determining this standard rate is not always feasible because it is often a moving target.

The reasonableness of the hourly rate tends to be determined independently of the value of the services rendered. An extraordinarily efficient attorney may still face a de facto ceiling on his or her hourly rate, even if the average attorney would have incurred more hours at a lower rate to accomplish the same result, thus yielding a higher overall fee. It is difficult to demonstrate that particular services were provided more efficiently than average and that an attorney deserves a premium for that efficiency, while it is relatively easy for objectors to show that an attorney's hourly rate is higher than the community average.

If an attorney's services have provided unique value to the estate, one argument that can be raised to obtain a premium rate is that "[t]he hourly rate should be commensurate with the undertaking and should not be so low as to discourage participation in such cases by highly qualified counsel." *Leader v. Cullerton,* 62 Ill.2d 483, 343 N.E.2d 897, 901 – 902 (1976), *abrogated on other grounds by Brundidge v. Glendale Federal Bank, F.S.B.,* 168 Ill.2d 235, 659

N.E.2d 909, 914, 213 Ill.Dec. 563 (1995). *Leader* held that an hourly rate of $100 was reasonable for work performed from approximately 1970 to 1972. 343 N.E.2d at 902. The premium rate was allowable due to the lawyers' specialized experience in the field, the complexity of the class action tax issues, the sizable recovery obtained, and the extreme risk that the attorneys incurred in agreeing to a contingent fee. 343 N.E.2d at 901 – 902. To provide perspective on the degree of premium allowed in *Leader,* a $100 hourly rate in annual average 1972 dollars would be equivalent to a $557 hourly rate in annual average 2015 dollars, based on the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index for All Urban Consumers (CPI-U) — U.S. City Average, All Items.

The hourly rate may be deemed to include certain costs, such as database fees for online research, photocopying, phone, and delivery charges, unless the engagement letter explicitly lists them as reimbursable costs. Accordingly, a reasonable practice is to itemize in the engagement letter each cost that is not to be included in overhead but rather is to be billed separately. *Guerrant v. Roth,* 334 Ill.App.3d 259, 777 N.E.2d 499, 267 Ill.Dec. 696 (1st Dist. 2002). *See also Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 115 Ill.Dec. 899 (1st Dist. 1987) (describing certain costs that should be included in overhead).

E. [18.16] Size of the Estate

The size of the estate often functions as a baseline for the reasonable level of fees, and, all other factors being equal, it may serve as a ceiling on fees. This concept was demonstrated in the past by the courts' reliance on fee schedules, which are no longer accepted by the courts. *See Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 709, 15 Ill.Dec. 916 (1st Dist. 1978) (approving use of fee schedule based on percentage of estate's gross value as starting point and reference point for appropriate level of fees).

However, courts often still use the fee schedule concept implicitly by using a percentage of the estate as a ceiling. In this regard, attorneys' fees equal to two percent of the gross probate estate value have a superficial appearance of reasonableness, although a court may permit higher percentages based on other factors under consideration. *See, e.g., Brown, supra,* 374 N.E.2d at 708 – 710 (sustaining fees of $33,800 in $1.6 million estate, or approximately two percent); *In re Estate of Enos,* 69 Ill.App.3d 129, 386 N.E.2d 1147, 1149 – 1150, 25 Ill.Dec. 483 (5th Dist. 1979) (reducing requested fee from six percent to two percent when fee petition lacked itemized statement of services and no extraordinary services were required); *In re Estate of Grabow,* 74 Ill.App.3d 336, 392 N.E.2d 980, 984 – 985, 30 Ill.Dec. 215 (3d Dist. 1979) (allowing 3.8-percent attorney fee when results obtained were particularly advantageous to estate).

To obtain substantial attorneys' fees in relation to the size of the estate, attorneys must show the economic value provided to the estate. For example, in *In re Estate of Saperstein,* 24 Ill.App.3d 763, 321 N.E.2d 328, 336 – 337 (1st Dist. 1974), the court upheld an award of attorneys' fees of approximately 13 percent based on the results obtained for the estate. In that case, the attorney had incorporated, managed, and brokered the sale of a basketball team and demonstrated to the court that through the coordinated efforts of the attorney and coexecutors (one of whom was the attorney, who took no separate fee as coexecutor), the value of the estate's primary asset was almost doubled within one year of the date of death. The attorney introduced further evidence that earnings had increased tenfold. 321 N.E.2d at 336.

F. [18.17] Estate Complexity

In deciding on attorneys' fees, the courts also will consider the complexity of the estate. It is essential that the practitioner bring this complexity to the court's attention. For example, in *In re Estate of Marshall,* 167 Ill.App.3d 549, 521 N.E.2d 637, 639 – 640, 118 Ill.Dec. 355 (4th Dist. 1988), the court reduced the attorneys' fees from 2.8 percent to 1.7 percent because the estate was not complex enough to justify the hours expended based on the court's review of the attorneys' time records. Similarly, in *In re Estate of Weber,* 59 Ill.App.3d 274, 375 N.E.2d 569, 572, 16 Ill.Dec. 696 (3d Dist. 1978), the court reversed a fee award approximating nearly 10 percent of the estate when the record did not reveal any complex transactions. *Cf. In re Estate of Hall,* 127 Ill.App.3d 1031, 469 N.E.2d 378, 380 – 381, 82 Ill.Dec. 844 (4th Dist. 1984) (upholding fee of 4.6 percent of gross estate value when bankruptcy of tenant farmer on estate's real property and two years of will construction litigation complicated administrative duties).

