

**GUARDIANSHIP SOURCE BOOK**  
**An Everyday Tool for Representing**  
**Clients in Illinois Contested Guardianship Proceedings**

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## **Preface**

Some time in early 2011, Kane County Public Guardian Diana Law asked me to be a speaker at a Kane County Bar Association Continuing Legal Education Seminar entitled, “Guardian Ad Litem for Alleged Disabled Person”. This presentation was given in conjunction with Judge Thomas Mueller and Judge James Murphy, who presided over these cases in our Kane County Court.

I cobbled together a pamphlet which was presented on April 14, 2011, called “Representing Individuals in Contested Guardianships”. I have tried to update that presentation and have reprised it here. It is quite imperfect.

It may be an everyday device that can be used by lawyers who appear in guardianship proceedings. It is not exhaustive, but provides a condensed version of many rules applicable to guardian-ship proceedings for disabled adults. It has been based on my experience in trying these types of cases. Maybe it will help you be a better advocate.

Patrick M. Kinnally  
January 2014

## **INTRODUCTION**

Using the statute, Guardians for Disabled Adults, 755 ILCS 5/11a-1, *et seq.*), as a template, I have tried to assemble a guide for lawyers and our judges in representing individuals in contested cases. Enclosed you will find jury instructions, the Diminished Capacity Rule of Professional Conduct, and caselaw, as well as ideas that might prove helpful to you in these types of proceedings. Put it in your briefcase or computer. Hopefully it will be a tool you can use.

## **DIMINISHED CAPACITY RULE**

Representing allegedly disabled adults requires special considerations in guardianship proceedings. This is based upon a variety of factors, but the most important one is the fact that an individual's liberty interest is at stake. Although an individual's property interest may also be at risk, it is the former which is paramount. When a plenary guardian of the person is appointed for a disabled adult, that person's freedom is lost and now is under the control of a government actor, namely the circuit court. *In re Mark W.*, 320 Ill.Dec. 798 (Ill. S.Ct. 2008)

When a client is suffering from a diminished mental capacity, the customary attorney-client relationship may not occur. This is so because one without the ability to appreciate fully the nature of his or her condition and consequently, not be able to make legally-binding decisions. It is not unusual for an elderly person to be able to make day-to-day decisions about his or her own person or affairs, but not be able to make decisions concerning major transactions. A rule was issued by the Supreme Court effective January 2010 which relates to representing a person with diminished capacity. (Ill. R. Prof. Cond 1.14). It states:

### **RULE 1.14: CLIENT WITH DIMINISHED CAPACITY**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

It is important in this regard to determine, and know at all times, who you represent. Do you represent the guardian? The ward? Also, you must analyze and be mindful of the ward's family members who wish to participate in the affairs of the allegedly disabled person. Determine their credibility, sincerity and motivations; not just once, but throughout the representation of your client. At the same time, you have an on-going responsibility to

determine and assess the competency of your own client. This can change during the course of representation.

Clearly, under Rule 1.14, a lawyer not only has the ability but the duty to take protective action which is in the client's best interest. The committee comments state:

#### Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

***Practice Pointer:* The Health Surrogate Act (755 ILCS 40/1) is a statute which many other States envy. It acknowledges every person has an inalienable right to make decisions about medical treatment which includes a right to eliminate life sustaining treatment. It includes physicians. So, take a look at the Act. The decision may be made by a court-appointed guardian (755 ILCS 40/20(a)(2)). The statute is wide-ranging. It seems that surrogate decision makers can be included in a Power of Attorney, a will or a trust. Talk to your clients about this law. It is a good thing.**

Also, you, as the lawyer for your client, "\*\*\*should consider whether appointment of a guardian ad litem, conservator, or guardian is necessary to protect the client's interest\*\*\*". Your job in this regard is to balance the protection of your client with the *least restrictive option* that might implicate the client's liberty and property interests. In this regard, you must remember that the issue of your client's condition is a predominant interest. This is because disclosure of that condition can lead to involuntary commitment. Disclosure of such information should only occur where to do so is in the client's best interest.

***Practice Pointer:* In the area of diminished capacity, a confluence exists between psychology and advocacy. You are not less of an advocate when you seek the input of a psychologist or medical professional. Probably, you are more of one.**

***Practice Pointer:* Illinois, like many other states, has promulgated statutes that deem Adult Protective Services to an administrative regimen through the office of Inspector General at the Department of Human Services (20 ILCS 2435), as well as the Elder Abuse and Neglect Act (320 ILCS 20). The Illinois Department of Aging, with a cadre of 41 local provider agencies, conducts investigations concerning elder neglect and financial exploitation. Whether the State of Illinois proves effective in this area remains an open**

**question.**

## **APPLICABLE RULES IN GUARDIANSHIP PROCEEDINGS**

755 ILCS 5/11A-22. TRADE AND CONTRACTS WITH A DISABLED PERSON.

§11a-22. Trade and contracts with a disabled person.

(a) Anyone who by trading with, bartering, gaming or any other device, wrongfully possesses himself of any property of a person known to be a disabled person commits a Class A misdemeanor.

(b) Every note, bill, bond or other contract by any person for whom a plenary guardian has been appointed or who is adjudged to be unable to so contract is void as against that person and his estate, but a person making a contract with the person so adjudged is bound thereby.

***Practice Pointer:* The rule cited above is straightforward. It says three things. First, if a plenary guardian has been appointed for a person, then any contract entered into by the person is void. Second, if the person has been adjudged to be unable to contract, then any agreement s/he entered into is also void. Lastly, the person who makes a contract with one who has been adjudicated incompetent still is bound by the agreement made.**

Take a look at *Frieders v. Dayton*, 19 Ill.Dec. 316 (2<sup>nd</sup> Dist. 1978). The issue in this case was whether a contract purchaser could specifically enforce a contract for the sale of real estate from an 85-year-old woman who had a stroke, suffered lapses of memory, and experienced periods of confusion. The trial court held a competency hearing and submitted the question to a jury for an advisory verdict. The court found her competent. The Appellate Court affirmed the decision, finding Mrs. Dayton to be competent. This was so, according to the Appellate Court, because Illinois has a well-settled law that even though one's, "\*\*\* mind may be impaired by disease incident to old age \*\*", if he understands the nature of the business in which he is engaged and the effect of what he is doing and can exercise his will with reference thereto — his acts will be valid. *Kelly v. Nussbaum*, 244 Ill.Dec. 158 (1910). This was so in *Frieders*, even though Mrs. Dayton's lawyer was also her guardian ad litem and clearly had a conflict of interest. *Frieders* seems to me to have been wrongly decided.

***Practice Pointer:* At the outset of your representation, figure out whom you client is and determine whether they have the ability to understand your relationship with him/her. Read the diminished capacity rule again. Can you make a client agreement for attorney's fees and expenses with your client?**

Perhaps *Karbin v. Karbin*, 2012 IL 12815 (Ill. 2012) may dilute this statute. It held a guardian has the right to seek a dissolution of marriage, even though the ward is incompetent. Although *Karbin* was correctly decided in my opinion, fallout could occur as to the continuing efficacy of this statute.

***Practice Pointer:* In addition, you must know what your role is with respect to a guardianship proceeding. Attorneys may act as trustees in certain cases where they are not acting as lawyers. In *Re Karavidas*, 2013 IL 115767. The**

**role of plenary guardian for an estate or person is probably not the same capacity as being a lawyer while acting as plenary guardian.**

755 ILCS 5/11a-1. DEVELOPMENTAL DISABILITY DEFINED.

§11a-1. "Developmental disability" means a disability which is attributable to: (a) mental retardation, cerebral palsy, epilepsy or autism; or to (b) any other condition which results in impairment similar to that caused by mental retardation and which requires services similar to those required by mentally retarded persons. Such disability must originate before the age of 18 years, be expected to continue indefinitely, and constitute a substantial handicap.

**Practice Pointer: The statements about "retardation, epilepsy, cerebral palsy or autism" in this section are misguided, dated and open to challenge. In my opinion, they are not necessarily a disability, developmental or otherwise. They may be.**

755 ILCS 5/11a-2. "DISABLED PERSON" DEFINED.

§11a-2. "Disabled person" means a person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental illness or developmental disability is not fully able to manage his person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his estate as to expose himself or his family to want or suffering, or (d) is diagnosed with fetal alcohol syndrome or fetal alcohol effects.

**Practice Pointer: The issue of mental disability is usually opinion-based and must be supported by evidence or a report (755 ILCS5/11a-9) from at least one physician or others which explains with sufficient analysis the nature of the disability. The sufficiency of the report can be determined upon motion, without the necessity of an evidentiary hearing. *Estate of Silverman*, 195 Ill.Dec. 299 (1<sup>st</sup> Dist. 1993); *Williams v. Estate of Cole*, 333 Ill.Dec. 27 (1<sup>st</sup> Dist. 2009). Our Supreme Court has not agreed with the efficacy of such opinions.**

The issue of what constitutes a physical disability has caused courts to pause. *Estate of Fallos*, 898 N.E.2d 793 (4<sup>th</sup> Dist. 2008). It appears that, although a person may be disabled in the statutory sense of not being fully able to manage his person, if he or she can still direct others in such activity, then he or she may not need a guardian over the person. *Estate of Mackey*, 40 Ill.Dec. 525 (1980). As long as a person has the ability to know what he wants to do, even though he needs assistance, a plenary guardian may not be warranted. *Estate of Bennet*, 78 Ill.Dec. 83 (1984).

Be mindful that the standard of proof the petitioner must bear is to establish the disability by clear and convincing evidence. 755 ILCS 5/11a-3.

**Practice Pointer: The presumption of fraud where a defendant holds a power of attorney (agent) which may benefit not only the principal as well as the**

**agent can only be overcome by clear and convincing evidence. This is due to the fact the agent enjoys a fiduciary relationship which prohibits the agent from obtaining any personal benefit, regardless of whether the principal also benefits. (*Spring Valley Nursing Center L.P. v. Allen*, 2012 IL.App. 3d 110915)**

More on this later.

5/11a-5. WHO MAY ACT AS GUARDIAN.

§11a-5. Who may act as guardian.

(a) A person is qualified to act as guardian of the person and as guardian of the estate of a disabled person if the court finds that the proposed guardian is capable of providing an active and suitable program of guardianship for the disabled person and that the proposed guardian:

(1) has attained the age of 18 years;

(2) is a resident of the United States;

(3) is not of unsound mind;

(4) is not an adjudged disabled person as defined in this Act; and

(5) has not been convicted of a felony, unless the court finds appointment of the person convicted of a felony to be in the disabled person's best interests, and as part of the best interest determination, the court has considered the nature of the offense, the date of offense, and the evidence of the proposed guardian's rehabilitation. No person shall be appointed who has been convicted of a felony involving harm or threat to an elderly or disabled person, including a felony sexual offense.

(b) Any public agency, or not-for-profit corporation found capable by the court of providing an active and suitable program of guardianship for the disabled person, taking into consideration the nature of such person's disability and the nature of such organization's services, may be appointed guardian of the person or of the estate, or both, of the disabled person. The court shall not appoint as guardian an agency which is directly providing residential services to the ward. One person or agency may be appointed guardian of the person and another person or agency appointed guardian of the estate.

(c) Any corporation qualified to accept and execute trusts in this State may be appointed guardian of the estate of a disabled person.

***Practice Pointer:* This section is without controversy. Your client need not be a United States citizen. Your client need not be a resident of Illinois. S/he need not be an angel. A felony conviction is a bar for all crimes committed against the elderly or a disabled person. As to the other felony convictions, rehabilitation must be shown.**

## 5/11a-6. DESIGNATION OF GUARDIAN.

§11a-6. Designation of Guardian. A person, while of sound mind and memory, may designate in writing a person, corporation or public agency qualified to act under Section 11a-5, to be appointed as guardian or as successor guardian of his person or of his estate or both, in the event he is adjudged to be a disabled person. The designation may be proved by any competent evidence, but if it is executed and attested in the same manner as a will, it shall have prima facie validity. If the court finds that the appointment of the one designated will serve the best interests and welfare of the ward, it shall make the appointment in accordance with the designation. The selection of the guardian shall be in the discretion of the court whether or not a designation is made.

***Practice Pointer. Designating a guardian in a will or a power of attorney (POA) is often overlooked. For example, a parent of a disabled person may designate by a will or POA a person or corporation to act under as a guardian or successor guardian (755 ILCS 5/11a-15) of the person, estate or both. This is true whether or nor a guardian has already been appointed for the disabled person. (755 ILCS 5/11a-16). If a guardian has not been appointed during the parent's lifetime, the designation can still be enforced by the circuit court if it finds the designation is in the best interest of the ward.***

Also, for some types of guardians, it does not have to be in a will. The guardian of a disabled adult may designate in writing according to the following form a person qualified to act as a stand-by guardian. 755 ILCS 5/11a-3.1:

### DESIGNATION OF STANDBY GUARDIAN IT IS IMPORTANT TO READ THE FOLLOWING INSTRUCTIONS:

A standby guardian is someone who has been appointed by the court as the person who will act as guardian of the disabled person when the disabled person's guardian dies or is no longer willing or able to make and carry out day-to-day care decisions concerning the disabled person. By properly completing this form, a guardian is naming the person that the guardian wants to be appointed as the standby guardian of the disabled person. Signing the form does not appoint the standby guardian; to be appointed, a petition must be filed in and approved by the court.]

