No. 121199

IN THE SUPREME COURT OF ILLINOIS

RUTH ANN ALFORD, as executor of the ESTATE OF DORIS E. SHELTON, Appellee (Plaintiff) v. RODNEY I. SHELTON, Appellant (Defendant)	)	On Petition for Leave to Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-14-0685 There on Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois No. 14-L-13 Honorable Lance R. Peterson, Judge Presiding

consolidated with:

In re ESTATE OF THOMAS F. SHELTON,) (Ruth Ann Alford, Executor, Petitioner v. Rodney I. Shelton, Respondent).	)	Appeal from the Circuit Court of the 13th Judicial Circuit Grundy County, Illinois Appeal No. 3-14-0163 Circuit No. 13-P-17 Honorable Lance R. Peterson, Judge Presiding

BRIEF OF APPELLANT, DEFENDANT RODNEY I. SHELTON

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POINTS AND AUTHORITIES

NATURE OF ACTION

Appellee, Ruth Ann Alford ("Plaintiff"), as executor of the Estate of Doris Shelton, filed a complaint at law ("Complaint") against Appellant, Rodney Shelton ("Defendant"), alleging that Defendant, the son of Doris and Thomas Shelton, participated in a breach of fiduciary duty committed by Thomas Shelton, the designated agent and attorney in fact under Doris Shelton's property power of attorney ("POA"), by transferring her interest in real property to Defendant and Defendant's spouse. Defendant was a named a "successor agent" in the power of attorney. The action is based solely on a provision of the Illinois Power of Attorney Act ("Act"), 755 ILCS 45/2-10.3(b) [see "Statutes Involved" for full text of the provision].

Defendant moved to dismiss the Complaint under Section 2-615(a) [735 ILCS 5/2-615(a)]. The trial court granted the motion, dismissing the Complaint with prejudice. Plaintiff appealed the dismissal to the Third District Appellate Court. The appellate court reversed the judgment of the trial court and remanded the case for further proceedings. *Alford v. Shelton (In re Estate of Shelton)*, 2016 IL App (3d) 140163 (2016).

Defendant file a petition for leave to appeal, which was granted by this Honorable Court and consolidated with the related case (Supreme Court Docket No. 121241).

The judgment appealed from is not based upon the verdict of a jury. A question is raised on the pleadings, specifically whether the allegations of the Complaint are sufficient to state a cause of action upon which relief can be granted. [735 ILCS 5/2-615(a)].

ISSUES PRESENTED FOR REVIEW

Whether section 2-10.3(b) of the Illinois Power of Attorney Act [755 ILCS 45/2-10.3(b)] applies to and imposes its described duties and liabilities upon a "successor agent", designated as such in a property power of attorney, before he becomes the acting agent under that instrument.

STANDARD OF REVIEW

Appellate review of an order granting or denying a section 2-615 motion to dismiss is *de novo*. *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 856 NE 2d 1048, 1053 (2006).

STATEMENT OF JURISDICTION

This appeal is taken pursuant to grant on November 23, 2016, of a petition for leave to appeal brought pursuant to Illinois Supreme Court Rule 315.

STATUTES INVOLVED

(755 ILCS 45/2-10.3) Sec. 2-10.3. Successor agents.

(a) A principal may designate one or more successor agents to act if an initial or predecessor agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to another person, designated by name, by office, or by function, including an initial or successor agent, to designate one or more successor agents. Unless a power of attorney otherwise provides, a successor agent has the same authority as that granted to an initial agent.

(b) An agent is not liable for the actions of another agent, including a predecessor agent, unless the agent participates in or conceals a breach of fiduciary duty committed by the other agent. An agent who has knowledge of a breach or imminent breach of fiduciary duty by another agent must notify the principal and, if the principal is incapacitated, take whatever actions may be reasonably appropriate in the circumstances to safeguard the principal's best interest.

(c) Any person who acts in good faith reliance on the representation of a successor agent regarding the unavailability of a predecessor agent will be fully protected and released to the same extent as though the reliant had dealt directly with the predecessor agent. Upon request, the successor agent shall furnish an affidavit or Successor Agent's Certification and Acceptance of Authority to the reliant, but good faith reliance on a document purporting to establish an agency will protect the reliant without the affidavit or Successor Agent's Certification and Acceptance of Authority. A Successor Agent's Certification and Acceptance of Authority shall be in substantially the following form:

SUCCESSOR AGENT'S
CERTIFICATION AND ACCEPTANCE OF AUTHORITY

I certify that the attached is a true copy of a power of attorney naming the undersigned as agent or successor agent for ..... (insert name of principal).