G. Work Covered and Not Covered

1. [18.18] Duplication

The view is that to the extent the services rendered are duplicative, either no fees will be allowed or fees will be adjusted to reflect the duplication of effort. *See Leader v. Cullerton,* 62 Ill.2d 483, 343 N.E.2d 897, 901 – 902 (1976) (reducing fee award for duplicative time incurred by three different law firms representing same class of plaintiffs, *e.g.,* multiple appearances at routine hearings), *abrogated on other grounds by Brundidge v. Glendale Federal Bank, F.S.B.,* 168 Ill.2d 235, 659 N.E.2d 909, 913 – 914, 213 Ill.Dec. 563 (1995); *Continental Illinois National Bank & Trust Co. v. Llewellyn,* 86 Ill.App.2d 1, 229 N.E.2d 334, 339 – 340 (1st Dist. 1967) (disallowing fees for attorneys of beneficiary's assignee when assigning beneficiary also had counsel in will construction litigation and interests were aligned, but allowing such fees on matters in which they were not duplicative because assigning beneficiary's interests were adverse to assignee's interests); *Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 708, 15 Ill.Dec. 916 (1st Dist. 1978) (stating "that a charge may not be made for duplicated work" as between executor and its attorney).

In *In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 1284, 111 Ill.Dec. 639 (1st Dist. 1987), the court reduced fees for "over-conferencing" caused by having 41 attorneys involved in the estate and noted that conference time should be accompanied by entries showing the persons attending, the topics discussed, and the conclusions reached. The court also reduced fees for unnecessary research time. 512 N.E.2d at 1284 – 1285 (contrasting research time on matters of general knowledge to experienced attorneys, which cannot be billed, against research about complex or novel matters). Similarly, in *Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 115 Ill.Dec. 899 (1st Dist. 1987), the court reduced attorneys' fees by over 51 percent, in part because the time records showed that 70 of the 330 total hours billed were for interoffice conferences and memoranda. 518 N.E.2d at 426 – 427.

Although these cases preclude fees for duplication, they do not prohibit all fees for attorney conferences or research. To prevail on this point, the practitioner will need to distinguish his or her research and interoffice conference time from abusive situations in cases like *Halas* and

Kaiser. To a degree, duplication is going to occur if use of professional staff within the lawyer's office is properly handled. If a senior attorney does legal research, it may be too expensive for the client. However, if the lawyer employs a younger attorney to do it, the research can be done economically, but the younger attorney will require supervision and guidance. Overlap may occur, but the real result is savings to the client. A review of the economics often will demonstrate that overlap is efficient and value-added to the client. The petition to the court and, more importantly, the specific time entries that form the basis of the invoices must emphasize and demonstrate why interoffice conferences were necessary and how they saved fees for the estate.

2. [18.19] Multiple Capacities

Typically, an attorney is entitled to compensation for both legal and nonlegal services performed. *In re Estate of Hackett,* 51 Ill.App.3d 474, 366 N.E.2d 1103, 1106, 9 Ill.Dec. 592 (4th Dist. 1977) (permitting attorney-representative to take executor's fee on top of his attorney's fee already awarded). *See also In re Estate of Saperstein,* 24 Ill.App.3d 763, 321 N.E.2d 328, 337 (1st Dist. 1974) (considering value of attorney's nonlegal services in permitting high fee award); RESTATEMENT (THIRD) OF TRUSTS §38, cmt. d (2003) (noting that trustee who performs legal services for trust may receive compensation for those services). The Uniform Trust Code "does not take a specific position on whether dual fees may be charged when a trustee hires its own law firm to represent the trust. The trend is to authorize dual compensation as long as the overall fees are reasonable." Uniform Trust Code §708, cmt. (2010). "The best practice [is] to include that [dual] compensation in a single fee." *Hackett, supra,* 366 N.E.2d at 1106.

However, failing to delineate the capacity in which time was spent, when the attorney wears two hats (fiduciary and attorney for fiduciary), can make it difficult for the court to determine the reasonable compensation of either. Nonlegal work will not necessarily be awarded the same hourly rate as legal work.