1. Guardian and Ward. I, (insert name of designating guardian), currently residing at (insert address of designating guardian), am the guardian of the following disabled person: (insert name of ward).

2. Standby Guardian. I hereby designate the following person to be appointed as standby guardian for my ward listed above: (insert name and address of person designated).

3. Successor Standby Guardian. If the person named in item 2 above cannot or will not act as standby guardian, I designate the following person to be appointed as successor standby guardian for my ward: (insert name and address of person designated).

4. Date and Signature. This designation is made this (insert day) day of

(insert month and year).

Signed: (designating guardian)

5. Witnesses. I saw the guardian sign this designation or the guardian told me that the guardian signed this designation. Then I signed the designation as a witness in the presence of the guardian. I am not designated in this instrument to act as a standby guardian for the guardian's ward. (insert space for names, addresses, and signatures of 2 witnesses)

**Practice Pointer. The approval of a standby guardian must be confirmed by the court. Also, the ward must be consulted and his/her wishes are to be considered by the court. The designation of a standby guardian in the appropriate form to the extent it is attested to in the manner of will is *prima facie* evidence of the appointment.**

Also, a guardian of a disabled person may appoint, in writing, a short-term guardian consistent with the following form:

APPOINTMENT OF SHORT-TERM GUARDIAN  
IT IS IMPORTANT TO READ THE FOLLOWING INSTRUCTIONS:

By properly completing this form, a guardian is appointing a short-term guardian of the disabled person for a cumulative total of up to 60 days during any 12 month period. A separate form shall be completed each time a short-term guardian takes over guardianship duties. The person or persons appointed as the short-term guardian shall sign the form, but need not do so at the same time as the guardian.]

1. Guardian and Ward. I, (insert name of appointing guardian), currently residing at (insert address of appointing guardian), am the guardian of the following disabled person: (insert name of ward).

2. Short-term Guardian. I hereby appoint the following person as the short-term guardian for my ward: (insert name and address of appointed person).

3. Effective date. This appointment becomes effective: (check one if you wish it to be applicable)

On the date that I state in writing that I am no longer either willing or able to make and carry out day-to-day care decisions concerning my ward.

On the date that a physician familiar with my condition certifies in writing that I am no longer willing or able to make and carry out day-to-day care decisions concerning my ward.

On the date that I am admitted as an in-patient to a hospital or other health care institution.

On the following date: (insert date).

Other: (insert other).

[NOTE: If this item is not completed, the appointment is effective immediately]

upon the date the form is signed and dated below.]

4. Termination. This appointment shall terminate on: (enter a date corresponding to 60 days from the current date, less the number of days within the past 12 months that any short-term guardian has taken over guardianship duties), unless it terminates sooner as determined by the event or date I have indicated below: (check one if you wish it to be applicable)

On the date that I state in writing that I am willing and able to make and carry out day-to-day care decisions concerning my ward.

On the date that a physician familiar with my condition certifies in writing that I am willing and able to make and carry out day-to-day care decisions concerning my ward.

On the date that I am discharged from the hospital or other health care institution where I was admitted as an in-patient, which established the effective date.

On the date which is (state a number of days) days after the effective date.

Other: (insert other).

[NOTE: If this item is not completed, the appointment will be effective until the 60th day within the past year during which time any short-term guardian of this ward had taken over guardianship duties from the guardian, beginning on the effective date.]

5. Date and signature of appointing guardian. This appointment is made this (insert day) day of (insert month and year).

Signed: (appointing guardian)

6. Witnesses. I saw the guardian sign this instrument or I saw the guardian direct someone to sign this instrument for the guardian. Then I signed this instrument as a witness in the presence of the guardian. I am not appointed in this instrument to act as the short-term guardian for the guardian's ward. (insert space for names, addresses, and signatures of 2 witnesses)

7. Acceptance of short-term guardian. I accept this appointment as short-term guardian on this (insert day) day of (insert month and year).

Signed: (short-term guardian)

(f) Each time the guardian appoints a short-term guardian, the guardian shall: (i) provide the disabled person with the name, address, and telephone number of the short-term guardian; (ii) advise the disabled person that he has the right to object to the appointment of the short-term guardian by filing a petition in court; and (iii) notify the disabled person when the short-term guardian will be taking over guardianship duties and the length of time that the short-term guardian will be acting as guardian.

No court approval is required. 755 ILCS 5/11a-3.2. A short-term guardian may only act for an aggregate period of 60 days during any twelve-month period. The date of the

appointment of the short-term guardian is the date the form is executed. Each time a guardian appoints a short-term guardian, s/he has the responsibility to provide the ward with:

1. the name, address and telephone number of the short-term guardian;
2. tell the ward when the short-term guardian will be taking over and for how long; and
3. inform the ward s/he has the right to object to designation of the short-term guardian by petitioning the court.

***Practice Pointer:* The use of these forms for guardians you represent may reduce the need for court intervention if for some reason the guardian is not available. Again, powers of appointment or trust declarations can appoint guardians, temporary, standby, limited, short-term or on a plenary basis.**

755 ILCS 5/11a-7. Venue.

§11a-7. Venue.

If the alleged ward is a resident of this State, the proceeding shall be instituted in the court of the county in which he resides. If the alleged ward is not a resident of this State, the proceeding shall be instituted in the court of a county in which his real or personal estate is located.

***Practice Pointer:* The command of this statute is mandatory. It does not matter where the petitioner resides. Venue is proper in the county where the ward resides or his real estate or personal estate is located.**

***Practice Pointer:* The Uniform Adult Guardianship and Protective Proceedings Act (755 ILCS 8) is a statute that we need to use. It provides a broad array of communication between Illinois courts and other states (755 ILCS 8/104/105) in guardianship proceedings where competing guardianships in a foreign state may be filed. It provides jurisdiction in Illinois where an emergency exists to protect the interests of a ward where his/her health, safety or welfare may be undermined (755 ILCS 8/201)**

755 ILCS 5/11a-4. Temporary Guardian.

§11a-4. Temporary guardian. Prior to the appointment of a guardian under this Article, pending an appeal in relation to the appointment, or pending the completion of a citation proceeding brought pursuant to Section 23-3 of this Act, the court may appoint a temporary guardian upon a showing of the necessity therefor for the immediate welfare and protection of the alleged disabled person or his estate on such notice and subject to such conditions as the court may prescribe. In determining the necessity for temporary guardianship, the immediate welfare and protection of the alleged disabled person and his or her estate shall be of paramount concern, and the interests of the petitioner, any care provider, or any other party shall not outweigh the interests of the alleged disabled person. The temporary guardian shall have all of the powers and duties of a guardian of the person or of the estate which are specifically enumerated by court order. The court order shall state the actual harm identified by the court that necessitates temporary guardianship.

The temporary guardianship shall expire within 60 days after the appointment or whenever a guardian is regularly appointed, whichever occurs first. Except pending the disposition on appeal of an adjudication of disability, no extension shall be granted. However, the ward shall have the right any time after the appointment of a temporary guardian is made to petition the court to revoke the appointment of the temporary guardian.

***Practice Pointer.* On January 1, 2012, this section was amended. (Public Act 97-0614). Read it. Most importantly, it says if the court determines that a temporary guardianship should be extended beyond sixty days, the Court must make a determination of the basis(es) as well as the need for any extension. It appears one paramount factor is what is in the best interests of the disabled adult.**

***Practice Pointer.* Where a temporary guardian acts pursuant to a valid court order, a subsequent proceeding to collaterally attack that order may fail. *Farwell v. Senior Services Assoc., Inc.*, 2012 IL.App. (2d) 110669.**

755 ILCS 5/11a-8. Petition.

§11a-8. Petition. The petition for adjudication of disability and for the appointment of a guardian of the estate or the person or both of an alleged disabled person must state, if known or reasonably ascertainable: (a) the relationship and interest of the petitioner to the respondent; (b) the name, date of birth, and place of residence of the respondent; (c) the reasons for the guardianship; (d) the name and post office address of the respondent's guardian, if any, or of the respondent's agent or agents appointed under the Illinois Power of Attorney Act, if any; (e) the name and post office addresses of the nearest relatives of the respondent in the following order: (1) the spouse and adult children, parents and adult brothers and sisters, if any; if none, (2) nearest adult kindred known to the petitioner; (f) the name and address of the person with whom or the facility in which the respondent is residing; (g) the approximate value of the personal and real estate; (h) the amount of the anticipated annual gross income and other receipts; (i) the name, post office address and in case of an individual, the age, relationship to the respondent and occupation of the proposed guardian. In addition, if the petition seeks the appointment of a previously appointed standby guardian as guardian of the disabled person, the petition must also state: (j) the facts concerning the standby guardian's previous appointment and (k) the date of death of the disabled person's guardian or the facts concerning the consent of the disabled person's guardian to the appointment of the standby guardian as guardian, or the willingness and ability of the disabled person's guardian to make and carry out day-to-day care decisions concerning the disabled person. A petition for adjudication of disability and the appointment of a guardian of the estate or the person or both of an alleged disabled person may not be dismissed or withdrawn without leave of the court.

***Practice Pointer:* The petition is a pleading. Its requirements are procedural, not jurisdictional. See, *Estate of Steinfeld*, 196 Ill.Dec. 636 (S.Ct. 1994). The provisions for a petition for a standby guardian are similar. (755 ILCS 5/11a-8.1). Also as part of the petition, you can assert a cause of action for an order of protection under the Illinois Domestic Violence Act. (755 ILCS 5/11a-10.1)**

***Practice Pointer.* The employment of guardianship cases to somehow alter**

**estranged family relationships occurs. Be vigilant in opposing such a petition. *Estate of Hanley, 2013 IL.App. (3d) 110264***

755 ILCS 5/11a-9. Report.

§11a-9. Report.

(a) The petition for adjudication of disability and for appointment of a guardian should be accompanied by a report which contains (1) a description of the nature and type of the respondent's disability and an assessment of how the disability impacts on the ability of the respondent to make decisions or to function independently; (2) an analysis and results of evaluations of the respondent's mental and physical condition and, where appropriate, educational condition, adaptive behavior and social skills, which have been performed within 3 months of the date of the filing of the petition; (3) an opinion as to whether guardianship is needed, the type and scope of the guardianship needed, and the reasons therefor; (4) a recommendation as to the most suitable living arrangement and, where appropriate, treatment or habilitation plan for the respondent and the reasons therefor; (5) the signatures of all persons who performed the evaluations upon which the report is based, one of whom shall be a licensed physician and a statement of the certification, license, or other credentials that qualify the evaluators who prepared the report.

(b) If for any reason no report accompanies the petition, the court shall order appropriate evaluations to be performed by a qualified person or persons and a report prepared and filed with the court at least 10 days prior to the hearing.

(c) Unless the court otherwise directs, any report prepared pursuant to this Section shall not be made part of the public record of the proceedings but shall be available to the court or an appellate court in which the proceedings are subject to review, to the respondent, the petitioner, the guardian, and their attorneys, to the respondent's guardian ad litem, and to such other persons as the court may direct.

***Practice Pointer:* The better practice is to have the report as an attachment to the petition, although it is not a jurisdictional requirement. *Estate of Steinfeld, 196 Ill.Dec. 636 (S.Ct. 1994).***

**At least one of the persons who prepare the report must be a licensed physician. All of the persons who took part in evaluations for the report must sign it. The credentials of the preparer should be provided. Take a look at IPI 200.06 as to the weight to be accorded a physician's testimony. (In the Appendix.) It gets no greater credence merely because s/he is a physician where a conflict exists between a lay witness and a doctor as to mental capacity. In the absence of a report, the court can require evaluations to be performed. Such evaluations are not part of the public record and are only available to the court, the parties and their lawyers, and the guardian ad litem.**

755 ILCS 5/11a-10. Procedures Preliminary to Hearing.

§11a-10. Procedures preliminary to hearing.

