ILLINOIS STATE BAR ASSOCIATION

FEBRUARY 2018 VOL 4 NO. 3

Mental Health Matters

The newsletter of the Illinois State Bar Association's Section on Mental Health Law

Caselaw update
1

Caselaw update

BY ANDREAS LIEWALD

Illinois Supreme Court

In re Benny M., 2017 IL 120133 (Opinion filed November 30, 2017).

The trial court granted the State's petition for involuntary treatment (psychotropic medication). ¶1. During the hearing, the trial court permitted Respondent to remain shackled. ¶1. The appellate court reversed the trial court's judgment, holding that the trial court erred in allowing Respondent to be physically restrained during the hearing. ¶1. The Illinois Supreme Court reversed the appellate court's judgment and affirmed the circuit court's judgment. ¶1, 49.

Background

After being found unfit to stand trial on a domestic battery charge, Respondent was involuntarily admitted to an Illinois Department of Human Services mental health facility (DHS facility). ¶3. Respondent was involuntarily medicated there and later found fit to stand trial. ¶3. Respondent was transferred to jail and stopped taking his psychotropic medication, and was again found unfit to stand trial. ¶3. Respondent was transferred back to the DHS facility, and the State filed the petition for involuntary treatment at issue in this case. ¶3.

A hearing on the petition was held before the trial court on two separate days. ¶4. On the first day, Respondent was physically restrained while being transported, but the shackles were removed before he entered the courtroom. ¶4. Following the direct examination of the State's expert witness, the hearing was continued for two weeks. ¶5.

When the hearing resumed, Respondent was physically restrained, and his attorney asked for the shackles to be removed. ¶6. When the trial court inquired whether the shackles were necessary for security, the security officer stated that Respondent was "listed as high elopement risk" and then provided a "patient transport checklist" to the court. ¶6, 40. The checklist was not admitted into evidence and was not included in the record on appeal. ¶6. In response to the trial court's inquiry, Respondent's attorney stated that she had not reviewed the document. ¶6. Respondent was questioned as to whether he was a high risk for elopement. ¶6. He stated in part "[w]here am I going to go? I'm trapped" and that he was willing to be present at the hearing. ¶6.

The trial court denied the attorney's request for the shackles to be removed. ¶6. Respondent's attorney then asked if Respondent's right hand could be released to take notes and communicate with her during the hearing. ¶7. Respondent interjected, "Do you think I am going to take the pen or something and try to stab someone with it?" ¶7. The trial court then inquired to Respondent's attorney whether she felt if Respondent was unable to participate with his hands restrained. ¶7. The trial court then stated that if there is a need for Respondent to take notes, it

Continued on next page

If you're getting this newsletter by postal mail and would prefer electronic delivery, just send an e-mail to Ann Boucher at aboucher@isba.org

Caselaw update

CONTINUED FROM PAGE 1

would consider the request. ¶8.

Respondent's attorney cross-examined the State's witness. ¶9. Respondent interrupted occasionally and commented on the expert's testimony. ¶9. The trial court admonished Respondent several times that he would be removed from the courtroom if he kept interrupting. ¶9.

During Respondent's testimony, he asserted that he had not been taking his medication because he did not have a mental illness. ¶10. Respondent stated that the shackles were "very restrictive." ¶10. When the judge told Respondent he could step down from the witness stand, Respondent stated, "If I am still able to walk. I just got up." ¶10.

During closing arguments, Respondent interrupted the State. ¶11. The trial court advised Respondent that he would be removed from the courtroom the next time he interrupted. ¶11. Respondent's attorney asserted that Respondent had to stand up because he had been in pain. ¶12. Respondent then complained that his restraints had been "tightened" and asked if they could be removed. ¶12. A security officer then led Respondent out of the courtroom. ¶12. After the State finished its argument, Respondent's attorney asserted that Respondent complained about the restraints, stood up several times during the hearing, and indicated he was having cramps. ¶13. The trial judge responded, "I'm certain that those comments are not part of the record. I would have possibly addressed them if he had made them or you had made them on his behalf directly to me." ¶13. Respondent's attorney stated, "I apologize. I should have." ¶13. The trial court subsequently granted the petition for psychotropic medication for a period not to exceed 90 days. ¶13.

Respondent appealed the trial court's judgment, contending that he was denied a fair trial because he was shackled during the hearing. ¶14. Although the appeal was moot, the appellate court found that it fell within both the public interest exception to mootness and the exception for issues capable of repetition, yet evading review. ¶14. The appellate court held that the trial court abused its discretion in shackling Respondent because the court did not conduct an independent assessment of the factors bearing on that decision or make explicit finding that shackling was necessary. ¶14. The appellate court further concluded that the error could not be considered harmless beyond a reasonable doubt. ¶14. Accordingly, the trial court's judgment was reversed. ¶14.

Analysis

Mootness Exception – Capable of Repetition Yet Evading Review.

The Illinois Supreme Court found that the mootness exception, capable of repetition yet evading review applied to this case. ¶24. First, the challenged action was too short in duration to be litigated fully prior to its cessation since the 90-day duration of the order was too brief to allow appellate review. The court also concluded that the second element of the exception, requiring a reasonable expectation that the same complaining party will be subject to the same action again, was also met. ¶20, 24. The court found that there was a dispute on the procedure used in the trial court for ordering restraints. ¶23. The court believed that there was a reasonable expectation that respondent will be subjected to restraints again, given his history of mental illness and involuntary admission and treatment. ¶24. Accordingly, the appeal satisfied both requirements of the mootness exception for issues capable of repetition yet evading review. ¶24.

Merits – Shackling of Respondent

The court noted that it had not previously considered the standards of procedure for imposing restraints in mental health proceedings. ¶27. However, a general review of case law established that routine imposition or restraints is prohibited because it diminishes a

Mental Health Matters

Published at least four times per year. Annual subscription rates for ISBA members: $25.

To subscribe, visit www.isba.org or call 217-525-1760.

OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITOR
Sandra M. Blake

MANAGING EDITOR / PRODUCTION
Katie Underwood
kunderwood@isba.org

MENTAL HEALTH LAW SECTION COUNCIL
Robert J. Connor, Chair
Sandra M. Blake, Vice-Chair
Dara M. Bass, Secretary
Joseph T. Monahan, Ex-Officio
Richard W. Buelow
MaryLynn M. Clarke
Daniel G. Deneen
Mark B. Epstein
Nancy Z. Hablutzel
Scott D. Hammer
Jennifer L. Hansen
Mark J. Heyrman
Cheryl R. Jansen
Bruce A. Jefferson
Andreas M. Liewald
William A. McNutt
Susan K. O'Neal
Anthony E. Rothert
Meryl Sosa
Hon. John A. Wasilewski
Patricia A. Werner
Hon. Elizabeth M. Rochford, Board Liaison
Mary M. Grant, Staff Liaison
Carol A. Casey, CLE Committee Liaison
Barbara Goeben, CLE Coordinator

DISCLAIMER: This newsletter is for subscribers' personal use only; redistribution is prohibited. Copyright Illinois State Bar Association. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association or Editors, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

Articles are prepared as an educational service to members of ISBA. They should not be relied upon as a substitute for individual legal research.