I certify that to the best of my knowledge the principal had the capacity to execute the power of attorney, is alive, and has not revoked the power of attorney; that my powers as agent have not been altered or terminated; and that the power of attorney remains in full force and effect.

I certify that to the best of my knowledge ..... (insert name of unavailable agent) is unavailable due to ..... (specify death, resignation, absence, illness, or other temporary incapacity).

I accept appointment as agent under this power of attorney.

This certification and acceptance is made under penalty of perjury.*

Dated: .....

..... (Agent's Signature)

.....(Print Agent's Name)

.....(Agent's Address)

The following provisions of the Illinois Power of Attorney Act are submitted as also relevant:

(755 ILCS 45/2-3) Section 2-3. Agency.

(a) "Agency" means the written power of attorney or other instrument of agency governing the relationship between the principal and agent or the relationship, itself, as appropriate to the context, and includes agencies dealing with personal or healthcare as well as property.

(b) "Agent" means the attorney-in-fact or other person designated to act for the principal in the agency.

(c), (d) [Omitted here.]

(e) "Principal" means an individual (including, without limitation, an individual

acting as trustee, representative or other fiduciary) who signs a power of attorney or other instrument of agency granting powers to an agent.

(755 ILCS 45/2-10.5) Section 2-10.5. Co-agents.

(a) Co-agents may not be named by a principal in a statutory short form power of attorney for property under Article III or a statutory short form power of attorney of healthcare under Article IV. In the event that co-agents are named in any other form of power of attorney, then the provisions of this Section shall govern the use and acceptance of co-agency designations.

(b) Unless the power of attorney or this Section otherwise provides, the authority granted to 2 or more co-agents is exercisable only by their majority consent. However, if prompt action is required to accomplish the purposes of the power of attorney of to avoid irreparable injury to the principal's interests and an agent is unavailable because of absence, illness, or other temporary incapacity, the other agent or agents may act for the principal. If a vacancy occurs in one or more of the designations of agent under a power of attorney, the remaining agent or agents may act for the principal.

(c) An agent is not liable for the actions of another agent, including a co-agent or predecessor agent, unless the agent participates in or conceals a breach of fiduciary duty committed by the other agent. An agent who has knowledge of a breach or imminent breach of fiduciary duty by another agent must notify the principal and, if the principal is incapacitated, take whatever actions may be reasonably appropriate in the circumstances to safeguard the principal's best interest.

(d) [Omitted here.] [Source: P.A. 96-1195, eff. 7-1-11; 97-1150, eff. 1-25-13.]

STATEMENT OF FACTS

Plaintiff filed a complaint at law ("Complaint") against Defendant (R. C2-13) (A2-13), alleging that Doris E. Shelton ("Doris") executed a Short Form Property Power of Attorney ("POA") designating her husband Thomas F. Shelton ("Thomas") as her "primary agent (or attorney in fact)", and her son, Defendant Rodney Shelton, as "first successor agent". (R. C2) (A2). The Complaint further alleges that on December 1, 2011, Thomas, "as agent of Doris", executed a quitclaim deed conveying real property to Defendant and his wife, Regina Shelton. The POA and deeds at issue are attached to the Complaint as exhibits. (C5-8; A5-8) (C9-13; A9-13).

The Complaint alleges that Thomas, as "primary agent" under the POA, violated his duty to Doris in that he transferred all of Doris' interest in the subject real property to Defendant and his spouse without reserving a life estate in Doris, at a time when Doris was incompetent and in need of income from the property. Plaintiff alleges that Defendant "participated in such breach of fiduciary duty" by Thomas, "by failing to notify the principal....of such breach" by Thomas and by failing "to take action to safeguard" her best interests. The Complaint premises the alleged liability of Defendant solely upon a provision of the Illinois Power of Attorney Act, contained in 755 ILCS 45/2-10.3(b). (C2-4) (A2-4).