(a) Upon the filing of a petition pursuant to Section 11a-8, the court shall set a date and place for hearing to take place within 30 days. The court shall appoint a guardian ad litem to report to the court concerning the respondent's best interests consistent with the provisions of this Section, except that the appointment of a guardian ad litem shall not be required when the court determines that such appointment is not necessary for the protection of the respondent or a reasonably informed decision on the petition. If the guardian ad litem is not a licensed attorney, he or she shall be qualified, by training or experience, to work with or advocate for the developmentally disabled, mentally ill, physically disabled, the elderly, or persons disabled because of mental deterioration, depending on the type of disability that is alleged in the petition. The court may allow the guardian ad litem reasonable compensation. The guardian ad litem may consult with a person who by training or experience is qualified to work with persons with a developmental disability, persons with mental illness, or physically disabled persons, or persons disabled because of mental deterioration, depending on the type of disability that is alleged. The guardian ad litem shall personally observe the respondent prior to the hearing and shall inform him orally and in writing of the contents of the petition and of his rights under Section 11a-11. The guardian ad litem shall also attempt to elicit the respondent's position concerning the adjudication of disability, the proposed guardian, a proposed change in residential placement, changes in care that might result from the guardianship, and other areas of inquiry deemed appropriate by the court. At or before the hearing, the guardian ad litem shall file a written report detailing his or her observations of the respondent, the responses of the respondent to any of the inquiries detailed in this Section, the opinion of the guardian ad litem or other professionals with whom the guardian ad litem consulted concerning the appropriateness of guardianship, and any other material issue discovered by the guardian ad litem. The guardian ad litem shall appear at the hearing and testify as to any issues presented in his or her report.

(b) The court (1) may appoint counsel for the respondent, if the court finds that the interests of the respondent will be best served by the appointment, and (2) shall appoint counsel upon respondent's request or if the respondent takes a position adverse to that of the guardian ad litem. The respondent shall be permitted to obtain the appointment of counsel either at the hearing or by any written or oral request communicated to the court prior to the hearing. The summons shall inform the respondent of this right to obtain appointed counsel. The court may allow counsel for the respondent reasonable compensation.

(c) If the respondent is unable to pay the fee of the guardian ad litem or appointed counsel, or both, the court may enter an order for the petitioner to pay all such fees or such amounts as the respondent or the respondent's estate may be unable to pay. However, in cases where the Office of State Guardian is the petitioner, consistent with Section 30 of the Guardianship and Advocacy Act, where an elder abuse provider agency is the petitioner, pursuant to Section 9 of the Elder Abuse and Neglect Act, or where the Department of Human Services Office of Inspector General is the petitioner, consistent with Section 45(b) of the Abuse of Adults with Disabilities Intervention Act, no guardian ad litem or legal fees shall be assessed against the Office of State Guardian, the elder abuse provider agency, or the Department of Human Services Office of Inspector General.

(d) The hearing may be held at such convenient place as the court directs, including at a facility in which the respondent resides.

(e) Unless he is the petitioner, the respondent shall be personally served with a copy of the petition and a summons not less than 14 days before the hearing. The summons shall be printed in large, bold type and shall include the following notice:

#### NOTICE OF RIGHTS OF RESPONDENT

You have been named as a respondent in a guardianship petition asking that you be declared a disabled person. If the court grants the petition, a guardian will be appointed for you. A copy of the guardianship petition is attached for your convenience.

The date and time of the hearing are:  
The place where the hearing will occur is:  
The Judge's name and phone number is:

If a guardian is appointed for you, the guardian may be given the right to make all important personal decisions for you, such as where you may live, what medical treatment you may receive, what places you may visit, and who may visit you. A guardian may also be given the right to control and manage your money and other property, including your home, if you own one. You may lose the right to make these decisions for yourself.

You have the following legal rights:

- (1) You have the right to be present at the court hearing.
- (2) You have the right to be represented by a lawyer, either one that you retain, or one appointed by the Judge.
- (3) You have the right to ask for a jury of six persons to hear your case.
- (4) You have the right to present evidence to the court and to confront and cross-examine witnesses.
- (5) You have the right to ask the Judge to appoint an independent expert to examine you and give an opinion about your need for a guardian.
- (6) You have the right to ask that the court hearing be closed to the public.
- (7) You have the right to tell the court whom you prefer to have for your guardian.

You do not have to attend the court hearing if you do not want to be there. If you do not attend, the Judge may appoint a guardian if the Judge finds that a guardian would be of benefit to you. The hearing will not be postponed or canceled if you do not attend.

IT IS VERY IMPORTANT THAT YOU ATTEND THE HEARING IF YOU DO NOT WANT A GUARDIAN OR IF YOU WANT SOMEONE OTHER THAN THE PERSON NAMED IN THE

GUARDIANSHIP PETITION TO BE YOUR GUARDIAN. IF YOU DO NOT WANT A GUARDIAN OF IF YOU HAVE ANY OTHER PROBLEMS, YOU SHOULD CONTACT AN ATTORNEY OR COME TO COURT AND TELL THE JUDGE.

Service of summons and the petition may be made by a private person 18 years of age or over who is not a party to the action.

(f) Notice of the time and place of the hearing shall be given by the petitioner by mail or in person to those persons, including the proposed guardian, whose names and addresses appear in the petition and who do not waive notice, not less than 14 days before the hearing.

Once a petition is filed, the hearing is to occur within 30 days. Generally, the court will appoint a guardian ad litem ("GAL") to report to the court concerning the proposed ward's best interest. In this role, the GAL serves as the eyes and ears of the court. The GAL is not the respondent's attorney. *In re: Guardianship of Mabry*, 216 Ill.Dec. 848 (1996). In this regard, the GAL's role is to make a recommendation to the court as to what is in the ward's best interest. Such a decision may or may not be what the ward wants. Accordingly, where the proposed ward takes a position adverse to the GAL, the court is required to appoint counsel for the ward. The trial court has wide ranging authority in appointing a GAL or attorney to protect the ward's interest. *In re Mark W, a minor*, 320 Ill.Dec. 798 (S.Ct. 2008).

In these types of hearings, for sure, at least the persons who signed the report(s) and the GAL are going to be witnesses. Plumb their opinions as to the extent of their independent investigation. What records did they marshal and review? What evidence did they rely on? What proof did they reject? What is not in their report that is relevant? The court will thank you for this information

***Practice Pointer: The requirement of the type of summons and timeliness of its service appears in the statute. Follow it: The typeface must be bold, inform the respondent of his rights and be served with the petition 14 days prior to the hearing. Many practitioners fail to do this.***

***Practice Pointer: Consider alternatives to plenary guardians: limited, temporary and short-term guardians are less restrictive. Fashion orders with specific powers.***

755 ILCS 5/11a-11. Hearing.

§11a-11. Hearing.

(a) The respondent is entitled to be represented by counsel, to demand a jury of 6 persons, to present evidence, and to confront and cross-examine all witnesses. The hearing may be closed to the public on request of the respondent, the guardian ad litem, or appointed or other counsel for the respondent. Unless excused by the court upon a showing that the respondent refuses to be present or will suffer harm if required to attend, the respondent shall be present at the hearing.

(b) (Blank)

(c) Upon oral or written motion by the respondent or the guardian ad litem or

on the court's own motion, the court shall appoint one or more independent experts to examine the respondent. Upon the filing with the court of a verified statement of services rendered by the expert or experts, the court shall determine a reasonable fee for the services performed. If the respondent is unable to pay the fee, the court may enter an order upon the petitioner to pay the entire fee or such amount as the respondent is unable to pay. However, in cases where the Office of State Guardian is the petitioner, consistent with Section 30 of the Guardianship and Advocacy Act, no expert services fees shall be assessed against the Office of the State Guardian.

(d) In an uncontested proceeding for the appointment of a guardian the person who prepared the report required by Section 11a-9 will only be required to testify at trial upon order of court for cause shown.

(e) At the hearing the court shall inquire regarding: (1) the nature and extent of respondent's general intellectual and physical functioning; (2) the extent of the impairment of his adaptive behavior if he is a person with a developmental disability, or the nature and severity of his mental illness if he is a person with mental illness; (3) the understanding and capacity of the respondent to make and communicate responsible decisions concerning his person; (4) the capacity of the respondent to manage his estate and his financial affairs; (5) the appropriateness of proposed and alternate living arrangements; (6) the impact of the disability upon the respondent's functioning in the basic activities of daily living and the important decisions faced by the respondent or normally faced by adult members of the respondent's community; and (7) any other area of inquiry deemed appropriate by the court.

(f) An authenticated transcript of the evidence taken in a judicial proceeding concerning the respondent under the Mental Health and Developmental Disabilities Code is admissible in evidence at the hearing.

(g) If the petition is for the appointment of a guardian for a disabled beneficiary of the Veterans Administration, a certificate of the Administrator of Veterans Affairs or his representative stating that the beneficiary has been determined to be incompetent by the Veterans Administration on examination in accordance with the laws and regulations governing the Veterans Administration in effect upon the date of the issuance of the certificate and that the appointment of a guardian is a condition precedent to the payment of any money due the beneficiary by the Veterans Administration, is admissible in evidence at the hearing.

***Practice Pointer:* Judge Mueller and Judge Murphy have explained to you today the types of evidence they believe is helpful to their decision making in contested guardianship proceedings. In addition, there are a couple of matters that are going to be part and parcel of all contested guardianships.**

The burden of proof to determine disability is proof by clear and convincing evidence. What does that mean? Well, the Illinois Patterned Jury Instructions (IPI 800.03) punted on the issue, so we are left to caselaw. *Estate of Ragen*, 34 Ill.Dec. 523 (1979). Read this opinion. Basically, clear and convincing evidence is the quantum of proof necessary which leaves no reasonable doubt in the mind of the trier of fact as to the proposition in question. *Galapeaux v. Orviller*, 123 N.E.2d 321 (S.Ct. 1954). The nature of the evidence must show that the proposition to be proved is highly probably true.

***Practice Pointer:* As lawyers, we must be mindful of not only undue influence claims, but whether an actor interferes by tortious interference**

**with testamentary capacity. These claims are not identical. *In Re: Estate of Richard DiMatteo v. Eastman*, (2013 IL.App. 1<sup>st</sup>, 122948) (“DiMatteo”)**

For the pleading requirements in an undue influence claim to invalidate a will, as well as tortious interference with testamentary expectancy. Read the *DiMatteo opinion*. The petition as amended in *Matteo*, filed by the former devisee, Thomas Golly, although at times couched on information and belief, was detailed and not conclusory. It alleged a course of conduct by Eastman to influence the decedent to change his will to benefit Eastman. In this regard, what constitutes undue influence is not defined by fixed words and depends upon the factual circumstances of each case. Take a look at the jury instructions in the Appendix, I.P.I. 200, I.P.I. 200.09. Alleging undue influence and alleging a presumption of undue influence are different. The latter is, at least, going to get you to put on a case before the Court or jury. *In re: Estate of Glogovesk*, 248 Ill.App.3d 784 (1993).

## **UNDUE INFLUENCE**

Next, you are going to hear about undue influence and how that presumption works depending on whether the person exercising such influence is a fiduciary. The IPI jury instruction notes on this are instructive and are in the Appendix. For a recent example of how a trial court allocated the burden of proof to a fiduciary with respect to an allegation of undue influence (*i.e.*, clear and convincing evidence to dispel undue influence). See, *Estate of Pawlinski*, 942 N.E.2d 728 (1<sup>st</sup> Dist. 2011); 2011 WL 240464.

Prior to her death in 2004, Victoria lived with Sid and granted him a power of attorney in 2002. Victoria’s will was admitted to probate. It said she wanted to provide for all of her children. Victoria Pawlinski was survived by three children, Sid, Ed and Margaret. Sid, as Executor of her estate, filed a final account. His siblings challenged it, claiming it did not include over \$500,000 in certificates of deposit.

The trial court found that Sid and Victoria had a fiduciary relationship when the power of attorney was executed. During the period of the existence of that relationship, it gave rise to a presumption that any transaction entered into by Victoria for the benefit of Sid is fraudulent due to undue influence. It was Sid’s obligation to rebut that presumption by clear and convincing evidence. The trial court found that he failed to do that. The *Pawlinski* case is interesting and one you should read. Every undue influence opinion is fact specific and the court goes into detail analyzing the evidence.

Also, the court’s analysis of the clear and convincing standard bears repetition. It opines that, because the presumption of undue influence against Sid was a strong one, (*i.e.*, fiduciary relationship), the quantum as well as the quality of proof Sid needed to produce to rebut the presumption had to be of similar caliber. The court stated:

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The term “clear and convincing” is a relative term. The amount of evidence that is required from an adversary to meet the presumption is not determined by any fixed rule. A party may simply have to respond with some evidence or may have to respond with substantial evidence. If a strong presumption arises, the weight of the evidence brought in to rebut it must be great. (Sl. Op. at 17.)

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The Appellate Court affirmed the trial court, finding the “strength of the presumption” to be

considerable at the time the power of attorney was executed, as well as when the CDs were retitled.

***Practice Pointer:* We have a new Power of Attorney Act in Illinois It covers a lot of ground. 755 ILCS 4511-1 (July 1, 2011). I do not pretend to be an authority on it, like most legislators. But the important part is that where a power of attorney exists, the agent has a fiduciary relationship with the principal. This shifts the presumption of undue influence where gifts or bequests are made to the agent. It is a powerful tool where financial exploitation is apparent in a guardianship proceeding.**

## **FINALLY, THE DEAD MAN'S ACT.**

Included in the Appendix is a short article which analyzes a recent opinion that explains how the Act (735 ILCS 5/8-201) works. A few years ago, I wrote, *The Dead Man's Act. Here's How it Works*.