3. [18.20] Fee Disputes

Courts will not usually award fees for time spent objecting to the fee petitions of other attorneys. *See In re Estate of Bitoy,* 395 Ill.App.3d 262, 917 N.E.2d 74, 89, 334 Ill.Dec. 477 (1st Dist. 2009). Even though this work arguably benefits the estate by saving fees, the court already has an obligation to review the reasonableness of all attorneys' fees and views the objecting attorney's work as superfluous. *Id.*

H. [18.21] Who Performs the Work

Fees are not limited to legal representatives and their counsel. *In re Estate of Freund,* 63 Ill.App.3d 1, 379 N.E.2d 935, 936 – 937, 20 Ill.Dec. 102 (2d Dist. 1978) (upholding payment of legal fees to attorneys for heir when they wound up matters that enabled estate to be closed). *Cf. Continental Illinois National Bank & Trust Company of Chicago v. Bailey,* 104 Ill.App.3d 1131, 433 N.E.2d 1098, 60 Ill.Dec. 860 (1st Dist. 1982) (disallowing fees for counsel of beneficiaries when provisions in dispute were unambiguous, and beneficiaries forced trustee to file petition for instructions).

However, if a petitioner other than the representative brings an action that involves the estate or trust but seeks only personal benefits, that party is not entitled to fees. *Boldenweck v. City Nat. Bank & Trust Co. of Chicago,* 343 Ill.App. 569, 99 N.E.2d 692, 702 (1st Dist. 1951) (holding that lack of ambiguity in document reduces construction suit to standard adversarial proceeding, in which losing party may not recover fees out of trust funds; *i.e.,* petitioner represents personal interests rather than trust's interests when document is unambiguous). *See also Laubner v. JP Morgan Chase Bank, N.A.,* 386 Ill.App.3d 457, 898 N.E.2d 744, 754, 325 Ill.Dec. 697 (4th Dist. 2008).

I. [18.22] Appellate Review

The general rule is that "[t]he trial court has broad discretion to determine the 'reasonable compensation' to be allowed an attorney." *In re Estate of Shull,* 295 Ill.App.3d 687, 693 N.E.2d 489, 492, 230 Ill.Dec. 360 (4th Dist. 1998). *See also In re Estate of Thorp,* 282 Ill.App.3d 612, 669 N.E.2d 359, 364, 218 Ill.Dec. 416 (4th Dist. 1996) (noting trial court's broad discretion is based on its possession of requisite skill and knowledge to determine fair and reasonable compensation). *Cf. Wildman, Harrold, Allen & Dixon v. Gaylord,* 317 Ill.App.3d 590, 740 N.E.2d 501, 506, 251 Ill.Dec. 420 (1st Dist. 2000), noting in dicta that in fee petition cases, "the trial court has broad discretionary powers in awarding the attorney fees sought and its decision will not be reversed unless the court has abused its discretion."

Appellate courts are not likely to overturn the lower court's determination on fees. *See Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 707, 15 Ill.Dec. 916 (1st Dist. 1978) (noting standard on appeal is manifest or palpable error in trial court's exercise of its discretion); *In re Estate of Dudek,* 87 Ill.App.3d 528, 409 N.E.2d 418, 420, 42 Ill.Dec. 803 (3d Dist. 1980) (upholding reduction of fees from $13,500 to $8,500 based on finding "that the amount of time expended was not justified under the circumstances," despite lower court's contemporaneous findings that attorneys were skillful and acted in good faith and that petitioners actually expended all hours recorded in fee petition).

Although seeking appellate review of a lower court's seemingly unreasonable fee reduction may appear desirable, it likely will not be productive because of the deferential standard applied and noted in this section.

IV. [18.23] FEES IN DISPUTED CASES

Contested proceedings can take a variety of forms, such as the construction of a will or trust, the determination of the validity of portions or all of a will or trust, formal proof of a will under §6-21 of the Probate Act of 1975, 755 ILCS 5/6-21, the determination of who should act as administrator in intestacy situations, and citation proceedings.

A. [18.24] Construction Cases

In *Orme v. Northern Trust Co.,* 25 Ill.2d 151, 183 N.E.2d 505, 513 (1962), the Illinois Supreme Court set forth the general rule for payment of attorneys' fees in contested estates as follows:

> **In will construction cases the costs of litigation are borne by the estate on the theory that the testator expressed his intention so ambiguously as to necessitate construction of the instrument in order to resolve adverse claims to the property. . . . Legal fees are allowed to a party even though the construction adopted is adverse to his claim. . . . However, such fees should not be authorized where such construction is unnecessary. [**Citations omitted.**]**

The determination of whether there is an ambiguity is based in part on "whether or not there is an honest difference of opinion." *Ingalsbe v. Gough,* 2 Ill.App.3d 681, 277 N.E.2d 149, 150 (4th Dist. 1971). When the representative "did not feel that he could safely proceed with the administration without a judicial construction of the will," and the heir presented an opposing interpretation in good faith, the heir's attorney could recover fees from the estate even though the heir's position did not prevail. *Id. Accord Northern Trust Co. v. Tarre,* 83 Ill.App.3d 684, 404 N.E.2d 882, 889, 39 Ill.Dec. 291 (1st Dist. 1980) (upholding award of all parties' attorneys' fees from estate when litigation was result of honest differences of opinion), *rev'd on other grounds,* 86 Ill.2d 441 (1981); *Strauss v. Strauss,* 293 Ill.App. 364, 12 N.E.2d 701, 703 (3d Dist. 1938) (accepting "well-settled rule of law" that "where the will of a deceased testator must be judicially construed, reasonable solicitors' fees of necessary parties may be allowed by the court").