The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

defendant's or respondent's ability to assist counsel, undermines the presumption of innocence, and demeans both the defendant or respondent and the judicial process. Citing *Deck v. Missouri,* 544 U.S. 622, 630-31 (2005); *People v. Allen,* 222 Ill. 2d 340, 346 (2006); and *People v. Boose,* 66 Ill. 2d 261, 265 (1977). ¶33. While involuntary treatment proceedings do not involve a presumption of innocence, other concerns weighing against unnecessary use of restraints in criminal and juvenile delinquency proceedings also applied. ¶33. The court found that Respondent's ability to assist counsel and the dignity of the court proceedings are important concerns in involuntary treatment proceedings, and those interests may be impacted by unnecessary restraints the same as in criminal and juvenile delinquency proceedings. ¶33. Accordingly, the court held that trial courts may order physical restraints in involuntary treatment proceedings only upon a finding of manifest necessity. ¶34. It held that trial courts must exercise their discretion and make an independent determination on whether to impose physical restraints. ¶34. A finding of manifest necessity for restraints must be based on the risk of flight, threats to the safety of people in the courtroom, or maintaining order during the hearing. Citing *In re Staley,* 67 Ill. 2d 33, 38 (1977) (citing *Boose,* 66 Ill. 2d at 266), ¶34.

The court noted that case law and Illinois Supreme Court Rules 430 and 943 consistently provide that the defendant's or respondent's attorney must be given an opportunity to be heard on reasons for removing restraints and the trial court must state on the record its reasons for allowing the defendant to remain shackled. ¶36. Accordingly, the court held that before ordering restraints in involuntary treatment proceedings, the trial court must give the respondent's attorney an opportunity to be heard and must state on the record the reasons for allowing the respondent to remain shackled. ¶36. The court did not attempt to list the factors to be considered in making this decision. ¶37. Nonetheless, the court reiterated that any factors considered in determining whether physical restraints are necessary should bear on the risk of flight, threats to people in the courtroom, or maintaining order during the hearing. ¶38. It held that the *Boose* hearing requirements apply to involuntary treatment proceedings. ¶42.

The court found that the record showed that the trial court questioned the security officer after Respondent's attorney asked for removal of the restraints. ¶40. The court noted that the trial court made several statements in the course of discussing the matter with Respondent and his attorney, including a statement about balancing "whatever security feels is necessary and [Respondent's] ability to participate. ¶40. The court noted that throughout the hearing, the trial court made statements indicating it was considering the information and making an independent determination. ¶41. The court concluded that the record, read in its entirety, showed the trial court did not simply defer to the security officer but weighed the information provided and made an independent determination that restraints were necessary. ¶41.

Although the court found that the respondent's attorney asked for shackles to be removed and later the right hand to be released, she did not object to the procedure used by the trial court in making its decision, ask for additional opportunity to be heard, or request findings of fact or an explicit statement of the trial court's reasons for permitting Respondent to remain shackled. ¶45. The court concluded that a more specific objection was required to preserve Respondent's procedural arguments for review given that the procedure for allowing restraints in involuntary treatment proceeding was not established at the time of the hearing in this case. ¶45. Finally, the court noted that Respondent did not make a separate argument that the trial court abused its discretion in deciding not to order removal of the restraints. ¶47.

Linda B., 2017 IL 119392 (Opinion filed September 21, 2017) (Petition for Rehearing filed by Guardianship and Advocacy Commission on October 12, 2017, denied on November 20, 2017).

"The overarching issue presented in this appeal is whether a timely petition was filed, seeking immediate, involuntary admission of respondent for inpatient psychiatric treatment in a mental health facility pursuant to article VI of the Mental Health and Developmental Disabilities Code" (Mental Health Code) (405 ILCS 5/3-600 *et seq.*). ¶1. The Illinois Supreme Court affirmed the appellate court's judgment. ¶52

Background

On May 9, 2013, a petition for involuntary admission was filed for Respondent Linda B. stating that Respondent was admitted to the "Mental Health Facility/Psychiatric Unit" on April 22, 2013. ¶3. At the trial, a psychiatrist testified in part that Respondent's hospitalization at Mt. Sinai began on April 22, 2013, when she was admitted to a "medical floor," where she was also "treated psychiatrically." The psychiatrist testified that Respondent exhibited agitated and angry behavior and was admitted to a medical floor because she had tachycardia and was severely anemic. ¶5. Throughout Respondent's hospitalization, she was followed by a psychiatrist and had a one-to-one sitter, and needed supervision all of the time. ¶5, 9.

Respondent's counsel moved to dismiss the petition for involuntary admission "based upon the petition having been filed well beyond the 24 hours after [Respondent's] admission." ¶10. Counsel argued that the petition was untimely filed where Respondent was admitted to the medical floor on April 22, 2013, but was also being treated psychiatrically from that date. ¶10. Over counsel's objection, the court allowed the State to reopen its case in order to adduce evidence related to Respondent's motion. ¶11. The psychiatrist testified that Respondent was admitted to the medical floor for both medical and psychiatric treatment. ¶11.

After closing argument, the circuit court denied Respondent's motion to dismiss and granted the petition for involuntary admission and provided that Respondent should be treated at a nursing home for a

period not to exceed 90 days. ¶12, 13.

Respondent appealed the court's order. The appellate court "appeared to have resolved this case on the basis of two premises:" (1) Respondent's "physical" admission to the hospital was not synonymous with "legal" admission under article VI of the Mental Health Code; and (2) the medical floor of the hospital, arguably, was not a "mental health facility" within the meaning of the statute irrespective of whether psychiatric treatment was rendered there. ¶15. The appellate court affirmed the judgment of the circuit court, concluding that the petition for involuntary admission was timely filed. ¶15.