The Dead Man's Act ("the Act") has nothing to do with fairness, or really, evidence, for that matter. It addresses whether a witness has the capacity or competency to testify. It has applicability not only to those who are deceased but also to those who are under a legal disability. It casts a wide net, because it applies to all actions. This means personal injury (*Ruback v. Doss* (2004) 347 Ill.App.3d 808); will contests (*Manning v. Mock* (1983) 119 Ill.App.3d 788); forfeiture actions (*People v. \$5,608 United States Currency* (2005) 359 Ill.App.3d 391); contracts (*Muka v. Estate of Muka* (1987) 164 Ill.App.3d 223); guardianship cases (*Estate of Rollins* (1995) 269 Ill.App.3d 261) as well as professional negligence (*Hoem v. Zia* (1994) 159 Ill.2d 193). It applies to all cases where the opposing party to the decedent or person whom is operating under a legal disability sues or defends as a representative of a deceased person or one who is legally disabled.

***Practice Pointer.* In every case where the testimony of a decedent, or a person under legal disability is implicated you need to analyze how the Dead Man's Act applies. In this regard take a look at Illinois Pattern Jury Instruction 5.02, which is in the Appendix. The court will give this instruction in a jury trial where trial testimony obviates the Act. The instruction is utilized so the jury can understand why a witness has not come forward to testify when, quite naturally, the jurors think s/he should be doing so.**

The existence of the Act has been criticized. ("The Death of the Dead Man's Act?", Hoffman and Shawski 82 Illinois Bar Journal 620 (1994)). One argument, is that the law is anachronistic since the question of a witness's credibility and the weight to be accorded the testimony of such witness should be left to the trial court to assess. (*In re: Estate of Babcock* (1985) 105 Ill.2d 267). The second, is the common law historical notion that a witness should be disqualified from testifying in favor of his own cause of action. Although both these premises are well-articulated, they miss the point. The genesis for the Act derives from the imperfection of the human condition; namely, that one who outlives an event or transaction with a decedent is more prone to prevaricate where to do so is in his/her pecuniary interest. It has to do with lying. Courts have difficulty dealing with this type of behavior. It is something we need to be aware of not only in the witness box but also in our client relationships.

Furthermore, if the fact sought to be advanced cannot be disputed by the person against whom it should operate, the proposition becomes incontrovertible without other witness

testimony. In other words, the issue is not the admissibility of testimony, but the capacity of the witness to utter what was said. This is because the testimony can be introduced from another party who is not adverse and is not interested in the action. (See, *Estate of Sewart* (1995) 274 Ill.App.3d 298) [attorney who drafted will was competent to testify concerning decedent's testamentary scheme].

The Act has three prerequisites to render the witness incapable of testifying. These are: (a) the person who seeks to be a witness must be an adverse party or directly interested in the action; (b) he must testify in his own behalf; and (c) the adverse party suing or defending as a representative of the decedent or ward is protected as to those conversations with the deceased or any event taking place in the person's presence. See, Cleary and Graham, *Handbook of Illinois Evidence, 9<sup>th</sup> Ed.*, pp. 375-394. ("Graham") Graham's *Handbook of Illinois Evidence* is a treasure. Use it.

Let's take these up in inverse order.

### **A. Events**

As to what constitutes an "event", one Illinois Supreme Court case establishes what this denotes. *Gunn v. Sobucki* (2005) 216 Ill.2d 602.

Ed Gunn filed a complaint for replevin and conversion against Lorraine Sobucki the surviving spouse of Robert Sobucki, contesting the ownership of a coin collection. The trial court entered judgment for Gunn declaring he was the lawful owner of the coins. The appellate court reversed and remanded for a new trial and the supreme court affirmed.

The facts are interesting. Basically, Gunn, who was a lawyer, claimed that he had a notarized bill of sale that said he sold the coin collection (which weighed half a ton) to Bob Sobucki for \$30,000 in 1979. Gunn moved to Florida and then divorced his wife. Bob Sobucki died in 1998 and his wife Lorraine inherited all of his personal property including the coin collection. Gunn demanded that Mrs. Sobucki return the coins to him. She refused.

At trial, Mrs. Sobucki's main defense was that her husband had purchased the coins and she had a bill of sale to prove it. Brazenly, Gunn conceded that he had given Mr. Sobucki the bill of sale. He argued this conveyance was a sham and only delivered so he could conceal his ownership to the collection during the divorce proceedings with his wife in a Florida state court. In attempting to prove this fact, among other things, Gunn testified as to many conversations which took place in Mr. Sobucki's presence and that in fact he had not "paid" the \$30,000 to Mr. Sobucki as evidenced by the bill of sale. No evidence was ever introduced by anyone orally that this sum had, in fact, been paid. The supreme court held the testimony that one did not do a certain act is the same as testimony that one did a certain act. Acts of commission and omission are prohibited by the Act where they occur in the decedent's presence. Hence, evidence of non-payment as offered by Gunn, an interested and adverse party, disqualified him from testifying and his declarations should have been excluded at trial.

### **B. Interested/Adverse Parties**

So, who is an interested or adverse party? The question may be answered in two parts: will the testimony of the party witness be of benefit to that witness and against the protected party; and, will the person offering that testimony directly experience a monetary gain or loss as an immediate result of a favorable judgment. *Graham*, p. 379, citing (*People*

*v. \$5,608 U.S. Currency (supra)*, (see also *Herron v. Underwood* (1987) 152 Ill.App.3d 144).

Paul Herron died. Prior to his death he executed three deeds, a trust agreement and an antenuptial contract between he and his third spouse. He gave these documents to a third party with instructions to give them to the grantees after his death. That party was his sister who was to act as trustee of the Trust Agreement. She was not a beneficiary under the Trust. She delivered the deeds consistent with his instruction. Paul died without a will. A dispute developed amongst his heirs and his surviving spouse as to the real estate conveyed by the deeds. During the trial, Anna Bush, Paul's sister and Trustee, testified over objection that she was an interested party. Her testimony replicated conversations with Paul as to what was to happen with the deeds. The trial court rejected the contention that Anna Bush was an interested party.

The Appellate Court agreed. First, it concluded that Anna was not an adverse party regardless as to whether she was named as a defendant in the litigation. In calculating adversity the court looked at what the actual interests of Anna were. This requires whether the testimony will benefit the witness, not whether she was named as a defendant. Because Anna had nothing to gain, personally, by her testimony she was not adverse.

Furthermore, the court found she was not incompetent because she was not directly interested in the action. This notion requires some immediate pecuniary interest to be gained or lost. Merely, because Anna had an "emotional interest" in seeing the third wife not get anything under the trust, such is not sufficient to show a direct interest to disqualify the witness. (see, "The Dead Man's Act in Trial Practice," Lipschultz, Chicago Bar Association Record 19 APR 48) (2005).

In my career, I have tried two will contests to a jury's verdict and several more before the court. In every one of those trials, at some point *Manning v. Mock* has been cited. I don't know whether the result reached was right, but it was a good job of lawyering and a fair result.

Madge Willis was 85 years young when she died in a nursing home in Toledo, Illinois on January 16, 1980. Her will was admitted to probate and was contested by her heirs. They claimed she lacked testamentary capacity, was unduly influenced in the execution of her will and that defendant, John Mock, abused his fiduciary relationship and procured Madge's will for his own benefit. After a jury trial, the court entered judgment on the jury's verdict finding her will invalid. The Appellate Court affirmed that ruling. The facts and what happened at trial are must reading.

Madge's husband, Ben, was the president of probably the only bank that mattered in Toledo, Illinois. Also, Madge was on its Board of Directors. The couple were childless. Ben predeceased her. After a fall, she was confined to a nursing home in 1971. She took care of her own affairs until 1979. Then, her husband's sister was given a power of attorney. Later, John Mock assumed that role after, Betty, the sister in law died. Madge owned the largest minority block of stock in the bank.

The trial was hotly contested and a great deal of the evidence focused on Madge's mental and physical condition prior to her death. The contestants called various nursing home employees, who testified on balance that prior to execution of her will Madge was incapable of caring for her own physical needs like, dressing, bathing, toilet and was generally disoriented.

The lawyer who drafted Madge's will testified that he knew Madge all of his life and he drafted her will based on instructions that were given to him by John Mock. Glen Neal, the lawyer never talked to Madge about her will. Of course, various "expert" witnesses on gerontology testified about Madge's condition, even though none had ever met her. Her personal physician testified he thought she was of sound mind at the time she executed her will.

John Mock testified he was a life long resident of Toledo, had been a sheriff, county treasurer and the president of the bank in which Madge owned stock. Mock claimed he participated in the preparation of Madge's will after the objection was made based on the Dead Man's Act. Mock's testimony came in by way of an offer of proof. This offer basically stated that he had met with Madge on various occasions in the month before her death and she was the one who told him to whom she wanted to leave her property. Mock then conveyed this information to Attorney Neal who drafted the will for Madge to sign her will. Madge could not sign the will physically and one of the attendants had to help her complete the execution of the will.

On appeal Mock claimed the will contestants "opened the door" when they permitted Ina Green, Madge's attendant to guide her hand in signing the will. Also, they claimed Attorney Neal's testimony as to the provisions of her will had a likewise effect. The court dismissed these claims finding that neither Neal or Green ever discussed the meetings with Mock about the will. Nor was any cross examination apparently offered on these points. Accordingly, Mock's conversations about the will with Madge was not an event, or a door in which he could walk through.

Finally, the party entitled to use the Act is the one who is suing or defending as a representative of a deceased person or a person under a legal disability as to any event taking place in such person's presence. (See, *The Deadman's Act: Here's How it Works*, in the Appendix)

## **EXCEPTIONS TO THE RULE**

If this rule of witness disqualification sounds stark, the legislature did provide for exceptions. There are several:

1. If any person testified on behalf of the representative to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability, any adverse party or interested person, if otherwise competent, may testify concerning the same conversation or event. (735 ILCS 5/8-201(a).
2. If the deposition of the deceased or person under legal disability is admitted in evidence on behalf of the representative, any adverse party or interested person, if otherwise competent, may testify concerning the same matters admitted in evidence. (735 ILCS 5/8-201(b).
3. Any testimony that qualifies as a public document (735 ILCS 5/8-201 (c)) and 8-401.
4. Certain conversations and or admissions by a decedent as to joint contractors, surviving partners, as well as the principal of a deceased agent. (735 ILCS 5/8-301)

See, *Graham*, at pp. 387-393.  
Let's take a look at these.

## A. Waiver

Maybe when you were in law school you were taught that making objections at trial was important. It is: but not just to show the court how smart you are. Objections are necessary when the need arises. So you have to listen. And, that need occurs less than some of your partners or Law School Professors think. This is because objections break up the flow of why the court and jury has been assembled. Both, want to get to the main event. What is the problem that needs to be resolved by a community of peers? So you have to be thoughtful when making objections. Otherwise, the court and jury are just going to get mad at you for trying to prevent them from doing their job. Objections put the focus on the lawyer. That's not where you want it. If you are being a good advocate you want the judge and jury's eyes on the witness and how s/he is acting and what s/he is saying.

But, that is not the rule here. In fact, it is just the opposite. In this context, you need to make objections early and often. Put some starch in your collar. The waiver rule in this context is one of procedural default. If you don't object the court will not apply the disqualifying rules of the Act. *Estate of Netherton* (1978) 62 Ill. App. 3d 55; *Estate of Phillips* (2005) 359 Ill.App. 3d 833). ("*Phillips*") You need to be persistent.

***Practice Pointer.* The use of motions in limine has become a cottage industry. Lawyers make a lot of money filing them. Frankly, they are over-used. They are attempts by lawyers to provide the script for a trial. That's not our job. Trials should engender spontaneity, not predictability. Yet, with the Dead Man's Act, a motion in limine with a memorandum of law is a good thing. It tells the trial court what it is coming and whether limitations on testimony should be employed not because of what is to be said, but because the witness is not competent to say it. Trial judges will thank you for giving them this "heads up".**

Another part of the waiver concept is not procedural default, but putting into evidence testimony that maybe you should have left in a shoe box. Thus, if you put into evidence as the representative, what was said by the decedent to another, or an event which occurred in his presence, you have effectively waived the protection the Dead Man's Act affords. This is called, "opening the door". (see, *Manning v. Mock, supra, Estate of Phillips* (1<sup>st</sup> Dist 2005) 359 Ill. App. 3d 114).

The *Phillips* case is interesting. John Phillips was a Chicago lawyer. He wrote a will in 1965 which provided some legacies for extended family members and friends but the bulk of his property he left to his two sons. Apparently, another will was executed in 1987 by Phillips. At that time and prior thereto his nephew, John Klebba, was working in various capacities until he became a lawyer in 1981. The original 1987 will could not be found: only, a copy. Klebba filed a petition to admit a lost or destroyed will. He asserted in a very detailed affidavit how Phillips executed the will. Klebba was a substantial legatee under the will. Phillip's sons opposed this motion.

