



ILLINOIS STATE
BAR ASSOCIATION

STANDING COMMITTEE ON GOVERNMENT LAWYERS

The newsletter of the ISBA's Standing Committee on Government Lawyers

Government lawyer honored as Laureate by the Academy of Illinois Lawyers

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By Marc Christopher Loro, Springfield

On March 3, 2004, retired First Assistant State Appellate Defender Patrick J. Hughes, Jr., will be inducted into the Academy of Illinois Lawyers as one of 12 distinguished Laureates in the 2004 class. Established by the Illinois State Bar Association in 1999 to celebrate excellence in the legal profession, the Academy of Illinois Lawyers annually recognizes attorneys throughout the

State who maintain the highest standards of professionalism and community service.

Springfield attorney Patrick Hughes, a 1960 graduate of Loyola University of Chicago's School of Law, engaged in the private practice of law for about one year at a small firm upon graduation from law school. Beginning in 1963, he served four years as an Assistant United State's Attorney for the Northern District of Illinois. His entrée into public defense work came in 1967 when he was recruited to serve as Director of Defender Services for the National Legal Aid and Defender Association. While there, he also served *ex officio* as a staff attorney for the American Bar Association Standing Committee on Legal Aid and Indigent Defendants. In 1973, Mr. Hughes returned to private practice engaging in criminal defense work in both the State and federal courts. Subsequently, he was retained by the State to conduct a number of surveys and to report the findings with respect to indigent defense in Illinois. In 1979, Mr. Hughes was hired as the Legal Director for the Office of the State Appellate Defender; a position he held until his appointment as First Assistant State Appellate Defender in 1993. He held the latter position until his retirement in 2002.

While with the State Appellate Defender's Office, it was among Mr. Hughes's duties to design and implement an in-house staff training program for the office's attorneys. In this regard,

for the last 10 years, Mr. Hughes has administered three regional training programs per year for appellate defenders. He co-designed and has co-administered, with the Capital Case Coordinator of the Cook County Public Defender's Office, a week-long death penalty defense program at the University of Chicago School of Law. Based upon the success of the State Appellate Defender's Office's program, Mr. Hughes was tabbed to co-create and has produced a training program for local (county) public defenders.

In addition to his legal defense work, Mr. Hughes devotes significant time to professional activities. He has been an active member and officer in a number of bar associations, including the Government Bar Association, the Chicago Bar Association, the Illinois Public Defender's Association, and the Illinois State Bar Association. With respect to the latter, Mr. Hughes currently serves as secretary of the Standing Committee on Government Lawyers and has served on the Individual Rights and Responsibilities Section Council since 1980, including a term as its chair. He presently serves as editor of the Individual Rights and Responsibilities Section Council newsletter, for which he was presented with a 15-Year Newsletter Editor's Award in June 2002.

The Committee on Government Lawyers applauds the selection of Patrick Hughes as a Laureate.

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Ethics corner: Blagojevich signs ethics reforms into law

On December 9, 2003, Governor Rod R. Blagojevich signed into law the State Officials and Employees Ethics Act. This legislation, which is touted by the Governor's Office "as the toughest, most comprehensive ethics reform package in the state's history," contains more definitive rules regarding what constitutes improper use of State time and resources, improves ethics training and reporting procedures, and establishes strong enforcement mechanisms to ensure ethics rules are followed.

It took nearly a year and two pieces of legislation to pass ethics reform. Original ethics legislation was passed by the General Assembly on May 31, 2003 (House Bill 3412). The Governor amendatorily vetoed the legislation, saying that it "lacked certain fundamental components present in states with respected ethics laws." Specifically, the Governor found that the original legislation lacked enforcement mechanisms and failed to address violations of the Gift Ban Act, ethics training, an ethics hotline and the inappropriate use of public service announcements. The initial legislation therefore was returned to the General Assembly for consideration with specific recommendations to make the legislation stronger. The General Assembly ultimately overrode the Governor's amendatory veto on November 19, 2003, and House Bill 3412 became effective that same day (Public Act 93-0615).

The General Assembly, however, also passed additional legislation. Senate Bill 702 was passed by the General Assembly upon the condition that House Bill 3412 as originally passed by the General Assembly became law by override of the Governor's amendatory veto. Senate Bill 702 contained provisions to amend the State Officials and Employees Ethics Act as contained in House Bill 3412 (Public Act 93-0615). Senate Bill 702 passed both houses on November 20, 2003, and was signed by the Governor on December 9, 2003 (Public Act 93-0617). Thus, both public acts must be read together in order to understand the new ethics measures and requirements.

Key elements of the new ethics

rules are as follows:

- Requires ethics training for all State employees.
- Bans taxpayer-funded public service announcements, newspaper or magazine ads, bumper stickers, billboards, buttons, magnets and stickers that feature the image, voice or name of constitutional officers or members of the General Assembly.
- Prohibits State workers from leaving government employment and immediately accepting jobs with companies that they regulated or licensed or were involved with in awarding State contracts worth more than \$25,000. The prohibition lasts for one year after an employee leaves the State payroll and may be waived by filing a written request with the appropriate entity.
- Removes numerous exemptions in the Gift Ban Act, including those for golf and tennis, and limits lobbyist spending on food and drinks to \$75 per State employee or State official per day.
- Prohibits lobbyists and individuals with a personal financial interest in State contracts from serving on boards or commissions.
- Requires contacts made with certain State regulatory or investment boards by unpaid advisors serving on behalf of constitutional officers to file Statements of Economic Interest, and requires disclosure of all *ex parte* communications involving various State regulators and licensing agents.
- Strengthens the prohibition against using State employees for political work, and bans accepting or making political contributions on State property.
- Requires documentation of work time for all State employees and the periodic submission of time sheets documenting time spent each day on official State business to the nearest quarter hour.
- Prohibits the retaliation against State employees who report suspected ethics violations.
- Establishes a nine-member Executive Ethics Commission to review and determine appropriate action in cases brought forward by the executive inspectors general

and represented by the Attorney General. The Governor appoints five members, each of the other four constitutional officers appoints one; no more than five may be from the same political party.

Commission members cannot be State government employees, and will receive the same part-time salary rate as members of the State Board of Elections (set by the Compensation Review Board).

- Requires each constitutional officer to appoint an executive inspector general (EIG) to review complaints of corruption or wrongdoing within each respective office. EIGs will be empowered with subpoena authority and will report to the independent ethics commission as well as the constitutional officer who appoints them. Previously, only the Governor, Treasurer and Secretary of State had inspectors general, and only the Secretary of State's inspector had subpoena power.
- Establishes stiff penalties—including Class A misdemeanor charges, possible dismissal and tough fines—for those found guilty of impropriety by the ethics commission.
- Establishes an eight-member Legislative Ethics Commission to review cases of wrongdoing within the legislative branch. Each legislative leader appoints two members.
- Creates the position of Legislative Inspector General, who will be nominated by the Legislative Ethics Commission and confirmed by the General Assembly.

A copy of Public Acts 93-0615 and 93-0617 may be found on the General Assembly's Web site at <www.legis.state.il.us>

**For copies of bills, amendments,
veto messages
and public acts, contact the
ISBA Department
of Legislative Affairs
at 800-252-8908**

ISBA Assembly adopts tribute to government lawyer fire victims

During the ISBA Assembly meeting held November 7, 2003, the following resolution was adopted to honor the memory of three government lawyers who died in a fire October 17, 2003, at the Cook County Administration Building.

* * *

Whereas, a tragic fire struck the Cook County Administration Building in Chicago on October 18, resulting in the deaths of six people who were trying to escape from their offices in the

building; and

Whereas, three of the victims were lawyers, talented and dedicated lawyers working long hours to serve the public, lawyers in the prime of their careers, with many professional accomplishments, and full of promise for many more contributions to the public and to the profession they proudly served; and

Whereas, the Illinois State Bar Association serves as the professional association for all Illinois lawyers and

shares with many others a profound sense of loss because of the deaths of these valued members of the profession;

Therefore, be it resolved that the Assembly, on behalf of the 32,000 members of the Illinois State Bar Association, expresses its admiration for the exemplary legal careers of Sara White Chapman, Janet Johnson Grant, and John Slater III, and by this resolution, conveys its deepest sympathies to the families of these three outstanding lawyers.

A short course on guardianship appointment and service

By James B. Moses, Jr., Peoria

Editors' Note: This article is the second in what is hoped to be a series of articles written by government lawyers with expertise in an area of law in which family and friends often pose questions. We welcome additional articles in this regard.

In a previous article, I reviewed advanced directives and how they may be utilized.* This article will look at what happens when a person has deteriorated to the point that he or she does not have the capacity to execute an advanced directive or never had capacity. As discussed in my previous article, medical decisions may be made for a person lacking capacity under the Health Care Surrogate Act. 755 ILCS 40/1 *et seq.* Under that Act, a surrogate may not address non-medical decisions such as where the person will live, how his or her funds will be spent and who may see the individual's records. For decisions in those areas and many others, a guardian must be appointed.