Analysis and Decision

Public Interest Exception

The Illinois Supreme Court (court) found that the requisites for the application of the public interest exception were satisfied in this case. ¶20. It found that the procedural issues involved in involuntary treatment to recipients of metal health services were matters of public nature and of substantial public concern. *(Citations omitted)*. ¶20. Second, there was apparently uncertainty as to the type of facilities, or portions thereof, that meet the statutory definition of a "mental health facility" and, relatedly, whether the type of treatment administered in a facility may, in itself, qualify it as a "mental health facility." ¶20. "Even more to the point, this case presents the question of whether simultaneous, hybrid treatment, for *both* psychiatric and medical conditions, either qualifies (in the first instance) or disqualifies (in the second" the recipient for status as a mental health patient in a facility, dependent upon which condition predominates." ¶20. Finally, "respondent's own history demonstrates how this question might recur." (Citation omitted). ¶20. The court found this scenario as one likely to recur in the general population. ¶20.

Merits – Under What Circumstances Does a Medical Floor Qualify as a "Mental Health Facility" Under Section 1-114 of the Mental Health Code and What Constitutes "Admission Under Section 3-611 of the Mental Health Code

"Mental Health Facility" Under Section 1-114

Initially, the court noted that it was far from "clear" that it was Respondent's medical condition alone that brought her to someone's attention and resulted in her hospitalization or even that her medical condition was the *primary* factor in her hospitalization and treatment. ¶35. The court noted that it seemed that Respondent's psychiatric treatment and supervision on the medical floor were at least as comprehensive and structured as anything she might have received in a psychiatric unit, which the State conceded was a "mental health facility." ¶36. "We think most people of ordinary sensibility would agree with the application of abductive reasoning in this instance and conclude that a facility, or section thereof, capable of providing mental health services, that does in fact provide the individual mental health services, *is* a mental health facility." ¶36. Citing section 1-114 of the Mental Health Code, the court further noted that "[t]he legislature made the definition of 'mental health facility' extremely broad so as to encompass *any* place that provides for the 'treatment of persons with mental illness.'" 405 ILCS 5/1-114. ¶36. The court repeated that the Mental Health Code defines a "mental health facility" as "*any* licensed private hospital, institution, or facility or section thereof, and *any* facility, or section thereof, operated by the State or a political subdivision thereof for the treatment of persons with mental illness and includes *all* hospitals, institutions, clinics, evaluation facilities, and mental health centers which provide treatment for such persons." (Emphases added) (405 ILCS 5/1-114). ¶37. "The salient feature of the definition is that it applies to any facility, or any part of a facility, that provides for "the treatment of persons [afflicted] with mental illness." ¶37. "What the facility is called, if and when it performs some other function, is irrelevant." ¶37. "In those instances in which a facility provides psychiatric treatment to a person with mental illness – as was the case here – it qualifies as a "mental health facility" for purposes of the Mental Health Code's application." ¶37.

Admission to a Mental Health Facility Under Section 3-611

The court found that the record did not reflect when Respondent became noncompliant with treatment and became an involuntary recipient of psychiatric services in the hospital. ¶40, 42. In order to establish untimely filing of the petition, Respondent had to establish that her initial period of hospitalization and psychiatric treatment was involuntary. ¶44. Citing *Andrew B.,* 237 Ill.2d 340, 350 (2010), the court noted that "the code refers to 'admission' in a legal sense to describe the individual's legal status" within a facility. ¶48. "In other words, section 3-611's reference to 'admission' is not always limited to the individual's original physical entry." *Id.* ¶48. "The takeaway, for our purposes, is that legal status may change while one is in a mental health facility – and that could well be the case here." ¶49. The court held that because Respondent was unable to demonstrate that her physical entry into the facility, and her initial treatment there, were involuntary, she did not demonstrate that error occurred and that the petition for involuntary admission was not timely filed. ¶49.

Amanda H., 122241.

Issue: Police not completing a petition after it took respondent into custody and ambulance then transporting respondent to hospital was a violation of section 3-606 of the Mental Health Code. There was also no written dispositional report and no oral testimony about disposition. Status: The State's Petition for Leave to Appeal was denied.

Clinton S., 122177.

Issue: Kidney dialysis authorized as a test/procedure under Section 2-107.1 of the Mental Health Code. Status: GAC's Petition for Leave to Appeal was denied.

Illinois Appellate Courts

In re Rocker, 2017 IL App (4th)

170133 (Opinion filed December 19, 2017).

Petitioner-Appellant, Leon C. Rocker, appealed the trial court's denial of his petition to terminate the guardianship of his estate. ¶1. Respondent argued (1) the trial court's order denying the petition to terminate guardianship was against the manifest weight of the evidence and (2) the trial court abused its discretion by admitting hearsay. ¶1. Appellate court affirmed trial court's judgment. ¶1, 54.

Background

In 2011, a plenary guardian was appointed for guardianship of the person and estate of Rocker. ¶3. The guardianship was established because family members discovered Rocker suffered from mental conditions and sent more than $100,000 to individuals soliciting money over the Internet. ¶3. In 2013, the guardianship of Rocker's person was terminated in an agreed stipulation by Rocker and his guardian, and in 2015, First Financial Bank, was appointed successor guardian of Rocker's estate. ¶3.

In 2016, Rocker filed a "Petition to Discharge Guardian and Terminate Guardianship." ¶5. Rocker alleged that he was no longer a disabled adult and no longer required a guardian. ¶5. Rocker further alleged that he had the capacity to perform the tasks necessary for the management of his person and estate. ¶5. To his petition, Rocker attached a physician's report, in which two medical professionals, Dr. Roberts and Dr. Whisenand, indicated that Rocker no longer suffered from a disability preventing him from managing his estate. ¶5.

In 2016, the trial court held a hearing on Rocker's petition to terminate guardianship. ¶7. At the hearing, the court heard testimony from Dr. Roberts, Dr. Whisenand, Rocker, and a trust officer from First Financial Bank. ¶7.

Dr. Roberts testified that he had initially advocated for the guardianship of Rocker's person and estate because Rocker's mental condition (bipolar disorder) caused him to be unable to manage his person or estate. ¶8. However, in the past two or three years, Rocker's condition had improved, and Dr. Roberts no longer believed guardianship was appropriate, despite the fact that Rocker made poor financial decisions. ¶8. Dr. Roberts testified that he was aware that Rocker sent money to Internet solicitors, many of whom appeared to be involved in scams. ¶8. However, Dr. Roberts opined Rocker's decision to send money to others was no longer the product of a mental illness; rather, he believed Rocker was decisional and was making his decision of his own volition. ¶8.

Dr. Whisenand, who agreed with Dr. Robert's medical assessment, testified that Rocker's bipolar disorder was a condition he will have throughout his lifetime, but bipolar disorder may be effectively managed and go into remission. ¶9. Based upon his examination of Rocker, he believed Rocker was capable of making decisions free from the effects of bipolar disorder, even if those decisions were poor financial decisions. ¶9.