1. [18.25] Winning

Being successful typically allows the attorney to recover fees. *See, e.g., In re Estate of Roberts,* 99 Ill.App.3d 993, 426 N.E.2d 269, 272 – 273, 55 Ill.Dec. 294 (5th Dist. 1981) (awarding attorneys' fees to counsel for guardian of estate when guardian prevailed in suit to require trustee to pay trust income to guardian following settlor-beneficiary's incompetency).

"To the extent the trustee is successful in defending against charges of misconduct, the trustee is normally entitled to indemnification for reasonable attorneys' fees and other costs." RESTATEMENT (THIRD) OF TRUSTS §88, cmt. d (2007).

2. [18.26] Losing

Provided the litigation emanated from the standard noted in §18.24 above — an honest attempt to resolve an ambiguity — all parties who have an interest and a reasonable involvement in the case are entitled to attorneys' fees.

The court considered the issue of whether a party has an interest in *Hinckley v. Beardsley,* 28 Ill.App.2d 379, 171 N.E.2d 401 (2d Dist. 1961), which involved the circuit court's allowance of attorneys' fees to unsuccessful litigants. The unsuccessful litigants were charities seeking distribution of estate funds under the cy pres doctrine. One of the charities was a residuary legatee, while the other was a voluntary intervenor. The lower court allowed the petition to intervene but distributed the funds to a third charity; nevertheless, it awarded attorneys' fees to the two unsuccessful charities. 171 N.E.2d at 402 – 403. The appellate court upheld the fee award to the residuary legatee but reversed the fee award to the intervenor, reasoning that the residuary legatee had no choice about becoming involved in the construction suit and had a sufficient

interest in the funds to justify its claim. By contrast, the court found no authority "which authorizes the payment of attorney fees and expenses to an unsuccessful voluntary intervenor." 171 N.E.2d at 404.

When a suit is groundless, legal fees and trustee expenses in defense of the suit "are to be paid out of the share of the complainant in the trust estate, and not charged against the estate generally nor a general fund by which cobeneficiaries would have to contribute." *Patterson v. Northern Trust Co.,* 286 Ill. 564, 122 N.E. 55, 56 (1919). *Accord Webbe v. First National Bank & Trust Company of Barrington,* 139 Ill.App.3d 806, 487 N.E.2d 711, 715, 93 Ill.Dec 886 (2d Dist. 1985) (holding that legal fees and costs incurred by trustee and other beneficiaries in defending suit were fully chargeable to unsuccessful plaintiff-beneficiary's share of trust but, in absence of statutory authority, not to such person individually); *Stein v. Scott,* 252 Ill.App.3d 611, 625 N.E.2d 713, 718, 192 Ill.Dec. 558 (1st Dist. 1993).

Attorneys' fees can be awarded to both sides in a construction suit if the litigation is the result of an honest difference of opinion between the parties that results in a deadlock. *Northern Trust Co. v. Continental Illinois National Bank & Trust Company of Chicago,* 43 Ill.App.3d 169, 356 N.E.2d 1049, 1072, 1 Ill.Dec. 767 (1st Dist. 1976) (holding individual cotrustees were entitled to litigation expenses and fees because of irreconcilable conflict between corporate and individual trustees), *rev'd in part on other grounds sub nom. Stuart v. Continental Illinois National Bank & Trust Company of Chicago,* 68 Ill.2d 502 (1977). *See also In re Estate of Hall,* 127 Ill.App.3d 1031, 469 N.E.2d 378, 381, 82 Ill.Dec. 844 (4th Dist. 1984) (upholding attorneys' fees for remainder beneficiary's separate counsel when construction of will was primary issue underlying theory of litigation).

3. [18.27] Ambiguity

If there is little or no dispute, ambiguity, or question, no fees will be granted to the party creating the disagreement, whether it was the petitioner or respondent. *See McCabe v. Hebner,* 410 Ill. 557, 102 N.E.2d 794, 799 (1951); *Continental Illinois National Bank & Trust Company of Chicago v. Bailey,* 104 Ill.App.3d 1131, 433 N.E.2d 1098, 1104, 60 Ill.Dec. 860 (1st Dist. 1982) (disallowing fees to counsel for beneficiaries-respondents, even though trustee was party bringing construction suit, when trustee was forced to bring suit by reason of beneficiaries' claims against trust funds in case in which trust was unambiguous); *Fifth Third Bank, N.A. v. Rosen,* 2011 IL App (1st) 093533, ¶¶32 – 40, 957 N.E.2d 956, 354 Ill.Dec. 362 (reversing fee award to trustee, even though trustee was responding party, when trustee's actions were in violation of unambiguous trust instrument).