Terminology

In this article I will examine the process of appointing a guardian, focusing on the differences from other civil actions. I will then look at how a guardian performs his or her duties. First, though, a couple of terms you will see in this article should be explained. The term "alleged disabled person" designates those persons who are believed to be incapable of making decisions and those persons who are subject to

guardianship proceedings until the permanent guardian has been appointed. As used in the Probate Act of 1975, the phrase "disabled person" refers to:

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. 755 ILCS 5/11a-2.

Once a permanent guardian has been appointed, the person is called a "ward." In some older files you may see the term "conservator," the person appointed to make decisions regarding the ward's property. Under current Illinois law, the Probate Act of 1975 refers to that person as the "guardian of the estate" or "estate guardian." 755 ILCS 5/11a-18.

The appointment of a guardian

All guardianship proceedings are actions before the circuit court. Forms necessary to establish a guardianship

are available in every circuit clerk's office. The forms for guardianship cases are somewhat specialized and general civil forms would be difficult to modify. The Illinois Institute for Continuing Legal Education has published a QuickGuide on guardianship with forms included and will publish a more extensive volume of guardianship and mental health law next year.

To initiate a guardianship proceeding, it is necessary to prepare and file a petition, accompanied by a physician's report, a guardianship summons and an Order Appointing Guardian *Ad Litem*. The petition contains the allegations that must be pleaded for the appointment of a guardian. 755 ILCS 5/11a-8. Unlike most petitions or complaints, the Petition for Adjudication of Disability and Appointment of Guardian must also list the nearest known relatives and close friends of the alleged disabled person, an estimate of the alleged disabled person's assets, both real and personal, and the alleged disabled person's estimated annual income. The petitioner usually nominates the person he or she thinks should serve as guardian in the petition. In most cases, the nominated person will be a relative or friend of the alleged disabled person. They know him or her best and in theory would be best able to decide matters as the alleged disabled person would want. The statutory requirements for who may serve as a guardian are not very

rigid. The guardian must be at least 18 years of age, not suffer from a mental defect, be a resident of the United States and not be a convicted felon. 755 ILCS 5/11a-5. The requirement that the guardian of the estate had to be a resident of Illinois was removed from the statute.

If there are no willing or suitable family or friends to serve, then other options for the guardian must be explored. There are, throughout Illinois, local voluntary organizations that serve as guardians. The best way to find such organizations would be to contact the circuit clerk's office, probate division. Each county also has a public guardian that handles cases where estates are larger than \$25,000. The activity level of the public guardian varies according to local custom and the willingness of the public guardian. For more on the public guardians, please review article 13 of the Probate Act. 755 ILCS 5/13-1 *et seq.*

For cases where the estate of the alleged disabled person is less than \$25,000, the State of Illinois has established the Office of State Guardian, a part of the Illinois Guardianship and Advocacy Commission. 20 ILCS 3955/1 *et seq.* This writer is an attorney for the Office of State Guardian. The Office of State Guardian serves as guardian of last resort, accepting an appointment only when no other suitable guardian can be found. To refer cases to the Office of State Guardian you may contact its intake office at (866) 274-8023. The Intake Office can also provide the name and contact information for your county public guardian. More information on the Office of the State Guardian and on guardianship in general may be found on the agency's Web site: <<http://gac.state.il.us/>>.

If the estate of the alleged disabled person is very large, the petitioner may wish to appoint a bank or other financial institution as guardian of the estate. Such an institution may be better positioned to invest and manage large sums of money. The guardian of the estate and the guardian of the person do not need to be the same person or entity. A bank may be willing to serve as guardian of the estate but unwilling to handle the duties of a guardian of the person. Another person or entity may be appointed guardian of the person.

A physician's report should be filed with the circuit clerk at the same time the guardianship petition is filed. 755

ILCS 5/11a-9. This report, usually in the form of an affidavit, is a functional assessment of the abilities of the alleged disabled person and his or her abilities to make decisions. As the name implies, the report must be signed by at least one physician who has examined the alleged disabled person within three months of the date the petition is filed. If for some reason the report cannot be obtained, such as if the alleged disabled person refuses to see a doctor, then the petitioner may file his or her petition and request that the court order that the alleged disabled person submit to an examination.

A *guardian ad litem* (GAL) will be appointed at the time of the filing of the petition or soon thereafter. 755 ILCS 11a-10(a). A written order for the appointment needs to be prepared and presented by the petitioner. How the GAL is chosen is a matter of local practice. Some counties maintain a list and the GAL is whoever is next on the list. In other counties the judge appoints the GAL and attempts to choose so the burden is evenly spread. In still other counties, the same person serves in almost all cases. You should consult with the circuit clerk or the judge's office to determine how the GAL is selected in the particular county.

The circuit clerk will issue a summons after the petition is filed. 755 ILCS 5/11a-10(e). Unlike a summons used in most civil matters, the summons for guardianship will name a date and time certain for return. How that date and time are chosen is a matter of local custom. Many counties have regular walk-in times where uncontested guardianship cases may be presented. The petitioner may choose one of those regularly scheduled times that will allow time for the sheriff to serve the summons on the alleged disabled person (14 days notice, not the more familiar 30 days on most civil summonses, required before the hearing in guardianship cases). In other counties, the judge will want to set the matter on his or her calendar for hearing. Unlike other summonses, those used in guardianship cases must list the name and telephone number of the judge who will hear the case. Finally, the summons must have a statement of the rights of the alleged disabled person in guardianship matters. The rights are:

1. You have the right to be present at the court hearing.
2. You have the right to be represent-

ed 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 be your guardian.

In addition to the alleged disabled person, those listed as family and friends of the alleged disabled person in the petition, as well as the proposed guardian, if the guardian is to be someone other than the petitioner, must receive 14 days written notice of the date and time of the hearing. Failure to provide notice is a jurisdictional flaw that will render the order void. 755 ILCS 5/11a-10(f); *Seibold v. Schulte*, 195 Ill. App. 3d 891 (5th Dist. 1990); *Wright v. Carley*, 172 Ill. App. 3d 1055 (4th Dist. 1988).

Where there is a need for immediate protection of the alleged disabled person or his or her estate from harm during the period of time between the filing of the petition and the date of the hearing, a petition for the appointment of a temporary guardian may be filed. 755 ILCS 5/11a-4. The filing of the petition for temporary guardian is usually done at the same time as the filing of the petition for a permanent guardian. The petition for a temporary guardian may be presented to the judge immediately after filing and an order may be entered on such notice as the court directs. In most cases, no notice is given to the alleged disabled person. *Hasse v. Arbor of Itasca, Inc.*, 327 Ill. App. 3d 1057 (2nd Dist. 2002). The order appointing a temporary guardian must state the actual harm identified by the court as necessitating the need for the appointment. The order must also innumerate the specific powers that the temporary guardian may exercise. The term of the temporary guardian is no longer than 60 days or until the appointment of the permanent guardian and may not be extended. Meanwhile, the process toward a hearing on the petition for permanent guardian continues.

Prior to the hearing for the appointment of a permanent guardian, the GAL must visit the alleged disabled person and inform him or her about his or her rights during the guardianship process and the contents of the guardianship petition. The GAL should also talk to the alleged disabled person and those who are familiar with his or her condition to determine both the appropriateness of the guardianship and the alleged disabled person's view on whether a guardian should be appointed and, if so, who that guardian should be. The GAL must then prepare a written report of his or her actions and findings and file it with the court. The GAL should also appear at the time of the hearing to elaborate on the report if the court desires further information.

If the alleged disabled person disagrees with the appointment of a guardian, then independent counsel should be appointed to represent the alleged disabled person at the guardianship hearing. In the past, the GAL often served in that capacity but changes in the law have made that a more neutral role. In consultation with the independent counsel, the alleged disabled person may demand an independent medical examination and trial by a six-person jury. The decision to exercise the right to independent examination and trial by jury are matters of trial strategy and must be considered carefully. It is not uncommon for the independent medical examiner to agree that the alleged disabled person is in need of a guardian. Having the alleged disabled person's own physician make that recommendation would, of course, be very detrimental to the position of one contesting the appointment. Likewise, citizens who are called to serve as jurors may not be as accustomed to seeing unique characters as would a judge who sees them every day in court. If the alleged disabled person would not present well to a jury or has a unique lifestyle, it may be wiser to try the case before the judge alone.

Most guardianship hearings, however, are uncontested affairs that take place with the parties gathered at the bench. If the alleged disabled person does not object to the appointment or is in such a condition that he or she is unable to object, many courts will not require that witnesses be called. The judge makes his or her decision based upon the statements of the attorneys,

the report of the GAL and the physician's report. If witnesses are required, the testimony is often limited, involving the observed activity of the alleged disabled person tending to show that the alleged disabled person is unable to make decisions for himself or herself.