During discovery the deposition of Betsy Ruley, Phillip's former secretary, was taken. She was not a legatee under the 1987 will. Ruley was asked when, how, and where the will was executed. This deposition was submitted in a motion for summary judgment that was filed by Phillips sons. The trial court ruled in favor of the sons, based, in part, on the presumption, that if a testator retains an original will and that devise cannot be found upon his death it is presumed to have been destroyed by him. (*Estate of Moos* (1953) 414 Ill. 54).

Klebba argued that the representative of Phillip's estate "opened the door" when it attached to its motion for summary judgment a copy of Betsy Ruley's testimony, and therefore he should be permitted to testify as to what happened after Ruley typed the will and gave it to Phillips. The court held the door was not opened since all Ruley testified to was what happened when the will was executed and not as to what the decedent said or did after that event. The opinion is worth reading since it details the fact that merely because the "events" testified to by Klebba were in temporal proximity to those of Ruley, they were different events, and clearly ones the Dead Man's Act disqualified Klebba from uttering as a witness.

## **B. The "Public" Document Exception**

The legislature has provided an exception to the Act where public documents are utilized to buttress a claim against a decedent.(735 ILCS 5/8-401) (*Estate of Tunnell* (1991) 210 Ill. App. 3d 904). See, *Graham*, at 391.

In *Tunnell* the state employment department made a claim in Tunnell's estate. It alleged the decedent owed the department unemployment compensation payments she never made. It's entire case was based on written determinations it made as to Tunnell's obligations. The estate resisted the claim and the trial ruled for estate. The Appellate Court reversed.

Writing for the court, Justice Goldenhersh stated that the purpose of the Dead Man's Act was to protect the decedent from " a particular type of hearsay". The court thought that because public records are prepared by public officials this creates a certain indicia of reliability as evidenced by the fact the court can take judicial notice of certain public records. In short, the court concluded the employment department had a made a *prima facie* case and the trial court should have given the evidence some probative value. Frankly, that is open to challenge. I believe since many governmental records are only as reliable as the person who created them.

Although this opinion addresses public records, the statute itself does not distinguish between the admissibility of public and private records except as to the admissibility of copies of public records and what is required to prove such copies. In my opinion private records, if in their original state, are covered by this exception.

***Practice Pointer.* This exception provides that the parties can be required by the court, upon motion, to produce books and writings in their possession which contain "evidence pertinent to the issue". Use this when you have recalcitrant executors, administrators or trustees. And in this regard, remember that, even if the Act is not applicable, rules relating to the exclusion of hearsay evidence may be.**

## **C. Partners, Joint Contractors, Agents**

The statute 735 ILCS 5/8-301 states:

\* \* \*

§ 8-301. Surviving partner or joint-contractor. In any action or proceeding by or against any surviving partner or partners, or joint contractor or joint contractors, no adverse party or person adversely interested in the event thereof, shall, by virtue of Section 8-101 of this Act, be rendered a competent witness to testify to any admission or

conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation; and in every action or proceeding a party to the same who has contracted with an agent of the adverse party—the agent having since died—shall not be a competent witness as to any admission or conversation between himself or herself and such agent, unless such admission or conversation with the deceased agent was had or made in the presence or a surviving agent or agents of such adverse party, and then only except where the conditions are such that under the provisions of Sections 8-201 and 8-401 of this Act he or she would have been permitted to testify if the deceased person had been a principal and not an agent.

\* \* \*

This provision is of importance because it applies to surviving partners and joint contractors. Also, it applies to surviving agents. Basically, it does not cover “events” as provided in the main proviso of 735 ILCS 5/8-201. In furtherance of the concept that a decedent or person under legal incapacity should have the ability to refute what the surviving person seeks to testify about, this provision only applies to conversations and admissions by the decedent. (See, *Graham*, pp. 392-393).

In representing our clients and being of assistance to the court, the Dead Man’s Act requires not only study of the case law but preparation for what you believe will unfold at trial. Like geometry, these are not easy lessons. To do an effective job it requires talking to witnesses, not necessarily taking depositions. Who was with the ward/decedent at the time the event or conversation occurred. Who else was there? What was that person’s relationship to the decedent or person under legal disability? When did it occur? It is only with this information we can understand the limits of a law that prohibits a witness from testifying about a matter in which he believes he has every right and obligation to do.

#### 755 ILCS 5/11a-3. Adjudication of Disability; Power to Appoint Guardian

##### §11a-3. Adjudication of disability; Power to appoint guardian.

(a) Upon the filing of a petition by a reputable person or by the alleged disabled person himself or on its own motion, the court may adjudge a person to be a disabled person, but only if it has been demonstrated by clear and convincing evidence that the person is a disabled person as defined in Section 11a-2. If the court adjudges a person to be a disabled person, the court may appoint (1) a guardian of his person, if it has been demonstrated by clear and convincing evidence that because of his disability he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person, or (2) a guardian of his estate, if it has been demonstrated by clear and convincing evidence that because of his disability he is unable to manage his estate or financial affairs, or (3) a guardian of his person and of his estate.

(b) Guardianship shall be utilized only as is necessary to promote the well-being of the disabled person, to protect him from neglect, exploitation, or abuse, and to encourage development of his maximum self-reliance and independence. Guardianship shall be ordered only to the extent necessitated by the individual's actual mental, physical and adaptive limitations.

755 ILCS 5/11a-14). Legal Disabilities of Ward

§11a-14. Legal disabilities of ward.

(a) An order appointing a limited guardian of the person under this Article removes from the ward only that authority provided under Section 11a-17 which is specifically conferred on the limited guardian by the order.

(b) An order appointing a limited guardian of the estate under this Article confers on the limited guardian the authority provided under Section 11a-18 not specifically reserved to the ward.

(c) The appointment of a limited guardian under this Article shall not constitute a finding of legal incompetence.

(d) An order appointing a plenary guardian under this Article confers on the plenary guardian of the person the authority provided under Section 11a-17 and on the plenary guardian of the estate the authority provided under Section 11a-18.

***Practice Pointer.* The adjudication of disability on a limited basis does not result in a finding of legal incompetence; however, it gives the limited guardian broad authority unless you reserve it to the ward in the guardianship order.**

755 ILCS 5/11a-12. Order of Appointment.

§11a-12. Order of appointment.

(a) If basis for the appointment of a guardian as specified in Section 11a-3 is not found, the court shall dismiss the petition.

(b) If the respondent is adjudged to be disabled and to be totally without capacity as specified in Section 11a-3, and if the court finds that limited guardianship will not provide sufficient protection for the disabled person, his or her estate, or both, the court shall appoint a plenary guardian for the respondent's person or estate or both. The court shall enter a written order stating the factual basis for its findings.

(c) If the respondent is adjudged to be disabled and to lack some but not all of the capacity as specified in Section 11a-3, and if the court finds that guardianship is necessary for the protection of the disabled person, his or her estate, or both, the court shall appoint a limited guardian of the respondent's person or estate or both. The court shall enter a written order stating the factual basis for its findings and specifying the duties and powers of the guardian and the legal disabilities to which the respondent is subject.

(d) The selection of the guardian shall be in the discretion of the court, which shall give due consideration to the preference of the disabled person as to a guardian, as well as the qualifications of the proposed guardian, in making its appointment.

***Practice Pointer:* The court is required to consider the ward's preference,**

**but it is not bound by that choice. *In re Schmidt*, 232 Ill.Dec. 938 (2<sup>nd</sup> Dist. 1998).**

The selection of a guardian is in the discretion of the court who shall give due consideration to the preference of the disabled person as to whom shall serve as guardian, as well as the qualification of the proposed guardian, in making an appointment. 755 ILCS 5/11(a)-12(d). Where multiple persons are competing for guardianship, various factors are to be analyzed by the trial court. *Estate of Johnson*, 708 N.E.2d 466 (1999).

755 ILCS 5/11a-19. Notice of Right to Seek Modification

§11a-19. Notice of right to seek modification. At the time of the appointment of a guardian the court shall inform the ward of his right under Section 11a-20 to petition for termination of adjudication of disability, revocation of the letters of guardianship of the estate or person, or both, or modification of the duties of the guardian and shall give the ward a written statement explaining this right and the procedures for petitioning the court. The notice shall be in large, bold type and shall be in a format similar to the notice of rights required under subsection (e) of Section 11a-10 of this Act.

***Practice Pointer:* The statute has no enforcement provision if a default occurs as to this notice provision.**

755 ILCS 5/11a-14.1. Residential Placement

§11a-14.1. Residential placement. No guardian appointed under this Article, except for duly appointed Public Guardians and the Office of State Guardian, shall have the power, unless specified by court order, to place his ward in a residential facility. The guardianship order may specify the conditions on which the guardian may admit the ward to a residential facility without further court order. In making residential placement decisions, the guardian shall make decisions in conformity with the preferences of the ward unless the guardian is reasonably certain that the decisions will result in substantial harm to the ward or to the ward's estate. When the preferences of the ward cannot be ascertained or where they will result in substantial harm to the ward or to the ward's estate, the guardian shall make decisions with respect to the ward's placement which are in the best interests of the ward. The guardian shall not remove the ward from his or her home or separate the ward from family and friends unless such removal is necessary to prevent substantial harm to the ward or to the ward's estate. The guardian shall have a duty to investigate the availability of reasonable residential alternatives. The guardian shall monitor the placement of the ward on an on-going basis to ensure its continued appropriateness, and shall pursue appropriate alternatives as needed.

***Practice Pointer.* A guardian without a court order has no authority to place a ward in a residential facility.**

755 ILCS 5/11a-17. Duties of Personal Guardian.

§11a-17. Duties of personal guardian.

(a) To the extent ordered by the court and under the direction of the court,

the guardian of the person shall have custody of the ward and the ward's minor and adult dependent children and shall procure for them and shall make provision for their support, care, comfort, health, education and maintenance, and professional services as are appropriate, but the ward's spouse may not be deprived of the custody and education of the ward's minor and adult dependent children, without the consent of the spouse, unless the court finds that the spouse is not a fit and competent person to have that custody and education. The guardian shall assist the ward in the development of maximum self-reliance and independence. The guardian of the person may petition the court for an order directing the guardian of the estate to pay an amount periodically for the provision of the services specified by the court order. If the ward's estate is insufficient to provide for education and the guardian of the ward's person fails to provide education, the court may award the custody of the ward to some other person for the purpose of providing education. If a person makes a settlement upon or provision for the support or education of a ward, the court may make an order for the visitation of the ward by the person making the settlement or provision as the court deems proper. A guardian of the person may not admit a ward to a mental health facility except at the ward's request as provided in Article IV of the Mental Health and Developmental Disabilities Code and unless the ward has the capacity to consent to such admission as provided in Article IV of the Mental Health and Developmental Disabilities Code.

(a-5) If the ward filed a petition for dissolution of marriage under the Illinois Marriage and Dissolution of Marriage Act before the ward was adjudicated a disabled person under this Article, the guardian of the ward's person and estate may maintain that action for dissolution of marriage on behalf of the ward.

(b) If the court directs, the guardian of the person shall file with the court at intervals indicated by the court, a report that shall state briefly: (1) the current mental, physical, and social condition of the ward and the ward's minor and adult dependent children; (2) their present living arrangement, and a description and the address of every residence where they lived during the reporting period and the length of stay at each place; (3) a summary of the medical, educational, vocational, and other professional services given to them; (4) a resume of the guardian's visits with and activities on behalf of the ward and the ward's minor and adult dependent children; (5) a recommendation as to the need for continued guardianship; (6) any other information requested by the court or useful in the opinion of the guardian. The Office of the State Guardian shall assist the guardian in filing the report when requested by the guardian. The court may take such action as it deems appropriate pursuant to the report.

(c) Absent court order pursuant to the Illinois Power of Attorney Act directing a guardian to exercise powers of the principal under an agency that survives disability, the guardian has no power, duty, or liability with respect to any personal or health care matters covered by the agency. This subsection (c) applies to all agencies, whenever and wherever executed.

(d) A guardian acting as a surrogate decision maker under the Health Care Surrogate Act shall have all the rights of a surrogate under that Act without court order including the right to make medical treatment decisions such as decisions to forgo or withdraw life-sustaining treatment. Any decisions by the guardian to forgo or withdraw life-sustaining treatment that are not authorized under the Health Care Surrogate Act shall require a court order. Nothing in this Section shall prevent an agent acting under a power of attorney for health care from exercising his or her

authority under the Illinois Power of Attorney Act without further court order, unless a court has acted under Section 2-10 of the Illinois Power of Attorney Act. If a guardian is also a health care agent for the ward under a valid power of attorney for health care, the guardian acting as agent may execute his or her authority under that act without further court order.