In the POA executed by Doris, Thomas was designated as her sole attorney-in-fact (her "agent"), and was granted standard powers, as well as the power to make gifts, to name or change beneficiaries or joint tenants, and to exercise trust powers. In paragraph 8 of the POA, if any named agent should die, become incompetent, resign or refuse to

accept the office of agent, Doris named as successors to such agent, to serve in listed order, Defendant and then Plaintiff, her daughter. (C5-6) (A5-6).

The quitclaim deed conveying the subject property was executed on December 1, 2011, by Thomas individually as to his own property interest, and as to the interest of Doris by Thomas as her "attorney in fact". (C9-10) (A-109). In addition, Thomas alone executed a quitclaim deed on the same date, conveying to Defendant and his spouse other real property titled in Thomas alone. (C11-13) (A11-13).

Defendant filed a Motion for Judgment on the Pleadings or, in the Alternative, a Motion to Dismiss Complaint, pursuant to 735 ILCS 5/2-615(e) and 735 ILCS 5/2-615(a), with a supporting memorandum. (C20-35). Plaintiff filed a response to the motions (C37-40), and Defendant filed a reply (C42-46).

In connection with both motions, Defendant submitted that he was not and could not be an "agent" as alleged in the Complaint, under either the power of attorney or the statute involved [755 ILCS 45/2-10.3(b)]. Defendant also argued that Thomas Shelton had no legally recognized fiduciary duty to act as alleged in the Complaint, and that the Complaint thereby failed to state a cause of action for breach of fiduciary duty as recognized in Illinois. (C20; C21-35).

In her response, Plaintiff contended that Rodney, as a named "successor agent" in the POA, was a fiduciary as a matter of law and thus had a fiduciary duty to Doris on the date of execution of the deeds. (C39; C37-40).

Plaintiff contended in oral argument before the trial court that Defendant "had a duty as the secondary agent", on the basis that section 2-10.3(b) of the Illinois Power of

Attorney Act created such a duty. Plaintiff argued that Rodney "watched his father . . . breach his fiduciary duty [to Doris]", accepted delivery of the deed, and therefore could be liable for wrongful conduct. (RP R14-15). Plaintiff argued that section 2-10.3(b) and the decision of *In re Elias* [408 Ill.App.3d 301, 946 N.E.2d 1015 (1st Dist. 2011)] stand for the propositions that a "secondary agent" could be liable if he "sees the primary agent violate his duty to the principal", and that there is a duty on the part of the "secondary agent" to take action to protect the principal. (RP R16).

The trial court found as a matter of law that Rodney never became an agent, and therefore no fiduciary duty ever developed; and that Thomas Shelton was the agent with all discretion that Doris Shelton chose to give him. (RP R28-29). The trial court granted Rodney's section 2-615 motion, dismissing the Complaint with prejudice. (C56) (A17). Plaintiff initiated her appeal in this cause in the Third Judicial District Appellate Court ("Third District" or "appellate court"), in addition to her appeal from the dismissal of her citation petition in the consolidated action in *Estate of Thomas F. Shelton (Ruth Ann Alford, Petitioner v. Rodney Shelton, Respondent)* [Illinois Supreme Court No. 121241, Third District Appeal No. 3-14-0163]. (C57) (A1).

In its opinion relating to this action [*Alford v. Shelton*, 2016 IL App (3d) 140163 (2016)] (Appendix, A18-39), the Third District held that section 2-10.3(b) of the Act [755 ILCS 45/2-10.3(b)], upon which the Complaint is solely based:

> (a) "provides that successor agents may be liable for breaches of fiduciary duty committed by their predecessor agents" if they participate in or conceal such breaches, "regardless of whether they have independent fiduciary obligations to

the principal" *(Alford v. Shelton*, ¶32);

(b) does not state that successor agents may be liable for breaches by their predecessor agents only if they themselves become acting agents (¶32);

(c) imposes "certain affirmative obligations upon successor agents", i.e., that a "successor agent" who has knowledge of a breach or imminent breach by "another agent" must notify the principal and, if the principal is incapacitated, take actions reasonably appropriate to safeguard the principal's best interest (¶33); and

(d) "suggests that successor agents who fail to discharge these obligations are liable for any breach of fiduciary duty by a predecessor agent", but only if the successor agent "has knowledge of the breach or imminent breach by another agent"(¶33).