After the hearing, the jury, or in a bench trial, the judge, will make a determination of whether a guardian should be appointed, and if there is to be a guardian, who that guardian should be. The alleged disabled person has the right to make his or her wishes known as to who should serve, but ultimately the decision on who should be appointed guardian is made by the judge based on what is in the best interest of the disabled person. 755 ILCS 5/11a-8(d). It is not uncommon in cases where the alleged disabled person has been abused or exploited, either physically or financially, for the alleged disabled person to choose his or her abuser as the guardian. Obviously, such an appointment would not be in the alleged disabled person's best interest. At times, even well meaning individuals may not be appropriate if it does not appear they have the ability to carry out their duties. 755 ILCS 5/11a-12(d).

The written order issued by the court must give the factual basis for the need to appoint a guardian. The order will also state whether the ward is in need of a guardian of the person, of the estate or of both. The order should indicate whether the guardian will be limited, granting the guardian the authority to make some but not all of the decisions for the ward, or plenary, where the guardian has all of the power that can be exercised by a guardian on behalf of another. 755 ILCS 5/11a-12. If the guardian is someone other than the Office of State Guardian or the public guardian, the order must specifically provide for residential placement if the guardian is to have that power. 755 ILCS 5/11a-14.1.

After the order is entered, the guardian will have to file an oath of office agreeing to accept the case and promising to carry out his or her duties faithfully. If appointed guardian of the estate, the guardian will also be required to file a satisfactory bond. 755 ILCS 5/12-2. The amount of the bond is twice the value of the personal property if personal sureties are used, and 1½ times the personal property if a commercial bond is obtained. Additional amounts may be added by the court

where the real estate of the ward is under the control of the guardian. The judge must approve the bond. Many circuit clerks' offices have a form oath and bond combining the two documents.

After the oath and bond are filed, the circuit clerk will issue letters of office to the guardian and will provide the guardian with certified copies of the letters of office. It is the letters of office that the guardian will show as proof of appointment. At times, a bank or other entity dealing with the guardian may require that the letters of office be recertified to demonstrate that the guardianship is still in effect. The guardian will then have to contact the circuit clerk and ask the clerk to sign, date and seal the bottom certificate form on the letters of office.

If sufficient, the estate of the ward is required to pay for the costs of bringing a guardianship case, including the fees of the GAL and of the independent counsel. If the estate of the ward is not sufficient, it becomes the obligation of the petitioner to pay those costs. 755 ILCS 5/11a-10(c).

The guardian's duties

So the guardian is appointed. Now what? How is the guardian to go about his or her duties? The section of the Probate Act dealing with the guardianship is thin, only a few pages in length. Moreover, the case law is scant, usually addressing a particular circumstance or event. Some of the direction that is provided often seems contradictory and confusing. The powers of a guardian are great. A plenary guardian will make decisions concerning nearly every aspect of the ward's life. Often, however, the guardian must look at what is provided in the statutes and the case law and attempt to extrapolate how he or she should make a particular decision. When in doubt about a crucial issue, the guardian may return to court and seek its advice on how to deal with a particular situation.

Guardians are required to make their decisions, whenever possible, based on substituted judgment: to take what the guardian knows of the ward, his or her beliefs and attitudes, and attempt to make the decision the ward would have made if he or she was capable of doing so. When the guardian is unable to determine what the ward would want, the guardian must make his or her decision based

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on what is in the ward's best interest. What would a reasonable person do if required to make the decision? 755 ILCS 5/11a-17(e). Neither of these standards is wholly satisfying. It is impossible to truly know what a person would want or what is in the ward's best interest in a particular circumstance. But at least this instruction gives the guardian a framework upon which he or she can begin to make decisions.

Guardian of the person

As the name implies, the guardian of the person makes personal decisions for the ward. Section 11a-17 of the Probate Act provides general instructions for the guardian of the person. 755 ILCS 5/11a-17. The grant of statutory authority includes medical decisions, from minor first aid to end-of-life decisions. As was noted in the previous article on advanced directives, the guardian of the person is the first person listed on the hierarchy of surrogates under the Health Care Surrogate Act. 755 ILCS 40/25. Thus, some minor care decisions may be made in advance with directions to the caregivers.

The guardian of the person also makes decisions on where a ward will live, if that authority is specifically granted in the court's order. The guardian must take into account the ward's preferences but may have to decide contrary to those preferences where the ward's wishes have a reasonable certainty to result in harm to the ward or his or her estate. The guardian should look to what is the least restrictive placement for the ward that provides for his or her needs. The guardian of the person may, but is not required to, provide personal care for the ward. It is not required that the ward live with the guardian. A guardian is a decision-maker. It may often be the case that others, community providers, nursing home staff, or others, provide the actual care.

The guardian of the person also has access to all of the records of the ward. The guardian may review the ward's medical or facility chart and may be asked to authorize the sharing of that information as is necessary for the benefit of the ward. This is often required where a ward sees several doctors or information from a doctor needs to be provided to the ward's residence so that the doctor's orders may be carried out.

The case law setting out the extent

of a guardian of the person's authority may be summarized as follows:

- The guardian may not consent to psychotropic medication or electroconvulsive therapy over the objection of the ward. Such decisions may only be made pursuant to the Mental Health and Developmental Disabilities Code (405 ILCS 5/2-107.1). *In re Austin*, 245 Ill. App. 3d 1042 (4th Dist. 1993).
- The guardian may not place a ward in a mental health facility or in a specialized portion of a nursing home or other facility specializing in the care of persons with mental illness. *In re Gardner*, 121 Ill. App. 3d 7 (4th Dist. 1984); *Muellner v. Blessing Hospital*, 335 Ill. App. 3d 1079 (4th Dist. 2002).
- The guardian may not bring an action for divorce on behalf of a ward. *In re Marriage of Drews*, 115 Ill. 2d 201 (1986). But a guardian may maintain an action for divorce filed by the ward when he or she was able to do so. 755 ILCS 5/11a-17 (a-5); *In re Marriage of Burgess*, 189 Ill. 2d 270 (2000). The question of what is the guardian's authority to consent to or prevent marriage is not yet settled. *Pape v. Byrd*, 145 Ill. 2d 13 (1991).
- A guardian may consent to an abortion on behalf of a ward. *Jolivet v. Chuhak*, 134 Ill. App. 3d 788 (1st Dist. 1985).
- A guardian may not remove driving privileges. *Thompson v. Patner*, 186 Ill. App. 3d 874 (1st Dist. 1989).

The guardian is required to make periodic reports to the court on the progress of the ward and his or her circumstances. Usually these reports are required annually. 755 ILCS 5/11a-17(b). Forms for making the report may be found on the Illinois Guardianship Commission Web site under "Legal Forms You Can Use." The guardian of the person can serve as representative payee for Social Security benefits. Some pensions and annuities will also pay to a guardian of the person or in accordance with the guardian's directions. Some investigation of these issues prior to appointment may eliminate the need for a guardian of the estate and the requirements that come with that office.

Guardian of the estate

The guardian of the estate is charged with the prudent management

of the ward's property, both real and personal. Section 11a-18 of the Probate Act provides general instructions to the guardian of the estate. 755 ILCS 5/11a-18. The guardian of the estate begins his or her service with the filing of an inventory. 755 ILCS 5/14-1. The inventory is a listing of all of the assets in the ward's estate on the date that the guardian of the estate is appointed. The inventory must be filed within the first 60 days after appointment. The guardian of the estate is a fiduciary. He or she is required to care for the ward's estate to maximize the benefit to the ward.

One of the most important things a guardian of the estate should do after appointment is to set up a separate account to manage the assets of the ward. The most frequent error that people make as the guardian of the estate is to commingle the guardian's personal funds with those of the ward's estate. To some extent, commingling of funds may feel natural to the guardian. This is especially true when the ward is a family member and lives with the guardian. All of the household money goes into an account and is used to pay the bills of the household. However, the guardian of the estate is required to account for all of his or her actions. An accounting must be filed on the first anniversary of appointment and then at least every three years thereafter. An accounting must also be filed at the close of the estate. 755 ILCS 5/24-11. In this accounting, the guardian of the estate must be able to demonstrate how each asset of the estate and every item of income has been expended for the benefit of the ward. Any remaining funds are shown and form the beginning balance for the next accounting. If the guardian has commingled personal funds with those of the ward, it is nearly impossible to demonstrate which expenditures were made for the ward's benefit and which for the guardian's. The guardian of the estate may be required by the court to reimburse those funds that he or she cannot document as having gone to the ward's benefit. It is still possible for the estate of the ward to pay a portion of the guardian's household expenses. The ward is using items just like other members of the residence. The guardian can use the ward's funds to pay certain bills while using their own

funds to pay others. At accounting time, the guardian will then be able to show where the funds of the ward went specifically. If the division of the bills appears to be fair, the courts generally do not have a problem with such an arrangement.