Rocker testified that he is a self-employed gardener and has between 35-50 clients. ¶10. He kept the money he made from his gardening business, which was not managed by his guardian. ¶10. Rocker testified that he sent money to people in need for religious and altruistic purposes, and for money in return. ¶11-12. Rocker was previously the victim of a scam, in which he lost $106,750. ¶13. The loss of this sum of money was the event which led his family to petition the trial court for guardianship. ¶13.

The trust officer for First Financial Bank testified that Rocker's estate was currently valued at approximately $420,000. ¶14. She testified that in 2016 Rocker had wired more than $9,600 to individuals in several countries and Rocker had indicated to her that he planned to continue sending money to individuals in need. ¶14. The trust officer believed that Rocker was incapable of managing his finances and therefore believed that guardianship of his estate was still necessary. ¶14.

In 2017 the trial court held a second hearing on Rocker's petition to terminate guardianship. ¶22. The trust officer was recalled to testify. ¶22. She testified that she accompanied Rocker to a Verizon store for him to obtain a new cellular phone. ¶22. The appointment took longer than expected, and Rocker needed to leave so he could get to a gardening job. ¶22. The officer stated that she would finish the appointment and bring Rocker's new phone to him afterward. ¶22. While she was waiting at the Verizon store, Rocker received several phone calls, and she wrote down the numbers. ¶22. Over the objection on hearsay grounds, the officer testified that she had spoken to a person named Williams, who had offered her a "promotion" for her to send money in return to receive more money. ¶23. Again over a hearsay objection, four emails were entered into evidence purporting a cash award of 2.5 million dollars. ¶24. Following her conversation with Williams, she received up to 25 phone calls a day from people soliciting money. ¶24. The officer also reviewed Rocker's Verizon statement, which notated several international phone calls. ¶25. She searched the phone numbers listed on the statement by using a website called "Spy-Dialer," a site that allows one to input a phone number and the site will generate a report, which will show the owner of the number and the location to which the number is associated. ¶25. The officer prepared a document, which listed the numbers, the location to which the phone number was associated, and relevant notes (i.e., whether the number was disconnected). ¶25. The document was entered into evidence over a hearsay objection. ¶25. The officer reiterated her concern about Rocker's ability to manage his estate and indicated her belief he remained financially vulnerable. ¶27. She expressed concern about Rocker's ability to say no to people who contact him soliciting money. ¶27.

The trial court denied Rocker's petition to terminate guardianship. ¶32. The trial court indicated that this was not a case where the ward merely used his money in eccentric or bizarre ways. ¶32. Rather, this was a case where Rocker was not logical or rational with respect to the use of his funds and was incapable of resisting the Internet and phone solicitations. ¶32. The court indicated there was no basis for Rocker's belief his funds were not being used for charitable purposes or for any

benefit to him, as he claimed. ¶32. The court concluded Rocker was still in need of guardianship of his estate so as to prevent it from suffering and waste. ¶32.

Analysis

Hearsay

Rocker asserted the trial court abused its discretion by allowing the bank officer to testify about the basis of her opinion that Rocker remained susceptible to scammers, specifically about (1) the conversation she had with Williams, (2) the four e-mails she received and (3) the document prepared by the bank officer, outlining the locations from which certain phone calls to her cellular phone had originated. ¶40. Rocker argued each of these bases constituted inadmissible hearsay. ¶40.

The appellate court defined hearsay as an out-of-court statement offered to prove the *truth of the matter asserted* and is generally inadmissible. Citing Ill. R. Evid. 801(c); and R. 802. ¶41. The appellate court found that the purpose for admitting the e-mails and testimony was to show why the bank officer believed Rocker remained susceptible to scams. ¶41. The conversation with Williams and the e-mails were offered not to prove the truth of the statements contained therein; rather they were offered to show the statements were incredible, thereby supporting the banks officer's opinion of Rocker's continued susceptibility. ¶41. The appellate court held that the trial court did not abuse its discretion by admitting the e-mails or allowing the bank officer to testify about her conversations with Williams because this evidence, by definition, was not hearsay. ¶41.

With respect to the bank officer's source of information from caller-identification feature of her cellular phone and the computer-generated output of the Spy-Dialer website, the appellate court found that this information was not hearsay. ¶42. Citing *People v. Caffey,* 205 Ill. 2d 52, 95 (2001) ("The information displayed on a caller ID device is not hearsay because there is no out-of-court asserter."). ¶42. Similarly, the computer-generated output from Spy-Dialer was not hearsay; there was likewise no human making an out-of-court assertion. Citing *People v. Holowko,* 109 Ill. 2d 187, 191-92 (1985) (concluding computer-generated records of telephone traces are not hearsay because the "evidence is generated instantaneously *** without the assistance, observations, or reports from or by a human declarant"). ¶42.

However, the appellate court found that a hearsay question was created by the fact the bank officer physically recorded the information into a document, as the recordation was an out-of-court statement written by a declarant. Citing Ill. R. Evid 801(a)-(c). ¶43. The appellate court found that the computer-generated information was not hearsay, and Rocker had not persuaded it that the recordation of this information was hearsay. ¶45. The appellate court concluded that the trial court did not abuse its discretion by admitting the document. ¶45.

Termination of Guardianship

The appellate court noted that as cases involving guardianships present unique factual questions, it did not find Rocker's factual comparisons to other cases particularly useful. Citing *In re C.M.,* 305 Ill. App. 3d 154 (1999) (concluding where a case is *sui generis,* courts do not typically make factual comparisons to other cases). ¶49.

The appellate court found that there was substantial evidence presented – including Rocker's own admission – showing he intended to continue sending his money to Internet and phone solicitations many of which appear to be scams. ¶50. It noted that Rocker had given away thousands of dollars even since the guardianship was established. ¶50. Prior to the guardianship, Rocker had given away in excess of $100,000, and very likely much more. ¶50. The appellate court found that it was clear that Rocker had a permanent mental illness – he continued to have bipolar disorder. ¶51. While stable, he continued to receive treatment and medications. ¶51. The court also found that both Dr. Roberts and Dr. Whisenand noted his mental condition could make him susceptible to financial manipulation, and Whisenand had only limited awareness of Rocker's financial choices. ¶51. The appellate court found that although Rocker's behavior and choices may be "decisional", they went far beyond poor financial decision making. ¶51. The appellate court concluded that the petitioner had not established by clear and convincing evidence that he was no longer disabled or that he was fully able to make financial decisions free from the effects of his disorder and manage his estate so as to prevent waste. ¶51. The court also concluded that it was not clearly evident from the record that Rocker was capable of managing his own estate such that his interest would be best served by terminating the guardianship; instead, the evidence tended to show his interests would be best served by continuing the guardianship to prevent further large-scale waste of his estate, especially in light of his own admission he intended to continued sending money to Internet solicitors. ¶52.