The Third District held that section 2-10.3(b) "could support an action" against a successor agent if he participated in or concealed a breach of duty by a predecessor agent under those circumstances, and that the Complaint alleged facts sufficient to state such a cause of action. *Alford*, ¶34. The court rejected Defendant's argument that section 2-10.3(b) does not apply to successor agents as such, but only to those acting as an "agent" as specifically defined in the Act in Section 2-3 (755 ILCS 45/2-3). ¶35. The court relied upon the fact that section 2-10.3 of the Act is entitled "Successor agents", and that its other two subsections both clearly apply to successor agents [755 ILCS 45/2-10 (a) and (c)]. ¶36. The court stated that Defendant's argument meant that Section 2-10.3(b) "could only apply in a situation where there are co-agents (i.e. two simultaneously acting attorneys-in-fact) under the POA", and found more important the fact that a separate

section in the Act is entitled "Co-agents" (755 ILCS 45/2-10.5), which would be rendered superfluous if section 2-10.3(b) applied to co-agents. ¶37.

Justice Carter dissented, having concurred with the decision rendered in the consolidated case (¶46), on the bases that the majority's decisions in the consolidated appeals were inconsistent with in reaching opposite conclusions on the same issue, i.e, whether a successor agent under a POA has a fiduciary duty to the principal before he becomes the acting agent; and that the majority's decision was based on a strained reading of section 2-10.3(b) and its specific use of the term "agent", a term defined in 755 ILCS 45/2-3(b). ¶47.

In the case consolidated on appeal (*Estate of Thomas Shelton*, Docket No. 121241), Plaintiff filed an estate citation petition against Defendant seeking the return of Thomas's land, alleging that the conveyance was presumptively fraudulent because it occurred while Defendant was named as "successor agent" under Thomas's Illinois Short Form Property POA, and while Doris, Thomas's primary agent under his POA, was incompetent. *Alford*, ¶19-20. Defendant filed a motion to dismiss the amended citation petition under Section 2-619(a)(9) [735 ILCS 5/2-619(a)(9)], which was granted by the trial court. ¶19. On appeal, the Third District affirmed that ruling, holding that a successor agent under a POA does not have a fiduciary duty to the principal before he becomes the acting agent (the attorney-in-fact) merely by virtue of being named a successor agent in the POA. ¶23.

Each party filed petitions for leave to appeal, which were granted by this Honorable Court on November 23, 2016; and both actions were consolidated.

ARGUMENT

Section 2-10.3(b) of the Illinois Power of Attorney Act ("Act") does not apply to a "successor agent" named in a property power of attorney before he becomes an acting agent under that agency instrument. The trial court properly dismissed the Complaint, and the Third District Appellate Court erred in reversing the dismissal.

A. Accepting all well-pleaded allegations of the Complaint as true, under any reasonable interpretation of the agency instrument (POA) and section 2-10.3(b), the statutory provision upon which the claim is founded, the trial court properly dismissed the Complaint with prejudice pursuant to section 2-615(a) of the Code of Civil Procedure.

1. Defendant was a named "successor agent" but not an "agent", either under the agency instrument (POA) or under section 2-10.3(b) of the Act, and therefore had no duty to the principal under the involved statutory provision.

A motion to dismiss brought pursuant to section 2-615 of the Code attacks the legal sufficiency of the complaint and alleges defects apparent on the face of the complaint. In Illinois, a pleading must be legally and factually sufficient. It must assert a legally recognized cause of action, and it must plead facts, not conclusions, which bring the particular case within that cause of action. *Chandler v. Illinois Central Railroad Co.*, 207 Ill.2d 331, 348, 798 N.E.2d 724 (2003). A reviewing court accepts as true all well-pleaded facts and inferences that may be drawn from those facts, and construes the allegations in the light most favorable to the plaintiff. A cause of action should not be dismissed unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 856 N.E.2d 1048, 1053 (2006). The existence of a duty is a question of law for the court to decide. *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 421, 592 N.E.2d 1098 (1992).

An agency relationship is predicated upon the authority the agent derives from the

principal and the execution of that authority. The Illinois Power of Attorney Act defines both principal and agent [now sections 2-3(e) and 2-3(a) respectively]. Accordingly, before an agency is created, both a principal and agent must exist. *Estate of Davis*, 260 Ill.App.3d 525, 632 N.E.2d 64, 65 (1st Dist. 1994).