With the approval of the court, the guardian of the estate may be required to sell real and personal property of the ward in order to meet the ward's needs. Procedures for the sale of real estate are found in article 20 of the Probate Act. 755 ILCS 5/20-1 *et seq.* Those for the sale of personal property are found in article 19 of the Probate Act. 755 ILCS 5/19-1 *et seq.*

Inability of the guardian to serve

Another area of concern is what to do if the guardian becomes temporarily or permanently unable to serve. If the guardian is unable to carry out his or her duties for a brief period of time, such as if the guardian becomes ill or is going to be away for a time on business or vacation, the statutes provide for the appointment of a short-term guardian. A form for the appointment of a short-term guardian is set forth in the Probate Act. 755 ILCS 5/11a-3.2. The form may also be found on the Illinois Guardianship Commission Web site under "Legal Forms You Can Use."

Short-term guardian

A short-term guardian may serve no more than 60 days in any 12-month period. Appointment of the short-term guardian does not require court action. The ward's views on the person to serve as short-term guardian must be taken into consideration. If the ward objects to the person who has been appointed, the ward may request that the court terminate the short-term guardian. 755 ILCS 5/11a-18.3(a). The short-term guardian has all of the powers of the permanent guardian of the person, unless that authority is limited in the appointing instrument. The authority of the short-term guardian over the estate of the ward is limited to the collection of public benefits such as Social Security funds. 755 ILCS 5/11a-18.3(b).

Standby guardian

To plan for the possible death or incapacity of the permanent guardian, the Probate Code provides for a stand-

by guardian. Again, a form is provided in the statutes and may be found on the Illinois Guardianship Commission Web site under "Legal Forms You Can Use." The form designating a standby guardian may be filed with the court either at the time the permanent guardian is appointed or a later date. The court appoints the standby guardian. The standby guardian has no duties until he or she is notified of the death or disability of the permanent guardian. At that time, the standby guardian steps into the shoes of the permanent guardian. The standby guardian has authority to act for up to 60 days. During that period, he or she may file a petition with the court asking to be appointed as permanent guardian. 755 ILCS 11a-18.2.

Successor guardian

The Probate Act also provides for the nomination of a successor guardian by the permanent guardian in his or her last will and testament. The nominated person is a testamentary guardian. 755 ILCS 5/11a-16. Unlike the standby guardian, the testamentary guardian has no authority to act on behalf of the ward until he or she appears in court and is appointed successor guardian. If no successor is named in either the guardian's last will and testament or by appointing a standby guardian, then any interested person may file a simple petition detailing the permanent guardian's inability to serve and the ward's continuing need for a guardian. 755 ILCS 5/11a-15. The court will usually appoint a successor guardian with little delay. The benefit of the standby guardian is that there is no gap in guardianship for the ward. The standby guardian serves essentially like a temporary guardian during that period of time between the death or disability of the permanent guardian and the appointment of a successor.

So now we have learned about advanced directives and the guardianship process. I encourage others of you who have expertise in common areas of the law to take the time to write an article so that other government attorneys may benefit from your knowledge.

* See "A Short Course on Advanced Directives," ISBA's *Committee on Government Lawyers* newsletter, August 2003, Vol. 5, No. 1.

Someone you should know: Raquel “Rocky” Martinez

By Bryant Gomez*

When Raquel “Rocky” Martinez approached her high school counselor to discuss her plan to pursue a legal career, she did not expect to receive such a discouraging response. Her counselor suggested enrolling in a trade school so that she could become a “good secretary.” At the time, Rocky Martinez, an ambitious young lady of humble upbringing, was a senior at a high school outside Chicago. She explained that she planned to attend local Morton College for two years, after which she would transfer to the University of Illinois at Chicago (UIC). After graduating from college, Rocky planned on attending law school. Although Rocky’s parents had promoted the idea of attending college her whole life, not one person in her family had been through the experience and nobody knew what was required. Although Rocky was an honor student and class president by her senior year, she had not taken the necessary preparatory classes nor had she taken the ACT or SAT. “A community college is about all you can hope for,” replied her counselor. “I was incensed,” remembers Rocky, who is now a strong advocate of community colleges. She would use this experience as a motivating factor for the following years as she persevered and carried on toward her aspiration of becoming an attorney.

Rocky Martinez was born in Chicago and grew up in suburban Lyons, Illinois. Her father was a Mexican-American, born and raised on a farm, with a high school diploma and a white-collar job. Her mother, a woman of Polish decent, was a housewife and a professional musician. Rocky is the youngest of four children, with three older brothers. “I knew at an early age that I was going to be an attorney,” recounts Rocky. “I credit that to my brothers, they were older, stronger, bigger, and more boisterous. The only defense I had was my mouth.”

Rocky’s parents understood the value of an education and insisted that she and her siblings attend college. “They were not in a position to help financially; emotionally they were there, but financially they weren’t.” In

an attempt to persuade her brothers to pursue a post-secondary education, her father made an offer to finance one year of college in Mexico. Otherwise, her brothers were on their own to finance their college educations. All of Rocky’s siblings declined their father’s offer and decided not to attend college. When it came time for Rocky’s high school graduation, the same offer to study in Mexico was not extended because her dad knew that she would be in school (and living at home) for a long time. But Rocky was determined not to let anything get in the way of achieving her ultimate objective—not her high school counselor’s discouraging words, and not the fact that her family was not in the position to finance her education.

Rocky began working part-time when she was only 14, pumping gas at a local Arco station in suburban Chicago. She continued working at gas stations and at school as she attended classes at Morton College. While at Morton, Rocky became active in politics and she continued her involvement in student government, becoming a student trustee by her second year.

In accordance with her plans, she transferred to UIC after earning her Associate’s Degree in Pre-Law. While at UIC, Rocky obtained a part-time position in the financial aid office. She also continued her political involvement and was elected student body president during her senior year. Rocky was able to graduate college, having studied political science and criminal justice, after five years—despite her involvement in student government and having two or three part-time jobs at all times. She took some time off between college and law school to work two jobs and save money, as she was able to convert her part-time job in the financial aid office to a full-time position.

After working for some time, Rocky applied for the January term at John Marshall Law School and was accepted. Her most opportunistic moment while in law school occurred near the end of her first year at a Christmas reception for what was then the Latin American Bar Association. Neil F.

Hartigan, Illinois’ Attorney General at the time, was in attendance. She remembers being advised by some seasoned attorneys in the Association not to approach Hartigan nor ask him about employment opportunities in the Attorney General’s Office. Rocky figured she had nothing to lose. She walked right up to Hartigan and said, “I am a first year law student who needs a job and I would like to work in your office.” “Come see me Monday,” replied Hartigan.

Rocky was sitting in the Attorney General’s office on Monday morning when Hartigan asked, “Where do you want to work?” “I didn’t do my homework,” remembers Rocky. “I didn’t know what positions were available. So I started telling him my interests.” She had hoped to become a criminal prosecutor. “So I mentioned criminal trials, he said ‘no problem.’ I was assigned to that Division and started work there shortly thereafter. I had a paid law-clerk’s position.” Rocky continued to work part-time for the Attorney General’s Office throughout law school and was able to make courtroom appearances with experienced attorneys by the time she was a 3L.

While clerking for the Attorney General’s Office, Rocky underwent an experience that would change her mind about being a career criminal prosecutor. At the time, the office was prosecuting a number of nursing homes for criminal neglect. “I remember them having blow-up photographs in the conference room. So here I come with some hotdogs for lunch. They start bringing out these photographs of this woman who had died from neglect. I mean, something like that...it’s beyond.” Rocky struggled to find words to describe the horror depicted in the photographs. “One of the guys looked at me and said, ‘hey little girl, you have to be able to eat your hotdog and keep it down while dealing with cases like this if you intend to be a criminal prosecutor.’ My face must have been green. I thought, no...I don’t have to do this; I don’t have to lose touch with my humanity. You can still get very involved and make a difference in the world, but you don’t have to lose your

humanity." Later, Rocky was able to secure a transfer to the Consumer Protection Division in the Attorney General's Office, where she stayed after obtaining her law license and concentrated on civil matters.

After leaving the Attorney General's Office, Rocky took a position in the Consumer Fraud Division of the Cook County State's Attorney's Office. Her new position was far more demanding but allowed for more interaction with victims and provided for hands-on experience with thousands of consumers in statutory fraud cases. She credits the office with helping her to understand the necessity of accurate record keeping and the benefits of preventative education by getting the word out to vulnerable consumers. "Our primary purpose was to put disreputable firms out of business... to prevent them from ripping anybody else off."

While working at the State's Attorney's Office, a Chicago newspaper ran a series of stories concerning disreputable privately owned trade schools with short-term programs. "They were basically financial aid mills, with some recruitment taking place at homeless shelters after offers of one-time cash payments." These schools did not provide the promised programs; some were without the necessary equipment while others did not have teachers. During the investigations of these cases, Rocky was able to work with representatives of the United States Department of Education, the Illinois State Board of Education, the Illinois Board of Higher Education and the Illinois Student Assistance Commission.