Courts will pay attention to whether the ambiguity is genuine or fallacious. Veiled attempts to generate an ambiguity for the sole purpose of instituting a construction suit will result in nonpayment of attorneys' fees to the unsuccessful litigant. For example, *Ingalsbe v. Gough,* 2 Ill.App.3d 681, 277 N.E.2d 149 (4th Dist. 1971), involved an heir of the decedent asserting the lapse of bequests under the will to take an interest by intestacy. The court noted that the will was not ambiguous on its face but found that a latent ambiguity arose from the prior deaths of five of the nine residuary legatees with no contingent gift provision. The court then applied an antilapse statute to the disposition rather than allowing partial intestacy. 277 N.E.2d at 149 – 150.

The court applied a two-part test: (a) whether an ambiguity existed in the document; and (b) whether there was an honest difference of opinion between the parties as to the application of the statutes to this ambiguity. In awarding fees to the heir's attorney, the court seemed to be persuaded on the sincerity prong by the fact that the heir became a party to the executor's construction suit involuntarily. 277 N.E.2d at 149.

4. [18.28] Neutrality

When the fiduciaries pick sides, they may not be entitled to have their attorneys' fees reimbursed from the estate. A representative may properly seek construction of an ambiguous provision, but if it supports an interpretation that favors one group of beneficiaries over another, it breaches its duty of impartiality. *Northern Trust Co. v. Heuer,* 202 Ill.App.3d 1066, 560 N.E.2d 961, 965, 148 Ill.Dec. 364 (1st Dist. 1990). In such a case, fees will be denied if they are "in excess of those incurred in preparing and filing the complaint for construction . . . and in gathering and presenting the information necessary to interpret the [document]." *Id.*

5. [18.29] Appeals

Courts will not allow fees for appeals of construction cases to be borne by the estate as to the unsuccessful appellant. *See Rosenthal v. First National Bank of Chicago,* 127 Ill.App.2d 371, 262 N.E.2d 262, 264 – 265 (1st Dist. 1970) (reversing fee award to counsel for party prosecuting unsuccessful appeals from both trial court and appellate court rulings as to hours incurred in preparation of appeals). *Cf. Estate of Knight v. Knight,* 202 Ill.App.3d 258, 559 N.E.2d 891, 894, 147 Ill.Dec. 551 (1st Dist. 1990) (denying attorneys' fees for unsuccessful appeal from trial court's finding that will was unambiguous and holding that "[e]ven where construction of a will is necessary . . . the losing party who decides to appeal litigates at his or her own risk and is not entitled to attorney fees and costs"). *See also NC Illinois Trust Co. v. Madigan,* 351 Ill.App.3d 311, 812 N.E.2d 1038, 1042, 286 Ill.Dec. 23 (4th Dist. 2004) (trustee bringing "reasonable but unsuccessful appeal" is not allowed reimbursement for attorneys' fees).

The general rule as to appeals is implied by the Illinois Supreme Court's holding in *Glaser v. Chicago Title & Trust Co.,* 401 Ill. 387, 82 N.E.2d 446, 448 – 449 (1948), as follows:

> **When the will has been construed by a court having jurisdiction of the subject matter and the parties, its decree affords authority to all interested persons for the administration thereunder according to its terms unless it be modified or set aside by a court of superior jurisdiction. The construction placed upon a will by the lower court may not be satisfactory to some of the parties and they may be able to have it changed on appeal, but, should they feel disposed to litigate beyond the court of original jurisdiction, this they must do at their own risk and costs.**

However, a successful appellant may generally recover fees. *See Landmark Trust Co. v. Aitken,* 224 Ill.App.3d 843, 587 N.E.2d 1076, 1086, 167 Ill.Dec. 461 (5th Dist. 1992). Likewise, if the fiduciary is obligated to defend an appeal, fees may be awarded even if the challenger is successful on appeal. *See id.*

B. [18.30] Contested Guardianships

In the case of guardianships, the well-accepted general rule is that "an attorney for a person seeking a conservatorship is entitled to attorney fees whether the petition is successful or not." *In re Estate of Johnson,* 219 Ill.App.3d 962, 579 N.E.2d 1206, 1210, 162 Ill.Dec. 392 (5th Dist. 1991). This allowance is crucial, given the number of contested guardianships and the importance of giving the court the opportunity to hear evidence from opposing parties.

A typical fact pattern is provided by *In re Estate of Shull,* 295 Ill.App.3d 687, 693 N.E.2d 489, 230 Ill.Dec. 360 (4th Dist. 1998). There, the ward's grandnephew hired an attorney to file a petition for temporary guardianship and plenary guardianship of the ward's person and estate. When the grandnephew discovered that the ward's grandson also desired to serve as guardian of the person, the attorney negotiated a stipulation between the parties specifying the terms of visitation, medical treatments, and a selection of a corporate estate guardian. Under the stipulation, the grandnephew would not serve as guardian of the person or estate. 693 N.E.2d at 490 – 491. The court held:

> **As a result of [**the grandnephew**]'s petitioning for temporary and plenary guardianship in this case, [**the ward**]'s personal welfare and her estate were ultimately protected and benefited by the appointment of [**the grandson**] as the guardian of her person and Magna Bank as the guardian of her estate. In addition, the fact that [**the grandnephew**] and [**the grandson**] negotiated and agreed to a stipulation of guardianship minimized both the time and expense involved in the guardianship proceeding.** 693 N.E.2d at 492.