In re Beverly B., 2017 IL App (2d) 160327 (Opinion filed September 28, 2017).

Respondent appealed an order for the involuntary administration of psychotropic medication, contending that the State failed to present sufficient evidence of its compliance with the mandate of section 2-102(a-5) of the Mental Health Code (Code) (providing recipient with written information about alternatives to treatment) and that there was insufficient evidence that she was exhibiting deterioration of her ability to function or was suffering, as required under section 2-107.1(a-5)(4)(B) of the Code. 405 ILCS 5/2-102(a-5) and 5/2-107.1(a-5)(4)(B). ¶1. The appellate court reversed the judgment of the circuit court.

Background

The State filed a petition for the involuntary administration of psychotropic medication to Respondent, who was adjudicated as unfit to stand trial. ¶3. At Respondent's request, she was permitted by the circuit court to represent herself with the public defender to serve as standby counsel. ¶4. During the trial, the public defender attempted to intervene as Respondent cross-examined a State's

witness, and the State successfully objected. ¶5. Respondent's psychiatrist opined that Respondent's serious mental illness precluded her from making a reasoned decision about treatment. ¶7. The psychiatrist further opined that Respondent's ability to function had declined seriously, an opinion he based largely on comparing Respondent's current functioning to her previous ability to work as an accountant. ¶7. The psychiatrist testified that Respondent had been given written materials about the risks and benefits of the medications. ¶8. When asked if Respondent was given written information about less restrictive alternatives, the psychiatrist responded that "At the time of her admission, we do give all the group schedule[s], what are the expectation[s], yes." ¶9.

The circuit court ruled that Respondent had a serious mental illness and was exhibiting deterioration and suffering. ¶14. It further stated that the testimony from the doctor also noted that Respondent had been advised in writing of the risks and side effects of the medications and of less restrictive services. ¶14.

Analysis

On appeal, Respondent raised three claims: (1) the circuit court violated her right to counsel when it declined standby counsel's request to step in following the direct examination of a witness; (2) the Stated failed to present clear and convincing evidence of compliance with section 2-102(a-5), which requires that a potential recipient of psychotropic medication be advised in writing of the side effects, risks, and benefits of the treatment, *and* of the alternatives to the proposed treatment; and (3) the State failed to provide sufficient evidence that she had experienced either deterioration in her ability to function or suffering as required by section 2-107(a-5)(4)(B). 405 ILCS 5/2-102(a-5) and 2-107(a-5)(4)(B). ¶17.

Exception to the Mootness Doctrine

The appellate court concluded that both of Respondent's claims about the merits of the judgment fall under the public-interest exception to the mootness doctrine. ¶19, 20. Citing *In re Katarzyna G.,* 2013 IL App (2d) 120807, the court found that the sections at issue – 2-102(a-5) and 2-107.1 – must be interpreted in most involuntary medication proceedings; thus, a court's interpretation of those statutes is a matter of public interest. ¶20. The appellate court also found that these issues have not been authoritatively decided in any published court decisions. ¶20. Finally, the appellate court found that because the issues related to important substantive aspects of those sections, they will certainly occur in other mental-health cases. ¶20.

However, the appellate court concluded that no mootness exception applied to her claim that the court deprived her of her right to counsel. ¶19, 21. It found that although questions of when standby counsel should take over for Respondent might be expected to arise in any future proceedings, little likelihood existed that any such question would arise with similar facts. ¶21.

Standards of Review

The appellate court found that because the evidence relating to compliance with providing written information to Respondent under section 2-102(a-5) was largely straightforward and undisputed, the question involved the application of law to essentially undisputed facts, and thus was a question of law, subject to *de novo* review. Citing *In re Laura H.,* 404 Ill. App. 3d 286, 290 (2010) (review of whether there has been compliance with section 2-102(a-5) is *de novo*). ¶23. Likewise, the court found that although Respondent's claim that the State failed to prove that she exhibited deterioration of her ability to function or suffering is a challenge to the sufficiency of the evidence, her claim turned on the interpretation of section 2-107.1. ¶23. This too was considered to be a question of law. Citing *Moon v. Rhode*, 2016 IL 119572, ¶22 (interpretation of a statute was a question of law, so review was *de novo*). ¶23.

Compliance with the Section 2-102(a-5) Mandate for Information Concerning Alternatives to the Proposed Treatment

The appellate court addressed why the information Respondent received upon admission – general information about the treatments available at the facility – did not satisfy section 2-102(a-5). ¶28. The court found that to make a reasoned decision, an individual should have a general idea of the advantages and disadvantages of his or her realistic choices. ¶33. "General information about mental-health treatments that might or might not be of use to a recipient does not help a recipient understand his or her choices." ¶33. "Moreover, the relevance of the information needs to be apparent." ¶33. "Merely advising a recipient that a treatment exists without advising him or her how it is relevant is not likely to help." ¶33.

The appellate court found that the information Respondent received about alternatives to psychotropic medication was not adequate. ¶34. According to the testimony, when Respondent was admitted, she apparently received group schedules and statement of expectations or rules. ¶34. However, there was no evidence that, when psychotropic medication was proposed, Respondent received an explanation of how any treatment referred to in the schedules was an alternative to the medication. ¶34. Nor was there evidence that, when she received the schedules, she was told that she would need to refer to them later if medication were proposed. ¶34. "More critically, no suggestion exists in the evidence that the schedules usefully informed Respondent what treatments were plausible alternatives for her." ¶34.

The appellate court concluded that the State did not show that Respondent received sufficient information to allow her to make a reasoned decision, which was what was necessary to achieve the legislature's purpose of section 2-102(a-5). ¶37. Thus, it did not deem the error harmless.

Sufficiency of the Evidence of Respondent's Deterioration or Suffering under Section 2-107.1(a-5)(4)(A).

The appellate court held that the circuit court erred in finding that Respondent was subject to the involuntary administration of psychotropic medication based on her exhibiting deterioration in her ability to

function and suffering. ¶39. It concluded that the evidence linking Respondent's deterioration and suffering to her mental illness was insufficient. ¶39.