Because of the investigations, the resulting litigation and her experience working in a financial aid office, Rocky was offered a position at the

Illinois Student Assistance Commission (ISAC). She thought, "Maybe I'll try something a little new." The gentleman extending the employment offer claimed: "You aren't going to know what to do with all the extra time on your hands. We have a 37½-hour work week and five weeks paid vacation to start." "And a healthy raise," adds Rocky. "I've never seen a 37½-hour work week," says Rocky chuckling. She continues, jokingly, "To this day I tell that man 'you lied to me.'"

As Compliance Administrator, Rocky's first job with ISAC was primarily a management position, which involved overseeing the managers of several departments within the Commission. A reorganization took place after only six months on the job, and Rocky credits her law degree with granting her the opportunity to stay with the Commission. As Compliance Counsel, she began providing legal services for the agency. One of her first tasks as an attorney for ISAC was to promulgate the office's administrative rules, "which is an experience in and of itself." She also started serving as the Freedom of Information Officer and interpreted a myriad of laws, rules and regulations involving student financial aid.

Five years ago, ISAC commenced an administrative hearing process. The hearings provide the Commission with an opportunity to answer concerns from scholarship and grant applicants, as well as student loan borrowers. The new process provides a less-expensive means of due process. Rocky eventually rose to the position of Deputy General Counsel and now manages the Chicago legal office for the agency. During the workday, you can find her in her office in the Thompson Center in downtown Chicago or advocating for

ISAC in one of the many administrative hearings conducted by the agency.

"ISAC is one-stop shopping. We teach people about funding higher education," explains Rocky. "I knew early on that I could easily double my salary working at a LaSalle Street law firm, but I wanted quality of life, and I really wanted to make a difference. I remember how truly difficult it was for me to fund my own education. I wanted to do some outreach and help other people learn about the resources that are available to them. Nobody knew any of these things in my family."

Rocky is married, currently has no children, and has two dogs, two and four years old, respectively. Her husband, who managed a muffler shop for 15 years, decided to go back to school, graduated college, and is now a Junior High teacher. For recreation, Rocky enjoys riding her Harley Davidson (which she has named Tommy—short for The Other Man), watching science-fiction movies, practicing skeet shooting with her 20-gauge shotgun (named Sweet Pea), and riding one of two dirt bikes on the family-owned 180-acre farm in Indiana. (Yes, they have names too: Little Sister and Number Four). Her mother currently resides in the 145+-year-old farmhouse on the property where Rocky plans to retire someday. When I asked her how she felt about being a life-long government attorney and about her husband's recent career choice, the charismatic and inspiring lawyer replied, "neither one of us is going to become rich, but we are happy and we will make a lot of difference in people's lives."

*Bryant Gomez is a second-year law student at the Southern Illinois University School of Law.

In-sites

By Kelly Wingard, Decatur*

Now that the last remnants of Christmas have been packed away and hauled to the attic, it is time to pull out the calculator, W-2s, and receipts in preparation for the 2003 tax-filing season. If your brain has not quite made the transition from dancing sugarplums to the Jobs and Growth Tax Relief Reconciliation Act of 2003, do not despair. Online help is

just a click away. Soon visions of reduced capital gains rates, marriage penalty relief, and increased child tax credits will be swirling through your head.

A great place to launch your online quest for tax information is <www.taxsites.com>, an award-winning site that offers a comprehensive register of tax-related information. Whether you

are searching for current standard mileage rates or an in-depth discussion of the nanny tax, this directory can guide you to an answer. The user-friendly format easily jump-sites visitors to reliable sources which assist in the preparation of tax returns as well as provide planning tips for reducing future tax burdens.

The taxsites.com information bank

provides links to the IRS Web site, Kiplinger's TaxCut, the Motley Fool, and SmartMoney, as well as lesser-known, more diverse offerings. Two other sites worth checking out: TaxMama and Uncle Fed, are both found under taxsites.com's Tax: Guides-Tips-Help topic. TaxMama (slogan: "Tax Information with a Mother's Touch"), is touted by INC magazine and Ms. Money and offers information on a wide spectrum of financial topics. Posted questions are answered in a folksy manner on topics ranging from deduction rates on bonus paychecks to inheritance disclaimers. And, if tax research starts to get too heavy, TaxMama offers comic respite with a regular feature titled "Money Funnies." Uncle Fed, a commercial site with no government affiliation, provides "audit-proofing" advice on how to minimize chances for an IRS audit and also includes articles on how to survive an audit should this strategy fail. In addition, this site offers some nifty financial calculators that aid in retirement planning and other

monetary considerations such as lease versus buy, mortgage affordability, and how to achieve savings goals.

If you are seeking the skinny straight from Uncle Sam, <www.irs.gov> is the official Internal Revenue Service Web site. Here you can find forms, instructions to forms, IRS news releases, and the text to the Internal Revenue Service's mission statement regarding its duty to provide taxpayers with "top quality service" by "applying the tax law with integrity and fairness to all" (someone should submit this to Money Funnies...) The IRS site offers an interesting interactive feature that walks visitors through frequently encountered tax situations, such as how to treat distributions from insurance company demutualizations. To access this feature, type "Tax Trails" in the "Search IRS site for:" box. If you are into statistics, this site can also supply you with fascinating information to impress your friends at dinner parties: did you know the IRS hauls in more than \$1 trillion in individual income taxes alone each year?

If you want to bone up on state taxes, <taxsites.com> is still my recommendation. The taxsites.com menu provides bonus links to legal research, judicial information, and Illinois revenue statutes. Although you can access the Illinois Department of Revenue site directly via <www.revenue.state.il.us>, I have found it easier to go to taxsites.com and to jump to Illinois through the "State" menu option. Once you are on the Illinois Department of Revenue home page, be sure to click on the "Related Sites" button on the left-hand side of the screen. This will lead you to a link to the Illinois State Treasurer's Office Unclaimed Property Web site. This site offers an easy-to-search database for discovering if Great-Aunt Mary left an unclaimed stash of cash, which the state is now holding to distribute to her rightful heir—which hopefully is you!

*Kelly Wingard is a private tax preparer with Kates Tax Service in Decatur.

News you can use

Federal student loan forgiveness legislation

Many government lawyers face a common challenge: struggling to pay off large law school loans while earning low wages. To try to alleviate this problem, Congress is considering a bill that would create a loan forgiveness program for local and state prosecutors and local, state, and Federal public defenders. Under the bill, titled "The Prosecutors and Defenders Incentive Act," the federal government would provide loan repayment benefits of up to \$6,000 per year to prosecutors and public defenders who have committed to their jobs for at least three years and who carry educational debt. The bill would cap the total amount of payments at \$40,000 per person.

The legislation has been introduced in both the House (H.R. 2198) and the Senate (S. 1091). At press time, various Congressional committees were reviewing the bill but had not yet voted on it. You can track the progress of this legislation online at <<http://www.senate.gov>>. Additionally, this Web site can provide you with access

to the text of the legislation.

Secretaries as "confidential employees"

Hobler v. Brueher (9th Circuit, April 8, 2003), 325 F. 3d 1145. Secretaries employed at will in county prosecutor's office filed a §1983 action in state court, claiming their firing by newly elected prosecutor violated their First Amendment rights. Action was removed to federal court. After new

prosecutor was substituted for county as defendant, the United States District Court for the Eastern District of Washington granted summary judgment for new prosecutor. Fired employees appealed. The Ninth Circuit Court of Appeals held, among other things, that based on their actual duties and their relationship to the elected official, secretaries were "confidential employees" excepted from First Amendment protection against patronage dismissals.

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Case law update

By Lee Ann Schoeffel, Springfield

Administrative law

Nudell v. Forest Preserve Dist. of Cook County, 207 Ill.2d 409 (October 17, 2003). Pursuant to section 3-103 of Administrative Review Act (735 ILCS 5/3-103 (West 1998)), 35-day period for filing a complaint to review a final administrative decision begins to run on the date that the agency decision is deposited in United States mail, rather than from the date that the decision is actually received, overruling *Lockett v. Chicago Police Board*, 133 Ill.2d 349 (1990), and *Carver v. Nall*, 186 Ill.2d 554 (1999).

Vuagniaux v. Department of Professional Regulation, No. 94073 (November 20, 2003). Licensed chiropractic physician sought administrative review of decision of the Department of Professional Regulation reprimanding and fining him for violating advertising provisions of the Medical Practice Act of 1987 (225 ILCS 60/26 (West 1998)). The Supreme Court held, among other things, that: (1) the Department's Medical Disciplinary Board, which included a member who was appointed by the Board, rather than by the Governor, was not properly constituted; (2) the Board did not have implicit authority to make temporary appointments of members; (3) the decision of the Department of Professional Regulation would be set aside, and the matter would be remanded to the Department for reconsideration by a legally constituted Board; (4) unauthorized appointment of this Board member did not invalidate the actions taken by the Department before the member's appointment; and (5) the General Assembly had a rational basis for its structuring of the Board.