Accordingly, the court reversed and remanded the lower court's allowance of only $500 on the $3,365.25 fee petition of the grandnephew's attorney. 693 N.E.2d at 493 – 494.

In *In re Estate of Byrd,* 227 Ill.App.3d 632, 592 N.E.2d 259, 169 Ill.Dec. 772 (1st Dist. 1992), two parties petitioned to be appointed as guardian of the estate for a person with a disability, and the attorney for the unsuccessful petitioner was awarded fees. The guardian appealed on the grounds that the attorney's services did not benefit the estate. 592 N.E.2d at 261 – 262. The court upheld the lower court's determination that the mere filing of the petition for guardianship by the unsuccessful litigant benefited the estate. 592 N.E.2d at 264. The court was willing to adhere to the benefit to the state standard but interpreted it literally. The benefit to the estate included the freezing of the alleged person with a disability's assets during the pendency of the litigation and, according to the trial court (whose finding was upheld in dicta), the presentation of evidence that permitted the trial court to evaluate more fully who would best serve as guardian. 592 N.E.2d at 264 – 265.

C. [18.31] Fees for Different Attorneys Representing Different Fiduciaries

Multiple representatives may or may not recover fees if they retain separate counsel. The general rule appears to be "that co-executors and co-trustees must act as an entity in matters pertaining to the administration of the estate; any other rule would lead to confusion and chaos and create unnecessary charges against estate funds." *In re Estate of Greenberg,* 15 Ill.App.2d

414, 146 N.E.2d 404, 408 (1st Dist. 1957). The *Greenberg* court further noted that the fees of lawyers retained by individual coexecutors should not be awarded out of the estate unless their employment was necessary to protect the estate. 146 N.E.2d at 409.

Such fees may be awarded, however, if the employment of separate counsel is necessary to the administration of the estate. *See Northern Trust Co. v. Continental Illinois National Bank & Trust Company of Chicago,* 43 Ill.App.3d 169, 356 N.E.2d 1049, 1072, 1 Ill.Dec. 767 (1st Dist. 1976), *rev'd in part on other grounds sub nom. Stuart v. Continental Illinois National Bank & Trust Company of Chicago,* 68 Ill.2d 502 (1977). In *Northern Trust,* the trust required a majority of the trustees to make a determination on charitable distributions by a date certain. 356 N.E.2d at 1054. The two individual trustees were in a deadlock against the corporate trustee, and the trust instrument, as interpreted by the court, required the corporate trustee to be one of the members of the majority if fewer than all trustees consented to a decision. 356 N.E.2d at 1065. The court held that "irreconcilable conflict between the corporate and individual trustees necessitated a final judicial resolution," and that this honest difference of opinion justified the retention of separate counsel at the expense of the trust. 356 N.E.2d at 1071.

D. [18.32] Fees for Defending Challenges to Documents

The general rule is that a fiduciary's defense of a will or trust document, absent undue influence by the fiduciary in the first place to procure the document, entitles the fiduciary to recover attorneys' fees from the estate. "It is the duty of the representative to defend a proceeding to contest the validity of the will." 755 ILCS 5/8-1(e). Moreover, because "[t]he employment of counsel is considered indispensable to the reasonable discharge of [a fiduciary's] duty . . . and the court may authorize attorney's fees to be paid from the assets of the estate." [Citation omitted.] *In re Estate of Lipchik,* 27 Ill.App.3d 331, 326 N.E.2d 464, 468 (1st Dist. 1975). *See also In re Estate of Breault,* 63 Ill.App.2d 246, 211 N.E.2d 424, 430 – 431 (1st Dist. 1965) (noting that in absence of executor's bad faith, attorneys' fees for defense of will are recoverable regardless of outcome).

However, the executor may be excused from defending a document when he or "she has reasonable grounds to believe the will is invalid." *Lipchik, supra,* 326 N.E.2d at 468. *Accord In re Estate of Minsky,* 59 Ill.App.3d 974, 376 N.E.2d 647, 650, 17 Ill.Dec. 501 (1st Dist. 1978).