"We agree that the requirements of section 2-107.1(a-5)(4)(B) make sense only on the assumption that the medication specifically addresses the deterioration, suffering, or threatening behavior." ¶39. The appellate court found that the State failed to show that the medication would alleviate Respondent's deterioration or suffering and that the direct evidence of the effect of Respondent's illness on her functioning was weak. ¶40, 41. Although there was testimony implying that Respondent's illness had cost Respondent her job and her family relationships, the record did not tell the appellate court whether it did so directly or through the cascading effects of a single incident. ¶41. The appellate court rejected the State's argument that it could reasonably infer that because Respondent was homeless and unemployed, she had experienced a deterioration in her functioning. ¶42. "[T]he legislature cannot have intended that we countenance the involuntary medication of Respondent on the basis of economic harm from her incarceration and commitment." ¶42.

The appellate court found that the evidence that Respondent was suffering was similarly insufficiently linked to her illness and that the trial court relied only on Respondent's unhappiness with her commitment. ¶43. The parties agreed that, in this context, "suffering" meant "experiencing distress or anguish"; it was thus not a synonym for "experiencing a specific condition." "Here, as in *Debra B.,* the State showed that Respondent was experiencing the symptoms of a serious mental illness and that she was experiencing distress at her circumstances, but it failed to show that the proposed medication could treat that distress." ¶43. "More specifically, the State showed that Respondent was experiencing delusions, but it failed to present evidence "provid[ing] any insights into why *** these symptoms caused *** suffer[ing]. *Debra B.,* 2016 IL App (5th) 130573, ¶45. The appellate court found that the evidence showed predominately that Respondent's suffering was the result of her dislike of her confinement. ¶44. That said, the court noted that although there was evidence of unpleasant-sounding delusions (Respondent had reported that Center staff members had been replaced by their twins) the inference that those delusions were distressing was not clear and convincing. ¶44.

Estate of Deborah Beetler v. Bledsoe, 2017 IL App (3d) 160248 (August 29, 2017).

Background

Approximately eight months after Deborah Beetler executed a power of attorney authorizing her husband, David Beetler, to make her health care decisions, a trial court appointed Deborah's daughter, Tricia Bledsoe, to serve as plenary guardian over her estate and also authorized the guardian to remove Deborah's person from David's care and place her in a residential facility. ¶1. The circuit court found that Deborah lacked the capacity to make reasoned decisions concerning the care of her person and the management of her finances due to her dementia. ¶16. The circuit court did not explicitly address the prior agency created by Deborah pursuant to the Illinois Power of Attorney Act ¶17. (Power of Attorney Act) (755 ILCS 45/1-1 *et seq.*). The circuit court order granted Bledsoe the power to serve as the plenary guardian for Deborah's person and estate, and "the power and authority to place the Ward in a residential facility." ¶17. The court order dictated that "Letters of Guardianship shall issue in accordance with the provisions of this Order." ¶18. The deputy clerk then issued letters of guardianship. ¶18. The letters stated, in part, that Bledsoe, as the plenary guardian, shall have the power "[t]o arrange for and consent to any and all medical and/or dental tests and/or examination which are reasonably required for the ward" and "[t]o consent to medical and/or dental treatment on behalf of the ward; including surgery, as is reasonably required for the ward, except where contrary to law." ¶18. The letters were not signed by a judge. ¶18.

Nearly two years after the court appointed Bledsoe to act as her mother's plenary guardian, David (agent under power of attorney) filed a motion in the circuit court seeking an order allowing him to arrange for certain dental services pursuant to his authority as Deborah's power of attorney for health care. ¶20. After an evidentiary hearing, the circuit court found that the denture reline would not be in Deborah's best interests. ¶25. The court found as a matter of law that the Guardian of the Person and Estate obviates and supersedes any Illinois Power of Attorney for Health Care executed by Deborah Beetler. ¶25. David filed a notice of appeal challenging the circuit court's denial of his motion to allow dental services filed pursuant to his authority as Deborah's power of attorney for health care. ¶26.

Analysis and Decision

The appellate court addressed the issue whether Deborah's decision to designate David as her agent for purposes of making her health care decisions under the Power of Attorney Act survives the subsequent judicial decision appointing Bledsoe as the plenary guardian. ¶30. The appellate court found that the statutory scheme of the Power of Attorney Act makes it clear that an agency is strictly protected from judicial intervention except under a very narrow set of rigid procedural circumstances. ¶32, 755 ILCS 45/2-10. Furthermore, under section 11a-17(c) of the Probate Act provides that "[a]bsent [a] court order pursuant to the Illinois Power of Attorney Act directing a guardian to exercise powers of the principal under an agency that survives disability, *the guardian has no power,* duty, or liability *with respect to any personal or health care matters covered by the agency."* ¶ 33, (Emphasis added.) 755 ILCS 5/11a-th(c). Thus, the Probate Act is entirely consistent with section 2-10 of the Power of Attorney Act, cited above." ¶33.

Bledsoe argued that although the order of guardianship did not explicitly terminate David's status as the power of attorney for health care for Deborah, it implicitly did revoked the relationship. ¶35. However, the appellate court was unwilling to ignore Deborah's unchallenged power of attorney based on implied assumptions

arising out of the order of guardianship. ¶38. Based upon strong public policy considerations, the appellate court held that the appointment of a plenary guardian did not automatically extinguish Deborah's preexisting and *unchallenged* power of attorney naming someone, other than a judicially appointed guardian, as her designated agent for health care purposes. ¶39.

In this case, the letters of guardianship issued by the circuit clerk contained language beyond the terms contained in the plenary guardianship order. ¶41. This order gave Bledsoe the power to place her mother in a residential care facility without addressing Bledsoe's authority to make dental care choices for her mother. ¶41. Therefore, the appellate court rejected Bledsoe's argument that the letters of guardianship issued by the circuit clerk should be interpreted as a judicial order revoking David's status as Deborah's power of attorney for health care. ¶41, see 755 ILCS 45/2-10(g); 755 ILCS 5/11a-17(c).

The appellate court held that absent a written court order explicitly directing a plenary guardian to exercise the powers of the principal under the agency pursuant to the Power of Attorney Act, the appointment of a plenary guardian does not automatically revoke an existing power of attorney for health care. ¶42. The decision regarding whether Deborah should receive the proposed denture reline procedure was clearly within the scope of the unchallenged power of attorney for health care document that Deborah executed giving David the authority to make such decisions. ¶42.

The appellate court reversed the trial court's order denying David's motion to allow dental services for Deborah and remanded that matter to the trial court for an entry of an order consistent with its decision. ¶43.

In re Estate of MaryLou Kusmanoff, 2017 IL App (5th) 160129. (Opinions filed August 29, 2017).

