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9 Heirship, Adoption, and Paternity

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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.