Lehmann v. Department of Children and Family Services, 342 Ill.App.3d 1069 (1st District, September 9, 2003). Procedural delays in administrative appeals process regarding the expungement of a child abuse finding did not deprive foster parents of their due process rights. Sufficient evidence supported finding that child abuse allegations against foster parents should not be expunged.

Harrisonville Telephone Co. v. Illinois Commerce Comm'n., 343

Ill.App.3d 517 (5th District, September 17, 2003). The Illinois Commerce Commission may require only one motion to rehear its decision before appeal. The case law requiring second rehearings is no longer relevant in light of the amendment of our State's constitution, as well as the enactment of both Supreme Court Rule 335 and the new version of the Public Utilities Act (220 ILCS 5/1-101 (West 2000)).

In re John Paul J., 343 Ill.App.3d 865 (1st District, September 24, 2003). Failure to conduct shelter care hearing within 48 hours of taking minor into custody does not deprive court of jurisdiction to consider neglect petition. Further, failure to conduct hearing within time limits of section 2-14 of the Juvenile Court Act of 1987 (705 ILCS 405/ 2-14 (West 1994)) is waived by respondent's failure to move for dismissal of the petition for adjudication of wardship.

Nickels v. Burnett, 343 Ill.App.3d 654 (2nd District, October 20, 2003). Plaintiff landowners brought action for nuisance and brought motion for preliminary injunction to prevent defendant landowners from constructing hog confinement facility pursuant to letters issued by Illinois Department of Agriculture authorizing construction of such facility. The appellate court held that: (1) trial court did not violate separation of powers; (2) plaintiffs were not required to exhaust their administrative remedies; (3) the Livestock Management Facilities Act (510 ILCS 77/1 *et seq.* (West 2002)) did not preempt statutory or common law nuisance claims; and (4) the motion for preliminary injunction was not premature.

Civil procedure

Niemberg v. Bonelli, 344 Ill.App.3d 459 (5th District, October 29, 2003). Petition to vacate judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2000)), is not a new action for purposes of motion for substitution of judge as a matter of right pursuant to section 2-1001(a)(2) of the Code (735 ILCS 5/2-1001(a)(2) (West 2000)).

Civil rights

Nelson v. Crystal Lake Park District, 342 Ill.App.3d 917 (2nd District, August

27, 2003). A park commissioner brought a §1983 action against a municipal park district, alleging that the district's imposition of a one-meeting suspension against her for purported release of executive session material and purported sexual harassment of an employee, without discussing the asserted inappropriate conduct with her in executive session, deprived her of her statutory right to serve in her capacity as a duly-elected public official. The appellate court held that: (1) trial court properly treated district's motion to dismiss as motion under statute by which a party challenges legal sufficiency of the cause of action, rather than statute by which a party raises an external defect or defense; (2) park district was a State actor subject to a §1983 suit; (3) commissioner had a due process property interest in her position; (4) alleged one-meeting suspension, though brief, was a deprivation of a due process property interest; (5) park district's alleged act of publicizing purported grounds for commissioner's suspension was an act on which to base §1983 claim of violation of due process liberty interest in commissioner's reputation; and (6) park district's alleged failure to discuss commissioner's purportedly inappropriate behavior with her in executive session before imposing sanction upon her, as required by policy manual, was sufficient ground on which to base a §1983 claim.

Criminal law

Criminal general

People v. Graves, 207 Ill.2d 478 (September 18, 2003). Because the elements of unauthorized theft of more than \$10,000 from a victim over the age of 60 (720 ILCS 5/16-1(a)(1), (b)(5) (West 2000); 730 ILCS 5/5-5-3.2(b)(4)(ii), 5-8-2(b)(4) (West 2000)) and theft by deception of \$20,000 from a victim over the age of 60 (720 ILCS 5/16-1(a)(2), (b)(7) (West 2000); 730 ILCS 5/5-8-1(a)(5) (West 2000)) do not contain identical elements, appellate court's holding that defendant's 12-year sentence for unauthorized theft of \$20,000 from elderly victims was not unconstitutionally disproportionate to three- to seven-year penalty for theft by deception.

People v. McCoy, 207 Ill.2d 352

(October 17, 2003). Defendant was convicted, after a bench trial, of two counts of aggravated criminal sexual assault. On appeal the Supreme Court held that defendant cannot challenge convictions on the sole basis that they are legally inconsistent with acquittals on other charges at the trial.

People v. Lopez, 207 Ill.2d 449 (October 17, 2003). Defendant charged with aggravated criminal sexual abuse filed motion seeking independent physical examination of the three-year-old victim. Appellate court properly reversed trial court's order prohibiting State from introducing any medical evidence of alleged three-year-old victim of sexual assault's condition as sanction for victim's parent's refusal to submit child to examination by defense expert, because court lacks authority to compel physical examination of minor victim, overruling *People v. Glover* 49 Ill. 2d 78 (1971). However, on remand, when the defendant requests an independent physical exam and the victim refuses, the trial court must balance the due process rights of the defendant with the privacy rights of the victim when determining what medical evidence, if any, the State is allowed to present.

People v. Pelt, 207 Ill.2d 434 (October 17, 2003). Defendant was convicted of aggravated battery of a child and first-degree felony murder predicated on aggravated battery of a child. The Supreme Court held that defendant's aggravated battery of his infant son was an act that was inherent in, and arose out of, the killing of the infant, and thus, aggravated battery of a child could not serve as the underlying felony for first-degree felony murder.

People v. Hanna, 207 Ill.2d 486, (October 17, 2003). Trial court erred when it held that breath testing equipment had not been properly certified by Illinois Department of Public Health as required by section 11-501.2 of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/11-501.2 (West 1998)) and the administrative regulations promulgated thereunder (77 Ill. Adm. Code §510.40(c) (1996)), because interpretation requiring Department to repeat tests already performed by National Highway Traffic Safety Administration is absurd.

People v. Derr, No. 5-01-0977 (5th District, September 10, 2003). By answering jury's question about how close in time the act resulting in the victim's death has to be to robbery with,

"Death does not have to be contemporaneous with the robbery; however, there must be some concurrence between the force used and the taking of the property," the trial court potentially misled the jury into thinking that defendant could be convicted of felony murder if he stole personal items from victim's body after victim was already dead, rather than caused victim's death in the course of a robbery. Therefore, felony murder charge must be retried.

People v. Henderson, 343 Ill.App.3d 1108 (1st District, September 25, 2003). Defendant was convicted of rape and deviate sexual assault. The appellate court held that: (1) Habitual Criminal Act (720 ILCS 5/33 B-1 *et seq.* (West 1998)) does not violate requirement that any fact, other than prior conviction, that increases maximum penalty for crime must be charged in indictment, submitted to factfinder, and proved beyond a reasonable doubt, and (2) results of testing the bloodstains on the pants recovered in the defendant's bedroom had the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence of rape offense, and thus defendant was entitled to obtain post-conviction forensic testing of pants.

People v. Briseno, 343 Ill.App.3d 953 (1st District, September 26, 2003). Because defendant was not in custody when he admitted to police officer at roadside stop that he smoked marijuana right before driving, he was not entitled to *Miranda* warnings. Further, section 11-501 (a)(6) of the Illinois Vehicle Code (625 ILCS 5/11-501(a)(6) (West 2000)) is not unconstitutionally vague. In addition, evidence of defendant's slurred speech, bloodshot eyes, admission of consumption of cannabis and slow motor skills were sufficient to find defendant guilty of DUI.

People v. Lee, 343 Ill.App.3d 431 (4th District, October 3, 2003). Defendant was convicted after a jury trial of second-degree murder and two counts of aggravated battery with a firearm. The Supreme Court, exercising its supervisory authority, directed the appellate court to vacate its judgment, and to reconsider. On reconsideration, the appellate court held that: (1) defendant's belief that deadly force was necessary was unreasonable; (2) convictions for both second-degree murder and aggravated battery with firearm violated the one-act, one-crime doctrine; but (3) the conviction and sen-

tence for the battery, which was the offense with the higher sentence, would stand, even though murder was legislatively classified as the more serious offense among the multiple offenses.

People v. Balayants, 343 Ill.App.3d 602 (2nd District, October 22, 2003). Trial court infringed on defendant's right of confrontation in robbery trial when it barred defendant from cross-examining State's principal witness about his incarceration pending criminal charges with potential sentence of 15 years even though no plea offer had been requested or made.

People v. Edwards, 343 Ill.App.3d 1168 (2nd District, October 27, 2003). Defendant was convicted of felony murder predicated upon offense of robbery, and was sentenced to natural life imprisonment. On appeal, the appellate court held that: (1) defendant waived issue on appeal that he was denied fair trial when trial court failed to *sua sponte* instruct jury as to definition of robbery; (2) trial court's failure to give jury instruction was not reviewable under plain error exception; and (3) trial court did not abuse its discretion in determining that certified record of proceedings was accurate as to testimony of witness.