This consolidation of three appeals concerned the guardianship of the person and estate of MaryLou Kusmanoff. ¶1. MaryLou and her son Michael Burgett, appealed the adjudication of MaryLou as a disabled person pursuant to section 11a-2 of the Probate Act (755 ILCS 5/11a-2) and the appointment her daughter, Carol Easterley, as guardian over her person and estate. ¶1. MaryLou also appealed the circuit court's order, which denied her motion to take judicial notice of a Texas judgment finding that a guardianship of her person and estate was not required and to terminate the circuit court's adjudication of her disability. ¶1.

Facts

In April 2015, the circuit court entered an *ex parte* order adjudging MaryLou to be a disabled person, and appointed her daughter Carol as temporary guardian over her person and estate. ¶4. Carol alleged that MaryLou was a disabled adult incapable of managing her person or estate of approximately $750,000, and had been the victim of fraud and abuse. ¶4. Approximately one month after the initial order for temporary guardianship was entered, Michael moved MaryLou from the State of Illinois and transferred the majority of MaryLou's assets to his personal account in Texas. ¶7. Carol continued to be temporary guardian for a period of over seven months prior to a hearing on the petition for plenary guardianship, which began on December 2, 2015. ¶4, 16. After the guardianship trial commenced in December of 2015 and the court heard the testimony of witnesses, the case was continued to March of 2016. ¶30. MaryLou then filed a motion to quash Carol's Illinois Supreme Court Rule 237 notice to compel her attendance at trial. ¶30. MaryLou argued that she intended to reside in Texas, was a resident under Texas law, and expressed a fear that the circuit court would require her to live in Illinois. ¶30. MaryLou's motion was denied. ¶30. The circuit court then entered an order enjoining the parties from proceeding in a guardianship action in Texas. ¶34.

After further testimonies, the circuit court appointed Carol as plenary guardian of MaryLou's person and estate in March of 2016. ¶57, 58.

Analysis and Decision

Jurisdiction under the Guardianship Jurisdiction Act.

The appellate court reviewed the issue of whether the circuit court had subject matter jurisdiction *de novo.* ¶72. The appellate court found that at the time Carol filed the petitions, Illinois was MaryLou's "home state" pursuant to section 201(a)(2) of the Guardianship Jurisdiction Act, and thus Illinois (not Texas) has jurisdiction to appoint a guardian over MaryLou's person and estate. ¶73, 755 ILCS 8/201(a)(2). Furthermore, once the circuit court appointed a guardian or issued a protective order, it has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the order expires by its own terms. ¶73.

Irregularities in the Procedures Employed Throughout the Proceedings.

The appellate court stated that there is a requirement that a temporary guardianship not be extended beyond 120 days as well as the requirement that upon the filing of a petition for guardianship, the court shall set a date and place for a hearing on the petition within 30 days. 755 ILCS 5/11a-4(b)(2) and 5/11a-10(a). ¶77. The appellate court was concerned about the impact (a freeze on MaryLou's access to funds and she was ordered that she could not leave the residence of a nursing home or choose her own caregiver) the significant delay in the guardianship proceedings of over nearly a year. ¶77. The appellate court was further troubled by the fact that for the majority of the time the petition for guardianship was pending and temporary guardianship extended, there was no physician's report on file as required by section 11a-9 of the Probate Act. ¶78, 755 ILCS 5/11a-9.

"Perhaps most troubling was the circuit court's failure to procure an evidentiary statement by MaryLou regarding her preferences of caregiver and residence and the circuit court's utter disregard for the preferences that were communicated by MaryLou to the various witnesses in the case and through her attorney." ¶79. Section

11a-12(d) of the Probate Act required that the circuit court give due consideration to the preference of the disabled person as to a guardian. ¶79, 755 ILCS 5/11a-12(d). MaryLou requested to be excused from being present at the hearing, and the circuit court denied the request, contrary to section 11a-11(a), which provides for the potential ward to be excused upon the mere showing that she refused to be present. ¶79, 755 ILCS 5/11a-11(a). The circuit court could have ordered, on its own motion, that the testimony of a witness who is located in another state be procured by deposition or other means, including by telephone or other audiovisual or electronic means. ¶79, 755 ILCS 8/106. Instead, the circuit court guessed that she would want to stay in Texas but quoted the Rolling Stones saying, "You can't always get what you want." ¶79.

The appellate court considered the possibility of ordering a new trial based on the cumulative impact of the procedural irregularities, combined with its conviction that the circuit court did not review and/or consider the medical evidence in determining whether MaryLou was disabled. ¶80. However, because the appellate court did not wish to prolong the proceedings any further, leaving MaryLou's rights in limbo, it elected to review the record to determine the propriety of the circuit court's order in light of the applicable legal standards and its standard of review. ¶80.

Adjudication of Disability and Power to Appoint Guardian

The appellate court found that there was no clear and convincing evidence in the record from which the circuit court could conclude that MaryLou's mild to moderate cognitive deficits, manifesting as short-term forgetfulness and periods of confusion, prevented MaryLou from communicating to others regarding her desires with respect to her living arrangements and the direction of her care. ¶87. Consequently, the appellate court reversed, without remanding, the circuit court's finding that MaryLou required a guardian of her person. ¶87.

Although the appellate court affirmed the circuit court's finding that MaryLou required a guardian of her estate, it found that there was no clear and convincing evidence in the record as to whether MaryLou lacked merely some, or lacked all, capacity to manage her estate. ¶90. The circuit court was required to determine whether a limited guardianship would be appropriate based on the level of MaryLou's disability. ¶90, 755 ILCS 5/11a-12(b) and (c). It found that the circuit court's conclusion that a plenary guardian was required was against the manifest weight of the evidence. ¶90. It vacated the circuit court's finding that a plenary guardianship was required and remanded for the limited purpose of an evidentiary hearing with respect to the exact parameters of the guardianship of MaryLou's estate that are necessary to effectuate the requirements of section 11a-3(b) and (c) of the Probate Act. ¶91, 755 ILCS 11a-3(b)

In addition, the appellate court instructed the circuit court that, should MaryLou so choose, she be permitted to be absent from the hearing pursuant to section 11a-11(a) of the Probate Act (755 ILCS 5/11a-11(a)), and that her testimony be procured through electronic or other means as set forth in section 106 of the Guardianship Jurisdiction Act. ¶91, 755 ILCS 8/106.

Selection of Guardian

Section 11a-12(d) of the Probate Act (755 ILCS 5/11a-12(d) provides in part:

> "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. However, the paramount concern in the selection of the guardian is the best interest and well-being of the disabled person."

¶93.