(e) Decisions made by a guardian on behalf of a ward shall be made in accordance with the following standards for decision making. Decisions made by a guardian on behalf of a ward may be made by conforming as closely as possible to what the ward, if competent, would have done or intended under the circumstances, taking into account evidence that includes, but is not limited to, the ward's personal, philosophical, religious and moral beliefs, and ethical values relative to the decision to be made by the guardian. Where possible, the guardian shall determine how the ward would have made a decision based on the ward's previously expressed preferences, and make decisions in accordance with the preferences of the ward. If the ward's wishes are unknown and remain unknown after reasonable efforts to discern them, the decision shall be made on the basis of the ward's best interests as determined by the guardian. In determining the ward's best interests, the guardian shall weigh the reason for and nature of the proposed action, the benefit or necessity of the action, the possible risks and other consequences of the proposed action, and any available alternatives and their risks, consequences and benefits, and shall take into account any other information, including the views of family and friends, that the guardian believes the ward would have considered if able to act for herself or himself.

(f) Upon petition by any interested person (including the standby or short-term guardian), with such notice to interested persons as the court directs and a finding by the court that it is in the best interest of the disabled person, the court may terminate or limit the authority of a standby or short-term guardian or may enter such other orders as the court deems necessary to provide for the best interest of the disabled person. The petition for termination or limitation of the authority of a standby or short-term guardian may, but need not, be combined with a petition to have another guardian appointed for the disabled person.

***Practice Pointer: Certain elder abuse claims at nursing homes result in liability to the nursing home. Maplewood Care, Inc., v. Arnold, 2013 IL.App. (1<sup>st</sup>) 120602. In Maplewood, a resident was admitted. He had a serious criminal history. He raped another resident at the home. During the admission process, his criminal history was not obtained because whomever inputted his birth date entered the wrong date. The Appellate Court, in affirming an administrative law judge, found that Maplewood's failure to properly request a criminal background check resulted in strict liability to the nursing home. 210 ILCS 45/1-114.01. It did not matter that the error in admitting the patient was unintentional.***

755 ILCS 5/11a-18. Duties of the Estate Guardian.

***Practice Pointer: An attorney's duty to a non-client continues to confound courts. Whether an attorney owes a duty to a legally disabled next of kin in a wrongful death action is a question our Supreme Court will consider soon. Estate of Powell v. John Wunsch, PC, 2013 IL.App. (1<sup>st</sup>) 121854, leave to***

**appeal granted, No. 115997 (9/25/13)**

§11a-18. Duties of the estate guardian.

(a) To the extent specified in the order establishing the guardianship, the guardian of the estate shall have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward, his minor and adult dependent children, and persons related by blood or marriage who are dependent upon or entitled to support from him, or for any other purpose which the court deems to be for the best interests of the ward, and the court may approve the making on behalf of the ward of such agreements as the court determines to be for the ward's best interests. The guardian may make disbursement of his ward's funds and estate directly to the ward or other distributee or in such other manner and in such amounts as the court directs. If the estate of a ward is derived in whole or in part from payments of compensation, adjusted compensation, pension, insurance or other similar benefits made directly to the estate by the Veterans Administration, notice of the application for leave to invest or expend the ward's funds or estate, together with a copy of the petition and proposed order, shall be given to the Veterans' Administration Regional Office in this State at least 7 days before the hearing on the application.

(a-5) The probate court, upon petition of a guardian, other than the guardian of a minor, and after notice to all other persons interested as the court directs, may authorize the guardian to exercise any or all powers over the estate and business affairs of the ward that the ward could exercise if present and not under disability. The court may authorize the taking of an action or the application of funds not required for the ward's current and future maintenance and support in any manner approved by the court as being in keeping with the ward's wishes so far as they can be ascertained. The court must consider the permanence of the ward's disabling condition and the natural objects of the ward's bounty. In ascertaining and carrying out the ward's wishes the court may consider, but shall not be limited to, minimization of State or federal income, estate, or inheritance taxes; and providing gifts to charities, relatives, and friends that would be likely recipients of donations from the ward. The ward's wishes as best they can be ascertained shall be carried out, whether or not tax savings are involved. Actions or applications of funds may include, but shall not be limited to, the following:

(1) making gifts of income or principal, or both, of the estate, either outright or in trust;

(2) conveying, releasing, or disclaiming his or her contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety;

(3) releasing or disclaiming his or her powers as trustee, personal representative, custodian for minors, or guardian;

(4) exercising, releasing, or disclaiming his or her powers as donee of a power of appointment;

(5) entering into contracts;

(6) creating for the benefit of the ward or others, revocable or irrevocable trusts of his or her property that may extend beyond his or her disability or life;

(7) exercising options of the ward to purchase or exchange securities or other property;

(8) exercising the rights of the ward to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any one or more of the following:

(i) life insurance policies, plans, or benefits,

(ii) annuity policies, plans, or benefits,

(iii) mutual fund and other dividend investment plans,

(iv) retirement, profit sharing, and employee welfare plans and benefits;

(9) exercising his or her right to claim or disclaim an elective share in the estate of his or her deceased spouse and to renounce any interest by testate or intestate succession or by inter vivos transfer;

(10) changing the ward's residence or domicile; or

(11) modifying by means of codicil or trust amendment the terms of the ward's will or any revocable trust created by the ward, as the court may consider advisable in light of changes in applicable tax laws.

***Practice Pointer: We have a new Directed Trust Statute in Illinois (P.A. 97-921, 760 ILCS 5/16.3). This is an ambitious law which discusses people know as "investment trust advisors, distribution trust advisors and trust protectors." It seeks to imbue these individuals with broad-ranging powers. How this will affect wards who are beneficiaries of trusts is unclear. (See, Illinois Bar Journal, (June 2013), Vol. 101, pp. 292, 297, Daniel Felix,)***

The guardian in his or her petition shall briefly outline the action or application of funds for which he or she seeks approval, the results expected to be accomplished thereby, and the tax savings, if any, expected to accrue. The proposed action or application of funds may include gifts of the ward's personal property or real estate, but transfers of real estate shall be subject to the requirements of Section 20 of this Act. Gifts may be for the benefit of prospective legatees, devisees, or heirs apparent of the ward or may be made to individuals or charities in which the ward is believed to have an interest. The guardian shall also indicate in the petition that any planned disposition is consistent with the intentions of the ward insofar as they can be ascertained, and if the ward's intentions cannot be ascertained, the ward will be presumed to favor reduction in the incidents of various forms of taxation and the partial distribution of his or her estate as provided in this subsection. The guardian shall not, however, be required to include as a beneficiary or fiduciary any person who he has reason to believe would be excluded by the ward. A guardian shall be required to investigate and pursue a ward's eligibility for governmental benefits.

(b) Upon the direction of the court which issued his letters, a guardian may perform the contracts of his ward which were legally subsisting at the time of the commencement of the ward's disability. The court may authorize the guardian to execute and deliver any bill of sale, deed or other instrument.

(c) The guardian of the estate of a ward shall appear for and represent the ward in all legal proceedings unless another person is appointed for that purpose as guardian or next friend. This does not impair the power of any court to appoint a guardian ad litem or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute or defend any proceeding in his behalf. Without impairing the power of the court in any respect, if the guardian of the estate of a ward and another person as next friend shall appear for and represent the ward in a legal proceeding in which the compensation of the attorney or attorneys representing the guardian and next friend is solely determined under a contingent fee arrangement, the guardian of the estate of the ward shall not participate in or have any duty to review the prosecution of the action, to participate in or review the appropriateness of any settlement of the action, or to participate in or review any determination of the appropriateness of any fees awarded to the attorney or attorneys employed in the prosecution of the action.

(d) Adjudication of disability shall not revoke or otherwise terminate a trust which is revocable by the ward. A guardian of the estate shall have no authority to revoke a trust that is revocable by the ward, except that the court may authorize a guardian to revoke a Totten trust or similar deposit or withdrawable capital account in trust to the extent necessary to provide funds for the purposes specified in paragraph (a) of this Section. If the trustee of any trust for the benefit of the ward has discretionary power to apply income or principal for the ward's benefit, the trustee shall not be required to distribute any of the income or principal to the guardian of the ward's estate, but the guardian may bring an action on behalf of the ward to compel the trustee to exercise the trustee's discretion or to seek relief from an abuse of discretion. This paragraph shall not limit the right of a guardian of the estate to receive accountings from the trustee on behalf of the ward.

(e) Absent court order pursuant to the Illinois Power of Attorney Act directing a guardian to exercise powers of the principal under an agency that survives disability, the guardian will have no power, duty or liability with respect to any property subject to the agency. This subsection (e) applies to all agencies, whenever and wherever executed.

(f) Upon petition by any interested person (including the standby or short-term guardian), with such notice to interested persons as the court directs and a finding by the court that it is in the best interest of the disabled person, the court may terminate or limit the authority of a standby or short-term guardian or may enter such other orders as the court deems necessary to provide for the best interest of the disabled person. The petition for termination or limitation of the authority of a standby or short-term guardian may, but need not, be combined with a petition to have another guardian appointed for the disabled person.

***Practice Pointer:* This provision of the statute covers a lot of ground. It gives the estate guardian authority to appear and defend in all litigation or hire counsel to do so. Make sure the estate guardian posts an adequate bond which covers the value of the ward's estate.**

**Practice Pointer:** A recurring issue relating to the scope of the probate court's authority over a ward's interest in a trust has caused, at times, fractious debate. Many estate planners believe trusts are outside the probate court's jurisdiction since trust declarations say so. The law we have on the issue seems to declare otherwise. *Estate of Pellico*, 916 N.E.2d 45, 334 Ill.Dec. 12 (2009). One issue in *Pellico* is whether the trial court had authority to award attorney's fees from trust assets after the ward died. *Pellico* held that the trial court had authority over the trust created for the ward's benefit.

755 ILCS 5/11a-18.1. Conditional Gifts.

§11a-18.1. Conditional gifts.

(a) The court may authorize and direct the guardian of the estate to make conditional gifts from the estate of a disabled person to any spouse, parent, brother or sister of the disabled person who dedicates himself or herself to the care of the disabled person by living with and personally caring for the disabled person for at least 3 years. It shall be presumed that the disabled person intends to make such conditional gifts.

(b) A conditional gift shall not be distributed to the donee until the death of the disabled person. The court may impose such other conditions on the gift as the court deems just and reasonable. The court may provide for an alternate disposition of the gift should the donee die before the disabled person; provided that if no such alternate disposition is made, the conditional gift shall lapse upon the death of the donee prior to the death of the disabled person. A conditional gift may be modified or revoked by the court at any time.

(c) The guardian of the estate, the spouse, parent, brother or sister of a disabled person, or any other interested person may petition the court to authorize and direct the guardian of the estate to make a conditional gift or to modify, revoke or distribute a conditional gift. All persons who would be heirs of the disabled person if the disabled person died on the date the petition is filed (or the heirs if the disabled person is deceased) and all legatees under any known last will of the disabled person shall be given reasonable notice of the hearing on the petition by certified U. S. mail, return receipt requested. If a trustee is a legatee, notice shall be given to the trustee and need not be given to the trust beneficiaries. Any person entitled to notice of the hearing may appear and object to the petition. The giving of the notice of the hearing to those persons entitled to notice shall cause the decision and order of the court to be binding upon all other persons who otherwise may be interested or may become interested in the estate of the disabled person.

(d) The guardian of the estate shall set aside conditional gifts in a separate fund for each donee and shall hold and invest each fund as part of the estate of the disabled person. Upon order of the court, any conditional gift may be revoked or modified in whole or part so that the assets may be used for the care and comfort of the disabled person should funds otherwise available for such purposes be inadequate.

(e) Upon the death of the disabled person, the guardian of the estate shall

hold each special fund as trustee and shall petition the court for authorization to distribute the special fund and for any other appropriate relief. The court shall order distribution upon such terms and conditions as the court deems just and reasonable.

***Practice Pointer. Gifts should not be problems, although they can be. What would the ward want to do; what was his/her past practice. Where uncertainty abounds, ask the Court for direction.***

755 ILCS 5/11a-20. Termination of Adjudication of Disability.

§11a-20. Termination of adjudication of disability - Revocation of letters - modification.

(a) Upon the filing of a petition by or on behalf of a disabled person or on its own motion, the court may terminate the adjudication of disability of the ward, revoke the letters of guardianship of the estate or person, or both, or modify the duties of the guardian if the ward's capacity to perform the tasks necessary for the care of his person or the management of his estate has been demonstrated by clear and convincing evidence. A report or testimony by a licensed physician is not a prerequisite for termination, revocation or modification of a guardianship order.

(b) A request by the ward or any other person on the ward's behalf, under this Section may be communicated to the court or judge by any means, including but not limited to informal letter, telephone call or visit. Upon receipt of a request from the ward or another person, the court may appoint a guardian ad litem to investigate and report to the court concerning the allegations made in conjunction with said request, and if the ward wishes to terminate, revoke, or modify the guardianship order, to prepare the ward's petition and to render such other services as the court directs.

(c) Notice of the hearing on a petition under this Section, together with a copy of the petition, shall be given to the ward, unless he is the petitioner, and to each and every guardian to whom letters of guardianship have been issued and not revoked, not less than 14 days before the hearing.

755 ILCS 5/11a-21. Hearing.

§11a-21. Hearing.