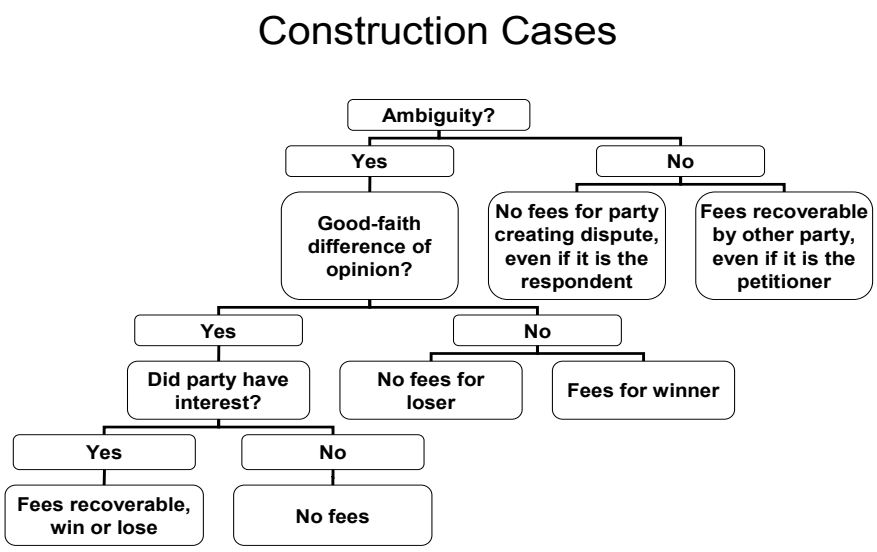
E. [18.33] Appointment of Representative

In *Estate of Roselli,* 70 Ill.App.3d 116, 388 N.E.2d 87, 89, 26 Ill.Dec. 463 (1st Dist. 1979), two nephews having equal preference petitioned to be appointed as administrator of a decedent's estate, and the court appointed one nephew based solely on the preferences of a group of coheirs of the estate. The court then awarded attorneys' fees to the unsuccessful petitioner under the provision codified at 755 ILCS 5/27-2, despite his non-appointment as administrator. The court applied a broad definition of "representative" as "simply one who represents," rather than limiting "representative" to those persons legally appointed to act for the estate, per the definition used in §1-2.15 of the Probate Act of 1975. 388 N.E.2d at 92.

Roselli goes one step further in expanding the scope of recoverable fees. It has been the practice of many probate courts not even to consider fees for attorney hours incurred prior to the attorney's first appearance on behalf of a party, whether the appearance be in person or in writing. In effect, the services required to prepare the petition for appointment and obtain information for the supporting filings are treated as voluntary. *Roselli,* however, upheld a fee award for time incurred by the attorney from the first contact by the unsuccessful litigant on August 27, 1976, even though the first round of fees related to advice on a guardianship proceeding that was not initiated prior to the decedent's death. 388 N.E.2d at 89 – 90. The court specifically held that arrangements to petition for the appointment of a guardian are services that benefit the estate, even if the petition, *i.e.,* the official court appearance, is never filed. 388 N.E.2d at 93.

F. [18.34] Decision Tree

The following decision tree may be helpful in determining the right to recover fees in construction cases:



V. [18.35] IS PREMIUM BILLING AVAILABLE TO OFFSET RISK OF FEE REDUCTION?

At one time, Illinois had legislatively set fees in probate matters. Ill.Rev.Stat. (1937), c. 3, ¶135 (providing cap on representatives' fees of six percent of personal estate and three percent of proceeds from real estate, plus costs). Many states still use this system as to both probate and trust matters (especially in states subjecting trusts to court review, similar to supervised administration in Illinois). From a competitive standpoint, percentages are probably permissible and likely result in a more thorough product.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L.Ed.2d 572, 95 S.Ct. 2004, 2008 – 2009 (1975) (holding that publication of fee schedules constituted price-fixing in violation of Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890), when ethics opinions exhorted practitioners not to charge fees lower than scheduled rates and when practitioners' behavior resulted in price floor in area), together with the Illinois Supreme Court decisions in *Flynn v. Kucharski,* 59 Ill.2d 61, 319 N.E.2d 1, 4 (1974) (reducing fee award of $750,000 to $560,000 based on time actually expended by attorneys), *Leader v. Cullerton,* 62 Ill.2d 483, 343 N.E.2d 897, 899 – 902 (1976) (applying lodestar method to calculate fee award based on starting point of time expended multiplied by reasonable hourly rate with adjustments for benefits obtained and contingent nature of undertaking, rather than based on percentage of recovery), *abrogated on other grounds by Brundidge v. Glendale Federal Bank, F.S.B.,* 168 Ill.2d 235, 659 N.E.2d 909, 213 Ill.Dec. 563 (1995), and *Fiorito v. Jones,* 72 Ill.2d 73, 377 N.E.2d 1019, 1025 – 1027, 18 Ill.Dec. 383 (1978) (applying lodestar method), have led to much confusion in the probate area. *Cf. Brundidge, supra,* 659 N.E.2d at 914 (abrogating *Flynn, Leader,* and *Fiorito* in holding that trial court has discretion to apply either lodestar method or percentage of recovery method in determining appropriate award of attorneys' fees).