People v. Harris, 343 Ill.App.3d 1014 (4th District, October 29, 2003). The appellate court held that: (1) section 24-1.1 of the Criminal Code of 1961 (720 ILCS 5/24-1.1 (West 2000), statute defining unlawful possession of weapon by felon was not unconstitutional; (2) probative value of naming defendant's four prior felony convictions after defendant offered to stipulate to prior convictions, was substantially outweighed by unfair prejudice; and (3) trial court's refusal to accept defendant's stipulation to his prior felony convictions to prove unlawful possession of weapon by felon was plain error.

People v. Forcum, 344 Ill.App.3d 427 (5th District, November 7, 2003). Special interrogatory given to jury during guilt phase of deliberation with regards to enhancing factors for murder of household member and exceptionally brutal behavior formed proper basis for enhanced sentence and constitutionally applied procedural amendment of statute enacted after acts forming basis of conviction. Further, gruesome photographs of victim were properly admitted to show nature and extent of victim's injuries and manner inflicted. Although hearsay evidence that victim feared defendant lacked

proper foundation, it was harmless error. In addition, although armed violence count must be vacated as violative of one-act, one-crime rule, home invasion need not be.

People v. Rish, No. 3-01-0161 (3rd District, November 10, 2003). Trial court erred when it dismissed post conviction petition of murder defendant without an evidentiary hearing. Petition and affidavits sufficiently allege violation of defendant's due process when attorney representing defendant allowed defendant to make series of inconsistent statements during two days of interrogation without informing her that he was close personal friend of victim and attorney for police officer involved in investigation. Further, petitions contain sufficient allegations of *Brady* violation based on lies by investigator. However, *Apprendi* sentencing issues will not be applied retroactively.

In re Detention of Bolton, 343 Ill.App.3d 1223 (4th District, November 13, 2003). Jury verdict finding defendant subject to commitment under the Sexually Violent Persons Commitment Act must be vacated. The court allowed the State to introduce findings of psychologists based on actuarial tests that had not been properly validated by means of a *Frye* hearing.

People v. Willis, No. 1-01-4170 (1st District, November 18, 2003). Although there was probable cause to arrest defendant, detention for unreasonable length of time without providing him with a probable cause hearing violated his constitutional rights and confession given after 72 hours must be suppressed. Failure to suppress defendant's confession was reversible error.

People v. Etherly, No. 1-01-4166 (1st District, November 21, 2003). Allegations by defendant, that he did not receive fair trial because prospective jurors were not questioned about their potential bias against gang members, were sufficient to state constitutional deprivation as required for first-stage review under the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2000)). *Res judicata* can be basis for first-stage dismissal of petition for post-conviction relief where the facts are undisputed regarding an issue that has in fact been raised and previously ruled upon. The Post-Conviction Hearing Act precludes first-stage dismissal, based on waiver or procedural default, for issues of procedural compliance or for issues that

could have or should have been raised, which require fact finding, resolution of disputed facts or consideration of matters outside the record; and *res judicata* could not be basis for first-stage dismissal of defendant's petition.

People v. Probst, 344 Ill.App.3d 378 (4th District, November 21, 2003). *Per se* conflict did not exist, for purposes of ineffective assistance claim, based on defense counsel's prior representation of undercover informant who was key prosecution witness.

Criminal counsel

People v. Johnson, No. 90678, 90693, 90706 cons. (October 17, 2003). Cumulative error and pervasive pattern of unfair prejudice in the second and third cases, relating to prosecutor's closing argument attempting to stir jury's outrage and divert jury's attention from more tangible issues regarding guilt or innocence, denied defendants a fair trial. Probative value of gang-affiliation evidence was not substantially outweighed by danger of unfair prejudice. Evidence that defendant in first case had taken and failed a polygraph examination was admissible. Defendant in first case's prior arrests as a juvenile, and his adjudications as a juvenile delinquent, were admissible. Defendant in first case was not substantially prejudiced by prosecutor's closing argument improperly commenting on defendant's exercise of his right not to testify.

People v. Jennings, 343 Ill.App.3d 717 (5th District, October 16, 2003). Although member of appellate prosecutor's office was not properly appointed or statutorily authorized to try defendant's murder trial, conviction is not void because prosecuting attorney was licensed attorney and defendant failed to object to his participation in trial.

Criminal procedure

People v. Blue, 207 Ill.2d 542 (November 20, 2003). Double jeopardy did not preclude the State in retrial from using defendant's conviction for police officer's murder to establish defendant's eligibility for the death sentence under multiple-murder aggravating factor.

People v. Pinkonsly, 207 Ill.2d 555 (November 20, 2003). Appellate court erred when it reversed trial court's denial of 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2002)) motion challenging unlawful

delivery of controlled substance charges based on ineffective assistance of counsel. Ineffective assistance is not available for 2-1401 motions. However, extended term sentence was not available for narcotics racketeering charge, as it was not being the most serious charge of which defendant was convicted.

People v. LaFond, 343 Ill.App.3d 981 (3rd District, October 23, 2003). Defendant was not precluded from retrial of aggravated battery and resisting a police officer charges after trial court declared mistrial when one juror was hospitalized during deliberation, other jurors were unavailable to continue deliberation the following Monday, and defendant refused to stipulate to deliberation by fewer than 12 jurors. Further, because record was adequate to ascertain that defendant objected to trial by fewer than 12 jurors, there was no basis to conclude ineffective assistance of counsel for failure to sufficiently preserve record.

People v. Morales, 343 Ill.App.3d 987 (4th District, November 3, 2003). Warrantless search of vehicle by police officers incident to lawful arrest of driver properly extended to jacket of defendant, who was a passenger in the vehicle.

People v. Hood, 343 Ill.App.3d 1245 (4th District, November 3, 2003). Trial court committed reversible error when it allowed State to present expert testimony of reverse extrapolation of alcohol by coroner in reckless homicide trial to rebut defendant's claim that he had consumed only two beers when Supreme Court Rule 412(a)(i) (188 Ill. 2d R. 412(a)(i)) disclosure attached autopsy report to describe subject matter of coroner's testimony and State did not inform defendant that coroner would be offered for alcohol level testimony until after defendant's case in chief.

People v. Stewart, 343 Ill.App.3d 963 (2nd District, November 5, 2003). Technical defect in eavesdropping authorization order did not require suppression of recorded telephone conversations between defendant and victim.

In re Detention of Erbe, 344 Ill.App.3d 350 (4th District, November 13, 2003). Trial court properly admitted results of actuarial-based evaluation techniques in commitment trial pursuant to Sexually Violent Persons Commitment Act without *Frye* hearing, they being generally accepted tests. Further, defendant was not denied effective assistance of counsel by attorney moving to continue and failing to

appear at probable cause hearing.

Criminal sentencing

People v. Baker, 342 Ill.App.3d 615 (4th District, August 22, 2003). State concedes that trial court lacked authority, after finding defendant had violated terms of probation and as part of three-year prison sentence, to order that defendant submit to Treatment Alternatives for Special Clients evaluation as condition of mandatory supervised release. That power is exclusively vested in the Prisoner Review Board.

People v. Moore, 343 Ill.App.3d 331 (2nd District, September 16, 2003). Defendant was properly convicted of murder and subjected to 50 years with 25-year enhancement for use of a gun based on section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2000)), which does not violate proportionate penalties clause or constitute double enhancement.

People v. Carmichael, 343 Ill.App.3d 855 (1st District, September 30, 2003). Trial court erred when it treated defendant's previous conviction for armed violence as a "forcible felony" in order to elevate defendant's conviction for unlawful possession of a firearm by a felon to a class 2 felony. However, sentencing range does not violate proportionate penalties clause, and case can be remanded for resentencing.

People v. Washington, 343 Ill.App.3d 889 (1st District, September 30, 2003). Aggravated unlawful use of weapon cannot be compared to reckless discharge of a weapon statute for purposes of proportionate penalties analyses, because the statutes target different behaviors.

People v. Smith, 343 Ill.App.3d 613 (2nd District, October 23, 2003). Agreeing with 1st District *People v. Askew*, 341 Ill. App. 3d 548, 554 (2003), opinion, omission of recidivism exception when amending section 5-8-2(a) of Code of Corrections (730 ILCS 5/5-8-2(a) (West 2002) to comply with *Apprendi* was legislative oversight rendering that section inconsistent with other provisions of Code. Court will resolve ambiguity by inferring recidivism exception into statute to comport with clear legislative intent. Therefore, trial court did not err when it imposed extended sentence upon revocation of probation for forgery based on defendant's prior criminal record.

People v. Culbreath, 343 Ill.App.3d 998 (4th District, October 29, 2003).