(a) The court shall conduct a hearing on a petition filed under Section 11a-20. The ward is entitled to be represented by counsel, to demand a jury of 6 persons, to present evidence and to confront and cross-examine all witnesses. The court (1) may appoint counsel for the ward, if the court finds that the interests of the ward will be best served by the appointment and (2) shall appoint counsel upon the ward's request or if the respondent takes a position adverse to that of the guardian ad litem. The court may allow the guardian ad litem and counsel for the ward reasonable compensation.

(b) If the ward is unable to pay the fee of the guardian ad litem or appointed counsel, or both, the court shall enter an order upon the State to pay, from funds appropriated by the General Assembly for that purpose, all such fees or such

amounts as the ward is unable to pay.

(c) Upon conclusion of the hearing, the court shall enter an order setting forth the factual basis for its findings and may: (1) dismiss the petition; (2) terminate the adjudication of disability; (3) revoke the letters of guardianship of the estate or person, or both; (4) modify the duties of the guardian; and (5) make any other order which the court deems appropriate and in the interests of the ward.

***Practice Pointer.* The burden of proof in a restoration hearing is whether the ward's capacity to perform the tasks necessary for the care of his person or the management of his estate has been shown by clear and convincing evidence. This does not denote that the ward must literally and physically have the capacity to care for himself. What it means is the ward must have sufficient understanding to make or communicate responsible decisions concerning the care of his person. *Estate of Fallos*, 898 N.E.2d 793 (4<sup>th</sup> Dist. 2008). Remember, the least restrictive alternative (i.e., limited guardianship) should be the preferable choice.**

## **CONCLUSION**

This presentation provides a start, not a finish. Largely, it is rule-based, as it should be. No one wants to have his/her daily affairs controlled by the government if they do not have to be. Thankfully, for some, having the government act as his/her agent is a good thing. You, as an advocate, are required to find the correct course of action from the array of available options. It is your job to fashion the remedy which is the best interests of the disabled person with the assistance and authority of our judges, guardians and a guardian ad litem.

# **APPENDIX**





## **APPENDIX**

### ILLINOIS PATTERN JURY INSTRUCTIONS - CIVIL

General Instructions - Undue Influence (IPI 200.00)	A-1
Testimony of a Physician (IPI 200.06)	A-4
Undue Influence (IPI 200.09)	A-5
Failure of Party to Testify (Dead Man's Act) (IPI 5.02)	A-6
Clear and Convincing Evidence (IPI 800.03)	A-7
<i>The Dead Man's Act: Here's How It Works</i> , Patrick M. Kinnally, 2010	A-9

## **200.00**

### **WILL CONTEST**

#### Illinois Patterned Jury Instructions

### **Grounds for Invalidity of a Will**

#### **1. Undue Influence**

Influence is "undue" when it "prevents the testator from exercising his own will in the disposition of his estate" such that the testator's will is rendered more the will of another. *Id.*, 69 Ill.Dec. at 963. In order to invalidate a will, the undue influence must have been "directly connected with the execution of the will" and it must have operated at the time the will was made. *Schmidt v. Schwear*, 98 Ill.App.3d 336, 424 N.E.2d 401, 405, 53 Ill.Dec. 766, 770 (5th Dist.1981). Undue influence can be exerted by direct beneficiaries or by third parties, such as the spouse of a beneficiary. *Swenson v. Wintercorn*, 92 Ill.App.2d 88, 234 N.E.2d 91, 98 (2d Dist.1968). Influence need not be exerted in an untoward manner to be undue. Even kindness and affection can constitute undue influence if they destroy the testator's "free agency." *Kelley v. First State Bank of Princeton*, 36 Ill.Dec. at 575.

#### **a. Presumption of Undue Influence**

A rebuttable presumption of undue influence can result when a fiduciary relationship exists between the testator and a legatee. A rebuttable presumption arises when the plaintiff proves (1) the existence of an attorney-client relationship or other fiduciary relationship between the decedent and the beneficiary such that the beneficiary is the dominant party, (2) that the decedent reposed trust and confidence in the beneficiary, (3) that the beneficiary prepared or procured the preparation of the purported will, and (4) that the beneficiary would receive a substantial benefit under the document. *Tidholm v. Tidholm*, 391 Ill. 19, 62 N.E.2d 473 (1945) (the leading case). *Accord: Redmond v. Steele*, 5 Ill.2d 602, 610, 126 N.E.2d 619, 624 (1955); *Nemeth v. Banhalmi*, 125 Ill.App.3d 938, 960, 466 N.E.2d 977, 992, 81 Ill.Dec. 175, 190 (1st Dist.1984); *In re Estate of Mooney*, 117 Ill.App.3d 993, 997, 453 N.E.2d 1158, 1161, 73 Ill.Dec. 169, 172 (3d Dist.1983); *In re Stuhlfauth's Estate*, 88 Ill.App.3d 974, 979, 410 N.E.2d 1063, 1066—67, 43 Ill.Dec. 930, 933—34 (3d Dist.1980); *Kelley v. First State Bank*, 81 Ill.App.3d 402, 413—14, 401 N.E.2d 247, 256, 36 Ill.Dec. 566, 575 (3d Dist.1980); *In re Basich's Estate*, 79 Ill.App.3d 997, 1002, 398 N.E.2d 1182, 1186, 35 Ill.Dec. 232, 236 (1st Dist.1979); *Estate of Letsche*, 73 Ill.App.3d 643, 646, 392 N.E.2d 612, 614, 29 Ill.Dec. 915, 917 (1st Dist.1979); *Beyers v. Billingsley*, 54 Ill.App.3d 427, 436, 369 N.E.2d 1320, 1326, 12 Ill.Dec. 306, 312 (3d Dist.1977); *Herbolsheimer v. Herbolsheimer*, 46 Ill.App.3d 563, 565—66, 361 N.E.2d 134, 136, 5 Ill.Dec. 134, 136—37 (3d Dist.1977); *Swenson v. Wintercorn*, 92 Ill.App.2d 88, 99, 234 N.E.2d 91, 97 (2d Dist.1968). By proving these elements, a party contesting a will establishes a *prima facie* case of undue influence. *Nemeth v. Banhalmi*, 125 Ill.App.3d 938, 960, 466 N.E.2d 977, 992, 81 Ill.Dec. 175, 190 (1st Dist.1984).

A presumption of undue influence will not arise merely upon proof of a fiduciary relationship. Instead, the party contesting the will must demonstrate that the legatee who is the dominant party procured the execution of the will. *Estate of Letsche*, 73 Ill.App.3d 643, 392 N.E.2d 612, 614, 29 Ill.Dec. 915, 917 (1st Dist.1979).

## **b. Proof of Fiduciary Relationship**

The fiduciary relationships referred to in this four-part test are not limited to fiduciary relationships which exist as a matter of law, such as those between an attorney and client or a guardian and ward. A fiduciary relationship can also arise out of an informal relationship, which is "moral, social, domestic or even personal in its origin." *Swenson v. Wintercorn*, 234 N.E.2d at 97. Thus, courts have found fiduciary relationships between an elderly or infirm testator and a devisee or legatee who was taking care of the testator or who was handling the testator's financial affairs at the time the will was executed. See *Nemeth v. Banhalmi*, *supra*; *Kelley v. First State Bank of Princeton*, *supra*. Where a fiduciary relationship does not exist as a matter of law, the existence of the fiduciary relationship must be established by proof that is "clear, convincing, and so strong, unequivocal and unmistakable as to lead to but one conclusion." *Swenson v. Wintercorn*, 234 N.E.2d at 97.

***Practice Pointer:* The existence of a health care power of attorney is not the same as a property power of attorney. The former does not create a fiduciary relationship which raises a presumption of undue influence in the principal's execution of a deed that names the agent under the healthcare power of attorney as a joint tenant with the principal in a deed. A healthcare power of attorney does not give the agent the authority to manage or control the principal's property. *In re Estate of Stahling*, 2013 IL.App. (4<sup>th</sup>) 120271.**

## **c. Effect of Presumption**

Once the plaintiff has raised the presumption of undue influence, the burden of producing evidence to rebut the presumption shifts to the persons standing in the fiduciary relationship to the testator. *Franciscan Sisters Health Care Corp. v. Dean*, 69 Ill.Dec. at 964. The burden of persuasion, however, remains with the plaintiff, since plaintiff has the burden of proving undue influence. *Id.* at 964–65. The amount of evidence necessary to rebut the presumption depends upon the facts of each case. *In re Estate of Woodruff*, 164 Ill.App.3d 791, 518 N.E.2d 295, 297, 115 Ill.Dec. 770, 772 (1st Dist.1987), citing *Nemeth v. Banhalmi*, 81 Ill.Dec. at 191. Establishment of a *prima facie* case of undue influence in the procurement of the will has been held to be sufficient to overcome a motion for summary judgment. *In re Estate of Jessman*, 197 Ill.App.3d 414, 554 N.E.2d 718, 143 Ill.Dec. 783 (5th Dist.1990).

The issues of whether a presumption of undue influence has been raised and whether sufficient evidence to rebut the presumption has been produced are questions of law for the court to decide. If the presumption of undue influence is not rebutted, the plaintiff is entitled to a judgment as a matter of law. *Franciscan Sisters Health Care Corp. v. Dean*, 69 Ill.Dec. at 965. If the presumption is rebutted, the presumption of undue influence ceases to exist, but an inference of undue influence remains. Plaintiff then has the burden of proving that the will was the product of undue influence on the basis of the evidence offered at trial. In a case tried before a jury, the issue of undue influence must be submitted to the jury without any mention of the presumption if the presumption has been rebutted.

***Practice Pointer:* Our Supreme Court has recently provided a worthwhile opinion, authored by Justice Thomas, on the issue of undue influence and the possible absence of testamentary capacity. *Dehart v. Dehart* (2013 IL 114137). Take a look at it. Although the opinion addresses the notion of what constitutes an equitable adoption, the point of the opinion rests with whether a complaint should have been dismissed. In affirming the Appellate**

**Court's reversal of the trial court on the issue of testamentary capacity, the Supreme Court observed that at least at the pleading stage, whether a decedent was of sound mind and/or disposing memory is an area that should be explored by way of discovery. (*Dehart*, Sl. Op, at p. 7) And, on the undue influence claim the Court's opinion is more salutary. (See, *In re Estate of Hoover*, 155 Ill.2d 403, 411. It holds that since *Dehart* pleaded as a matter of fact, that a presumption of undue influence existed, then the propriety of such a claim can only be determined at the earliest, after the close of Plaintiff's evidentiary case, not the pleading stage. (*Dehart*, Sl.Op. at p. 8) This ruling supports the view to which most practitioners subscribe. *In re: Estate of Henke*, 203 Ill.App.3d 975, 979 (1990)**

#### **D. Tortious Interference With Expectancy**

At times, certain activities which give rise to grounds to invalidate a will can also serve as the basis for a cause of action for intentional interference with an expectancy. The practitioner should be aware that when this tort action involves the validity of a will, the plaintiff must likewise file this action within the six month period provided for contesting a will. For further discussion of this issue, see the introduction to IPI Chapter 205, Tortious Interference With Expectancy.

***Practice Pointer:* With regard to the statute of limitations in will contest cases, (i.e., 6 months), such a limitation does not apply to tortious interference claims. *Estate of Ellis*, 236 Ill.2d 45, 923 N.E.2d 237 (2009).**

### **200.06 Testimony of a Physician**

During the course of this trial [a] physician[s] and [a] lay- man [laymen] have testified concerning the mental capacity of \_\_\_\_\_. The testimony of the physician[s] is not en-

decendent's name

titled to any greater weight solely because [he] [they] is [are] [a] physician[s].

#### **Notes on Use**

This instruction must be used where a physician and a layman give conflicting testimony on the question of mental capacity of the testator. It should not be used where there is no conflict between the testimony of a physician and a lay witness.

#### **Comment**

Instructions which single out evidence or comment upon particular kinds of witnesses should be avoided. However, *Both v. Nelson*, 31 Ill.2d 511, 514—515, 202 N.E.2d 494, 496, 497 (1964), held it to be reversible error to refuse an instruction in substantially this language in a will contest case where a hospital intern and the family doctor testified. See also *Estate of Veronico*, 78 Ill.App.3d 379, 385, 396 N.E.2d 1095, 1099, 33 Ill.Dec. 371, 376 (1st Dist.1979), where the court held that an instruction indicating that the testimony of a physician is not entitled to any greater weight than that of a layman, is proper.

In *In re Estate of Clements*, 152 Ill.App.3d 890, 505 N.E.2d 7, 10, 105 Ill.Dec. 881, 884 (5th Dist.1987), where the administrator of the decedent's estate challenged pre-death transfers of property, the court noted that the testimony of physicians on the issue of mental capacity is not entitled to any greater weight than that of laymen. Instead, the value of an opinion on competency is measured by the facts and circumstances which form the basis of the evaluation. *Id.*

## **200.09 Undue Influence—Definition**

When I use the expression "undue influence," I mean influence exerted at any time upon the decedent which causes him [her] to make a disposition of his [her] property that is not his [her] free and voluntary act.