The appellate court found that it was of great consideration that no matter the cause or source of MaryLou's feelings, the record expressed her strong and unequivocal desire that Carol not serve as guardian of her estate. ¶96. The appellate court held that under the circumstances, the circuit court abused its discretion in not appointing a third party to act as limited guardian of MaryLou's estate. ¶97. It vacated that portion of the circuit court's order appointing Carol as guardian and remanded for proceedings in which the circuit appoints a corporation pursuant to section 11a-5(c) of the Probate Act as guardian of her estate. ¶97.

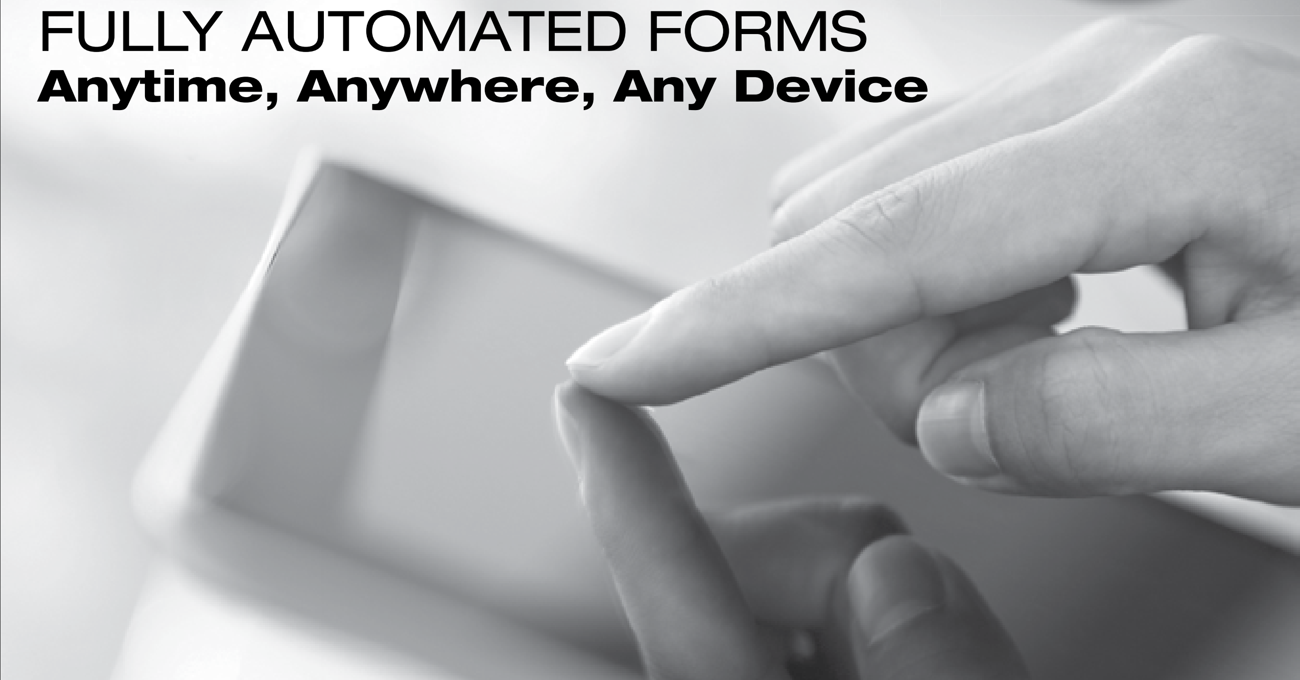
Order Denying MaryLou's Motion to Terminate Guardianship

The appellate court found no prejudicial error with regard to the circuit court's failure to take judicial notice of the Texas judgment in the competing guardianship proceedings. ¶99. It pointed the circuit court to section 11a-20 of the Probate Act (755 ILCS 5/11a-20) and the standards set forth therein for considering MaryLou's new petition to terminate. The appellate court noted that, in light of its opinion, MaryLou's petition should only be adjudicated as it pertains to the guardianship of her estate, as the appellate court had held that Carol did not prove that MaryLou required a guardianship of her person. ¶99. ■

Andreas Liewald is a staff attorney with the Illinois Guardianship and Advocacy Commission, West Suburban (Hines) Office.

IllinoisBarDOCS

Now including a complete ESTATE PLAN DRAFTING system and access to a User Group on ISBA Central!



Illinois-specific legal forms with a cloud-based document assembly system

Includes:

A complete **ESTATE PLAN DRAFTING system**

...

FAMILY LAW forms
(reflecting the recent IMDMA rewrite!)

...

STATUTORY POWER OF ATTORNEY forms

...

REAL ESTATE forms

New forms and practice areas will be added on an ongoing basis!

ISBA Forms for ISBA Members

LIMITED TIME PRICING:

$20 per month OR **$199** per year

Volume discounts available for multi-attorney firms

www.isba.org/illinoisbarDOCS

MENTAL HEALTH MATTERS

ILLINOIS BAR CENTER
SPRINGFIELD, ILLINOIS 62701-1779

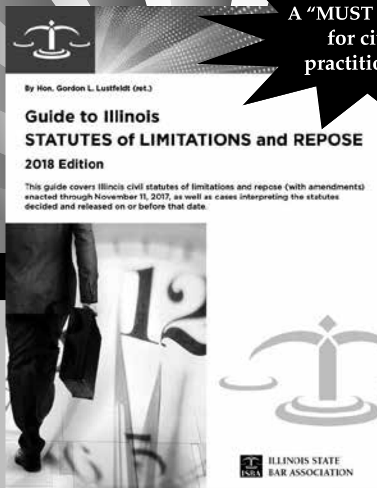
FEBRUARY 2018

VOL. 4 NO. 3

Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820

Bundled with a FREE Fastbook PDF!

A "MUST HAVE" for civil practitioners



Guide to Illinois STATUTES of LIMITATIONS and REPOSE

2018 EDITION

The new Guide to Illinois Statutes of Limitations and Repose is here! It contains Illinois civil statutes of limitations and repose (with amendments) enacted through November 11, 2017. The Guide concisely brings together provisions otherwise scattered throughout the Code of Civil Procedure and other chapters of the Illinois Compiled Statutes. It also includes summaries of cases interpreting the statutes that were decided and released on or before November 11, 2017. Designed as a quick reference guide for practicing attorneys, it provides comprehensive coverage of the deadlines you can't afford to miss. The Guide includes a handy index organized by act, code, and subject, and also includes a complete table of cases. Written by Hon. Gordon L. Lustfeldt (ret.).

Order at **www.isba.org/store**
or by calling Janet at 800-252-8908 or by emailing Janet at jlyman@isba.org

Guide to Illinois STATUTES of LIMITATIONS and REPOSE
2018 Edition
$40.00 Member/$57.50 Non-Member

Illinois has a history of some pretty good lawyers. We're out to keep it that way.