Defendant, on trial for aggravated battery, was not deprived due process when his attorney agreed to waive presence of court reporter during *voir dire*, particularly since defendant failed to supply appellate court with bystander's report or complain of any error during jury selection process.

People v. Sanchez Jr., 344 Ill.App.3d 74 (1st District, November 4, 2003). Defendant's mandatory natural life sentence for aggravated criminal sexual assault based on his prior conviction for criminal sexual assault did not violate proportionate penalties clause of State Constitution. *Apprendi* did not render defendant's natural life sentence unconstitutional.

Ethics

In re Gorecki, No. 96299 (November 20, 2003). Proper sanction for attorney who admittedly violated Rules of Professional Conduct when she left three messages on answering machine falsely indicating that county board chair could be bribed into providing a job is a four-month suspension from the practice of law. Attorney led otherwise exemplary life and showed genuine remorse for her behavior, taking full responsibility.

Freedom of Information Act

Harwood v. McDonough, 344 Ill.App.3d 242 (1st District, October 17, 2003). The Illinois Department of Commerce and Community Affairs (DCCA) was entitled to summary judgment dismissing the plaintiff's Freedom of Information Act action challenging the claimed exemption from disclosure of Arthur Andersen report, analyzing benefits of pursuing relocation of Boeing headquarters to Illinois, as preliminary recommendation of policy pursuant to the provisions of section 7(1)(f) of the Act (5 ILCS 140/7(1)(f) (West 2000)). Comments by the Governor and DCCA Director citing information contained in report's executive summary did not preclude use of exemption. Requester was not entitled to redacted copy of report that would consist of blank pages. Further, the response to a request for invoices indicating that no invoices had yet been received from Andersen was proper.

Labor law

City of Loves Park v. Illinois Labor Relations Bd State Panel, 343 Ill.App.3d 389 (2nd District, October

10, 2003). Collective bargaining agreement, which provides for arbitration of covered employees' discharge and discipline determinations, is legal and enforceable under Municipal Code. Board's determination that city committed unfair labor practice by challenging arbitrator's authority and refusing to recognize determination that there was no cause to terminate subject employee is not clearly erroneous.

Mental health law

People v. Masterson, 207 Ill.2d 305 (October 2, 2003). The definition of "mental disorder" in the Sexually Violent Persons Commitment Act should be read into the Sexually Dangerous Persons Act (SDPA) to correct legislative oversight. A finding of sexual dangerousness must be accompanied by an explicit finding that it is substantially probable the person subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined. SDPA complies with due process.

In re Detention of Varner, 207 Ill.2d 425 (October 2, 2003). Sexually Violent Persons Commitment Act, as applied in this case, does not unconstitutionally deprive the respondent of substantive due process. The jury was specifically instructed in such a way that it was clear that the State had the burden of proving that the respondent suffered from a mental disorder, which was defined in such a way that the jury was required to find an inability to control respondent's behavior.

In re Detention of Swope, 343 Ill.App.3d 152 (2nd District, September 16, 2003). Refusal of Department of Human Services employees to speak with petitioner's expert violated petitioner's right to due process. Petitioner waived review of due process issue by acquiescing in deposition procedure. Trial court's application of incorrect standard of State's burden of proof was harmless error.

In re Detention of Harold Powell, 344 Ill.App.3d 97 (1st District, October 29, 2003). The time requirements for filing petitions under the Sexually Violent Persons Commitment Act are mandatory and not directory. State's petition to commit inmate, which was filed based on inmate's anticipated release date, was untimely.

Municipal law

In re Application of the County Treasurer, 343 Ill.App.3d 122 (1st

District, August 29, 2003). Purchaser of property at tax sale on which portion of building had been demolished was required to reimburse municipality for cost of demolition of that portion of building located on property before he could take title to property. Further, duly recorded demolition lien was sufficient to trigger provisions of section 22-35 of the Property Tax Code (35 ILCS 200/22-35 (West 2002)) despite failure on part of city to file section 11-31-1 of the Municipal Code (65 ILCS 5/11-31-1 (West 2002)).

Serpico v. Village of Elmwood Park, 344 Ill.App.3d 203 (1st District, October 31, 2003). City ordinance prohibiting certain types of electronic video gaming devices does not warrant First Amendment scrutiny and bears rational basis to legitimate state purpose of regulating gambling. Further, ordinance is neither overly broad nor violative of equal protection.

Special districts

Wauconda Fire Protection District v. Stonewall Orchards, LLP, 343 Ill.App.3d 374 (2nd District, October 2, 2003). Fire protection district brought action against county and golf course located in an unincorporated area of the county, seeking enforcement of its fire protection ordinance requiring sprinklers to be installed in connection with construction of a new clubhouse at golf course. The circuit court granted county's and golf course's motions to dismiss. On appeal, the court held that: (1) county was not a "municipality" within meaning of statute depriving district of authority to enforce its ordinances in municipalities with their own fire protection codes (70 ILCS 705/11 (West 2002)); (2) golf course was required to comply with both sets of relevant ordinances; and (3) district was required to enforce its own ordinance (70 ILCS 705/11 (West 2002)) and could not require county to withhold certificate of occupancy.

School law

Dukett v. Regional Board of School Trustees, 342 Ill.App.3d 635 (4th District, August 7, 2003). Decision denying petition to detach from school district and attach to adjoining school district filed by family whose members more closely associate with adjoining school district and who are paying tuition for children to attend adjoining district, when neither district will be

affected in any substantial manner, is clearly erroneous.

Taxation

Ceres One Corp. v. Naperville Township Road District, 343 Ill.App.3d 382 (2nd District, September 30, 2001). Taxpayers filed objections to township road district's 1996 levy. The appellate court held that hard road tax levy expired five years after it was passed by referendum on April 10, 1979, and, thus, the 1996 road tax was *ultra vires*.

Leafblad v. Skidmore, 343 Ill.App.3d 640 (2nd District, October 20, 2003). Taxpayer filed action to enjoin county treasurer from collecting part of real estate tax bill, alleging that disputed taxes were based on unauthorized reassessment. The appellate court held that the appeal was rendered moot by taxpayer's voluntary payment of disputed property tax, and that the public interest exception to mootness doctrine did not apply.

Mill Creek Development, Inc. v. Property Tax Appeal Bd., No. 3-02-0596 (3rd District, October 29, 2003). Property owner petitioned for review of decision of the Property Tax Appeal Board, which upheld increased tax assessment on property. The appellate court held that: (1) farm land that was platted and subdivided prior to assessor's changing of property status to residential land was to be assessed at the farm land valuation; (2) land that was platted and subdivided subsequent to assessor's changing status to residential property was to be assessed at the residential valuation; and (3) property valuation which was based on comparable local market values was thorough and accurate.

Tort immunity and liability

Van Meter v. Darien Park Dist., 207 Ill.2d 359 (October 17, 2003). Homeowners brought negligence action against municipal defendants, among others, alleging that surface water flooded home upon completion of adjacent municipal recreation area. The circuit court granted municipal defendants' motion to dismiss. Homeowners appealed. The Supreme Court held that questions of material fact existed as to whether conduct of municipal defendants in designing and constructing municipal recreation area in such a manner as to allegedly cause surface water to flood adjacent home

was result of a policy decision and was discretionary, precluding an involuntary dismissal of negligence complaint based on affirmative defense of discretionary act immunity.

Hager v. Il In One Contractors, Inc., 342 Ill.App.3d 1082 (1st District, September 5, 2003). Injured construction worker brought action against contractor, city, and public building commission, after he allegedly slipped and fell on debris resulting from concrete overpour. The court found that four-year statute of limitations period for suits involving construction under section 13-214 of the Code of Civil Procedure (735 ILCS 5/13-214 (West 2000)), rather than one-year limitations period under section 8-101 of the Tort Immunity Act (745 ILCS 10/8-101 (West 2000)) applied to construction worker's action.

Ozik v. Gramins, No. 1-00-3280 (1st District, October 27, 2003). Evidence that police officers stopped severely intoxicated 19-year-old driver and issued traffic citations to him, but allowed him to continue driving vehicle, was sufficient for jury to award damages for wrongful death of passenger of intoxicated driver's car, subsequently killed in motor vehicle accident, based on officers' willful and wanton negligence. Further, there is no immunity under sections 4-102 and 4-107 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/4-102, 4-107 (West 1994)). In addition, defendants waived issue of contribution from driver by failing to tender jury instruction on that issue at trial.

Zoning

Board of Trustees of the University of Illinois v. Shapiro, 343 Ill.App.3d 943 (1st District, September 30, 2003). University board of trustees brought condemnation proceeding against owner's property. Defendant waived the issue of legitimate exercise of eminent domain authority by University by failing to file motion to dismiss and traverse at trial. Further, appellate court held that: (1) valuation of properties sold under threat of condemnation was not admissible to establish valuation; (2) values of improved properties were not admissible; (3) expert testimony about possible rezoning was not admissible; and (4) valuation was to be established according to board's evidence, as property owner presented no alternatives.

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