### **Notes on Use**

This instruction should be given whenever undue influence is an issue in the case.

### **Comment**

A definition of undue influence from *Peters v. Catt*, 15 Ill.2d 255, 263, 154 N.E.2d 280, 285 (1958), is as follows:

The undue influence which invalidates a will must be directly connected with the execution of the instrument and operate at the time it is made. It must be specifically directed toward procuring the will in favor of a particular party or parties and must be such as to prevent the testator from exercising his own will in disposition of his estate.

For similar expressions, see *Butler v. O'Brien*, 8 Ill.2d 203, 212, 133 N.E.2d 274, 279 (1956); *Hockersmith v. Cox*, 407 Ill. 321, 325, 95 N.E.2d 464, 467 (1950). For a further definition of undue influence see the cases cited in IPI 200.03 and 200.04. See also *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 460, 448 N.E.2d 872, 877, 69 Ill.Dec. 960, 965 (1983); *In re Estate of Osborn*, 128 Ill.App.3d 453, 455, 470 N.E.2d 1114, 1117, 83 Ill.Dec. 694, 697 (5th Dist.1984); *In re Estate of Shedrick*, 122 Ill.App.3d 861, 867, 462 N.E.2d 581, 586, 78 Ill.Dec. 462, 467 (1st Dist.1984); *In re Estate of Veronica*, 78 Ill.App.3d 379, 386, 396 N.E.2d 1095, 1101, 33 Ill.Dec. 371, 377 (1st Dist.1979); *Swenson v. Wintercorn*, 92 Ill.App.2d 88, 99—100, 234 N.E.2d 91, 96—97 (2d Dist.1968); *In re Estate of Woodruff*, 164 Ill.App.3d 791, 518 N.E.2d 295, 296, 115 Ill.Dec. 770, 771 (1st Dist.1987).

The phrase "at any time" is included in the instruction to make clear that the influence need not have been exerted at the time the document was signed in order to have caused its execution. It is necessary only that the influence be operative at the time the document is executed. *Wilbur v. Wilbur*, 138 Ill. 446, 450, 27 N.E. 701, 702 (1891); *Reynolds v. Adams*, 90 Ill. 134, 139 (1878).

This instruction embodies the elements of undue influence in simple language. There is no need to include the requirement that the influence be "directly connected" with the execution of the instrument since, if the influence were not so connected, it could not cause the challenged disposition. Also, it is unnecessary, and in some cases it would be inaccurate, to specify that the influence must be directed toward procuring the will in favor of a "particular person."

In *Williams v. Crickman*, 81 Ill.2d 105, 405 N.E.2d 799, 39 Ill.Dec. 820 (1980), the Illinois Supreme Court held that a trial court can invalidate only a portion of the will and allow the remaining portions of the will to stand if the invalid provisions could be separated without defeating the testator's intent or destroying the testamentary scheme.

## 5.02 Failure of Party to Testify

The [plaintiff] [defendant] in this case is [suing] [sued] as [administrator] [executor] [guardian] for a [deceased person] [incompetent person]. Since the deceased cannot be here to testify [since the incompetent person is incapable of testifying], the law does not permit the [defendant] [plaintiff] [or any person directly interested in this action] to testify in his own behalf [to any conversation with the] [deceased] [incompetent person] [or] [to any event which took place in the presence of the] [deceased] [incompetent person]. The fact that the [defendant] [plaintiff] did not testify to those matters should not be considered by you for or against him.

[In this case, however, the (plaintiff)(defendant) called (a witness)(the defendant)(the plaintiff) to testify on his behalf (to conversations with the)(deceased)(incompetent person) (or)(to an event which took place in the presence of the)(deceased)(incompetent person), and therefore the (plaintiff)(defendant)(interested person) had the right to testify as to the same (conversation)(event).]

[In this case, however, since the deposition of the (deceased)(incompetent person) was admitted in evidence on behalf of the (plaintiff)(defendant), the (plaintiff)(defendant) (interested person) had the right to testify as to the same matters admitted in evidence.]

[In this case, however, the law does not prevent the testimony concerning any fact relating to the heirship of the decedent.]

### Notes on Use

The "Dead Man's Act" is applicable and this instruction should be given only when: (1) the witness is a party or an interested person; (2) the witness is called in his own behalf; and (3) an adverse party is suing or defending in one of the enumerated representative capacities.

The instruction is intended to avoid confusion in the minds of the jury by reason of the fact that a party in the case sat silent throughout the trial.

If there is a full waiver of the "Dead Man's Act," no instruction on the subject is needed. If there is a partial waiver, paragraph two will be needed. If a party, due to the invoking of the rule, was incapable of testifying at all, there is no need to use the bracketed portion of the first paragraph.

This instruction is based on the evidence act, 735 ILCS 5/8—201 (1994), as amended effective October 1, 1973. Prior to that amendment, a protected party waived the protection of the act by calling the party or interested person but not by calling a non-party witness to the event. The amendment broadened the waiver to include such witnesses, and the instruction has been modified accordingly.

This instruction combines former IPI 5.02, 5.03, 5.04, 5.05, and 5.06, some of which were unnecessary and others rendered obsolete by the 1973 statutory amendments. Use only those paragraphs or parts of paragraphs that are applicable to the facts of the case.

### Comment

This instruction deals with the competency of a party as a witness and not with the admissibility of testimony or the competency of witnesses who are not parties. *Creighton v. Elgin*, 387 Ill. 592, 604, 56 N.E.2d 825, 830, 162 A.L.R. 883 (1944).

The giving of an instruction explaining the statute was approved in *Aldridge v. Morris*, 337 Ill.App. 369, 374, 86 N.E.2d 143, 145—46 (2d Dist.1949).

The disability is procedural and is waived if not asserted. *Karlos v. Pappas*, 3 Ill.App.2d 281, 121 N.E.2d 611 (2d Dist.1954)(abstract). However, where the objection is made, counsel may not comment on that fact. *Crutchfield v. Meyer*, 414 Ill. 210, 111 N.E.2d 142 (1953).

### **800.03 Fraud and Deceit—Clear and Convincing Evidence—Definition**

The committee recommends that no definition of "clear and convincing evidence" be given.

#### **Comment**

The expression "clear and convincing" has sometimes been defined in terms of "reasonable doubt." However, such a definition seems to lack clarity and could easily be confused with criminal matters in the minds of a jury. Definitions are discussed in the case of *Parsons v. Winter*, 142 Ill.App.3d 354, 491 N.E.2d 1236, 1240, 96 Ill.Dec. 776, 780 (1st Dist.1986). That court, after discussing a definition of "clear and convincing" which included the words "reasonable doubt," concluded that "highly probably true" would be a clearer statement of the concept. The court also relied on *In re Estate of Ragen*, 79 Ill.App.3d 8, 13—14, 398 N.E.2d 198, 202—03, 34 Ill.Dec. 523, 527—28 (1st Dist.1979).

The committee considered both the terms "reasonable doubt" and "highly probably true." The conclusion the committee reached is that the expression "clear and convincing" is more understandable than any definition that could be framed using "reasonable doubt" or "highly probably true." The expression "clear and convincing" contains terms which are readily understandable and in common every day usage, and an effort to define those terms might very well create confusion and misunderstanding.

## **THE DEAD MAN'S ACT: Here's How It Works**

The Dead Man's Act (735 ILCS 5/8-201) ("The Act") has been declared by some to be antiquated and a privilege that is disfavored in the law. (Cleary and Graham Handbook of Illinois Evidence, 9<sup>th</sup> Ed. 2009, Sec. 606.1, citing Wigmore, Evidence, Sec. 578a)

Although criticized, the Illinois Supreme Court has indicated no desire to retreat from enforcing the plain meaning of what the rules states. The idea behind the Act is to prevent one who has outlived another to a transaction to testify falsely since a decedent or one under a legal disability cannot rebut such evidence. It is an evidentiary rule that makes a witness incompetent, not his or her testimony, to testify where the decedent or person under a legal disability is the only one who could have refuted that witnesses' declaration. It seems complicated; really, it isn't. *Gunn v. Sobucki*, 216 Ill.2d 602 (2005). A recent opinion from the Appellate Court provides a helpful analysis of the rule as it is applied to a tort action and cross motions for Summary Judgment. *Balma and Gallup v. Henry and Grosvenor*, 404 Ill.App.3d 233, 935 N.E.2d 1204 (2<sup>nd</sup> Dist. 2010). ("*Balma v. Henry*")

State Street in Rockford runs in an east-west direction. It crosses New Towne Drive at a controlled, north-south intersection. Ms. Balma and her passenger, Linda Gallup were traveling westbound on State. Edward Henry was in his van waiting to turn left from State onto New Towne. Cynthia Grosvenor rear-ended the Henry van, which crashed into the Balma car. Plaintiffs filed negligence actions against both defendants. The defendants filed counterclaims *inter se* for contribution. The parties and a non-party were deposed. Mr. Henry died after his deposition was taken. Sharon Rudy ("Rudy") was appointed as Special Administrator of Mr. Henry's estate and substituted in as a defendant in the litigation. Rudy filed a Motion for Summary Judgment on behalf of the Estate. She attached to it the depositions of the parties as well as some documents. Rudy claimed there was no direct evidence as to how the accident occurred and, therefore, the liability of Henry was speculative and no one could show Henry was negligent. Also, she argued The Act would preclude plaintiffs or Grosvenor from testifying about the collision.

Next, the other defendant, Grosvenor filed a Motion for Summary Judgment attaching in addition a deposition of a non-party witness. She contended because of the invocation of The Act by Rudy, neither she nor plaintiffs could testify as to how the collision occurred. Also, she argued, the Estate could not use the discovery depositions of any party consistent with Supreme Court Rule 212. The trial court agreed with Ms. Grosvenor, and interestingly certified the following question for review, "whether or not admissions made by defendants in their discovery depositions are barred by the Dead Man's Act." Odd, since the trial court granted Summary Judgment for Cynthia Grosvenor, one of the defendants.

Justice McLaren declared the trial judge's ruling was mistaken. He observed that Supreme Court Rule 212(a)(2) states that any admission contained in a discovery deposition is admissible as a party-opponent admission. See, *In re Estate of Rennick* (1998) 181 Ill.2d 395. Death does not change that rule merely because the admission is featured in a discovery deposition. See, *Rerack v. Lally* (1<sup>st</sup> Dist. 1992) 241 Ill.App.3d 692. This is especially true because The Act says:

§ 8-201. Dead-Man's Act. In the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability. \* \* \* (Emphasis added.)

Grosvenor's argument was misplaced because she had no right to assert the Act as a bar to testimony because she was not the Estate's representative. (Query: Who has the right in a disabled guardianship case?)

Thus, the only party in this litigation entitled to assert The Act as a bar to the admission of a party opponent deposition is the representative of the Estate. *Ruback v. Doss* (1<sup>st</sup> Dist. 2004) 347 Ill.App.3d 808. Here, that would have been Sharon Rudy. But Ms. Rudy brought her own Motion for Summary Judgment on behalf of the estate. In so doing, she waived using The Act as a bar because The Act states:

\* \* \*

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

\* \* \*

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

Mr. Henry's estate might have been better served to do nothing, await trial, and then raise the Act as a bar as to conversations with Mr. Henry or an event which took place in his presence.

Because Mr. Henry's administrator waived the privilege, Cynthia Grosvenor and any other party had the ability to present testimony concerning those matters which were admissible in evidence. Here that included the depositions of all the parties which were attached to the Special Administrator's Motion for Summary Judgment. Furthermore, the Appellate Court held, correctly, that Grosvenor's deposition testimony was admissible, too, as an exception to the hearsay rule, as an admission by a party-opponent.

The upshot being that all of the party depositions could be used to plumb whether summary judgment was appropriate. Additionally, the court *in dicta* presented a thorough analysis of what constitutes an "event" for the purposes of The Act. In this context, the "event" was the collision, not the factors which occurred prior to it, such as the condition of Mr. Henry's car, what he heard, where his foot was in relating to the car brake, what he saw, and how long he was stopped all of which were all admissible regardless of the Dead Man's Act. Moreover, Grosvenor's similar actions and observations were admissible since none of them took place in the presence of Mr. Henry, the decedent. He never could have refuted such evidence since he was not in her presence when any of those acts occurred.

*Balma v. Henry* is a very good exegesis on the applicability of the Dead Man's Act in trial practice. It tells us: the privilege of asserting or waiving The Act belongs to the decedent's (or a person under legal disability) estate; the privilege once waived permits testimony by an adverse party as to the event or information waived; and finally, a party's opponent's admission is an exception to the hearsay rule for purposes of a Motion for Summary Judgment. Going forward, this opinion should help in at least lifting the veil in which The Dead Man's Act sometimes enshrouds us. With the advent of our new Illinois Evidence Act, the currency of The Act may come into question, again. I guess we will see.

Patrick M. Kinnally