Some courts will interpret this precedent as a blanket prohibition on fee schedules. *See, e.g., In re Estate of Venturelli,* 54 Ill.App.3d 997, 370 N.E.2d 290, 295, 12 Ill.Dec. 667 (3d Dist. 1977) (stating that U.S. Supreme Court mandated discontinuance of bar association fee schedules). A closer examination of the facts of each case should provide the practitioner avenues for distinguishing the precedent. Moreover, provided that an executor or attorney does not rely solely on any such schedule in determination of fees, it is acceptable to use a fee schedule as a starting point. *See Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 709, 15 Ill.Dec. 916 (1st Dist. 1978). *Cf. In re Estate of Weeks,* 409 Ill.App.3d 1101, 950 N.E.2d 280, 284 – 285, 351 Ill.Dec. 124 (4th Dist. 2011) (upholding trial court's rejection, in reliance on *Goldfarb, supra,* of expert testimony that local bar's fee schedule made attorney's flat three-percent charge reasonable).

The risk of fee reduction due to the court's disallowance of particular time entries or its reduction of the petitioner's hourly rate makes it tempting to build a risk premium into the invoice from a business standpoint. However, this argument may fail in the fee petition. *See, e.g., Ruiz v. City of Chicago,* 366 Ill.App.3d 947, 852 N.E.2d 424, 432 – 433, 304 Ill.Dec. 174 (1st Dist. 2006) (holding that premium fees beyond statutory schedule are not allowable under statutory exception for "extraordinary services" in medical malpractice actions, in part because attorneys are expected to understand inherent risks in taking on medical malpractice cases and to be "aware of insurance policy limits and the risk of being unable to attain compensation beyond those limits").

VI. [18.36] RECOVERY FROM NONPROBATE ASSETS

Often, the attorney is called on to render services with reference to assets not included in the probate estate, such as assets owned partly by the decedent and partly by another in joint tenancy or assets deemed owned by the decedent in a revocable trust or under a power of appointment.

When services are rendered with reference to assets not included in the probate estate, the attorney should present charges for his or her services to the persons receiving the benefit of those nonprobate assets, rather than to the estate. *See In re Estate of Breault,* 63 Ill.App.2d 246, 211 N.E.2d 424, 436 (1st Dist. 1965) (holding that "fees incurred on behalf of the probate estate can never be assessed to the non-probate assets if there is no benefit to such assets, and where the services are of benefit to both the probate and non-probate assets, the fees would have to be apportioned").

Note, however, that in *Breault,* the court allowed the attorneys' fees incurred by the executor to be charged against the nonprobate property because the decedent exercised a power of appointment over that nonprobate property. 211 N.E.2d at 428, 430, 435. The court held that the executor was under a duty to perform certain acts that benefited the nonprobate property and accordingly allowed the attorneys' fees to be charged against trust property that was not part of the probate estate. 211 N.E.2d at 433.

VII. [18.37] SAMPLE FEE PETITION (PERSON WITH A DISABILITY)

IN THE CIRCUIT COURT OF [county of filing**] COUNTY, ILLINOIS**

Estate of	**)**	**Case No. _____**
[name of person with a disability**],**	**)**	
A Disabled Person	**)**	

PETITION FOR ATTORNEYS' FEES

NOW COMES [name of petitioner**] (Petitioner), attorney for [**client's name**], as Guardian of the Estate of [**name of person with a disability**], a Person with a Disability (Estate), and hereby submits its Petition for Attorneys' Fees in the amount of $[**amount of attorneys' fees**] for services rendered to the Estate from [**date services began**], through [**date services ended**].**

In support of this Petition, Petitioner has described its services in the following paragraphs and in greater detail in Exhibit A, attached hereto.

1. Petitioner appeared before this Court on [number of appearances**] dates, on motions and matters relating to the administration of this Estate, including hearings on [**dates of hearings**].**

2. In conjunction with these hearings, Petitioner expended time in preparing motions and proposed orders and in preparing and sending all notices required by law. The motions included [names of motions prepared**].**

3. Petitioner further expended time in responding to telephone inquiries and written correspondence from the Guardian of the Estate, the Guardian of the Person, the Guardian ad Litem, and the Court-appointed social workers.

4. In performing the legal services described in Exhibit A, attached hereto, the attorneys at [name of petitioner's law firm**] have recorded [**number of billable hours**] hours of time at a rate of $[**rate per billable hour**] per hour.**

5. Petitioner expended $[amount of costs**] in Court fees to file the [**name of current account filed**].**

6. All services rendered by Petitioner were reasonable and necessary for the proper administration of this guardianship estate. Accordingly, Petitioner respectfully submits that it is entitled to payment of the fees requested herein.

WHEREFORE, Petitioner, [name of petitioner**], prays that an Order be entered authorizing the Guardian of the Estate to pay Petitioner's attorneys' fees and costs in the amount of $[**amount of attorneys' fees and costs**], consisting of $[**amount of attorneys' fees**] in fees and $[**amount of costs**] in costs, for services rendered to the Estate from [**date services began**], through [**date services ended**].**

Respectfully submitted,

_____

Dated: [date signed**]** **By: _____**

[attorney info**]**

Index

References in this index are to section number.