The Complaint is directly premised on section 2-10.3 of the Act, a part of the extensive statutory framework governing powers of attorney in Illinois (755 ILCS 45/1-1 et seq.). The Act contains other relevant provisions, including the definition of "agent" operative for purposes of the Act and a statutory property POA. The Third District construed section 2-10.3(b) to include a "successor agent" as an "agent" under its specific provisions regarding liability of an agent for the wrongful actions of another agent which harm the principal.

Statutory construction, the primary rule of which is to ascertain and give effect to the intent of the legislature, is a question of law. *People v. Davis*, 199 Ill.2d 130, 135, 766 N.E.2d 641 (2002). Courts determine this intent by reading the statute as a whole and considering all relevant parts. *Sylvester v. Industrial Commission*, 197 Ill.2d 225, 756 N.E.2d 822, 827 (2001).

In determining legislative intent in statutory construction, courts examine the language of the statute, which is the most reliable indicator of the legislature's objectives in enacting the law. Where the language is clear and unambiguous, courts must apply the statute without resort to further aids of construction. One of the fundamental principles of statutory construction is to view all provisions of an enactment as a whole. Words and phrases should not be construed in isolation, but must be interpreted in light of other

relevant provisions of the statute. *Michigan Avenue National Bank v. County of Cook*, 191 Ill.2d 493, 732 N.E.2d 528, 535 (2000). Statutory definitions control in the construction of the terms of an act, and common law definitions yield to statutory definitions. *People v. Perry*, 224 Ill.2d 312, 864 N.E.2d 196, 206 (2007); *Metropolitan Alliance of Police v. Illinois Labor Relations Board*, 2013 IL App (3d) 120308, 1 N.E.3d 593, 597 (2013).

Thus section 2-10.3, and particularly section 2-10.3(b), must be viewed and interpreted in light of the Illinois Power of Attorney Act as a whole. Its construction is dependent upon and must be read in conjunction with other provisions of the Act that define key terms. Those statutory definitions control in the construction of section 2-10.3(b).

Section 2-10.3(a) describes and defines a "successor agent": a person "designated [in the agency] . . . to act if an initial or predecessor agent resigns, dies, becomes incapacitated, is not willing to serve, or declines to serve." 745 ILCS 45/2-10.3(a). Section 2-10.3(b) imposes statutory liability upon an "agent . . . for the actions of another agent, including a predecessor agent . . ." The liability is restricted under the provision to participation in or concealment by "the agent" of a breach of fiduciary duty committed by "the other agent". 755 ILCS 45/2-10.3(b).

Section 2-3(b) defines an "agent" as "the attorney-in-fact or other person designated to act for the principal in the agency"; the "agency" is the written power of attorney. 755 ILCS 45/2-3(a) and (b). Under the Act, the principal can specify the selected agent, when the agency will begin and terminate, and the powers granted the

agent. 755 ILCS 45/2-4(a).

The involved statute and the other relevant provisions of the Act are clear and unambiguous, with defined terms that control in statutory construction. In the POA executed by Doris, a standard short form power for property, she designated one agent, her husband Thomas, and named in preprinted paragraph 8 certain "successor agents" to serve in the order listed (Defendant and then Plaintiff). (C5-6) (A5-6). For purposes of Section 2-10.3(b), entirely in accord with the relevant definitional components of the Act, there was on December 1, 2011, only one "agent", Thomas Shelton. Defendant was a named "successor agent", as described by the involved statute and the POA itself, and therefore was not and could not be an "agent" at the time the deed was executed. The language and substance of paragraph 8 in the POA comports exactly with section 2-10.3(a) as to the nature and designated role of a "successor agent". Defendant could only become the empowered agent by succeeding the primary agent (Thomas), if the latter failed to serve by reason of death, incompetence, resignation or refusal to accept the office. None of those circumstances are alleged to have occurred in the Complaint. (C2-13).

The provisions of the agency (POA) control notwithstanding the Act. 755 ILCS 45/2-4(a). It is well established that a written power of attorney must be strictly construed so as to reflect the clear and obvious intent of the parties. *Ft. Dearborn Life Insurance Co. v. Holcomb*, 316 Ill.App.3d 485, 736 N.E.2d 578, 583, 589 (2000). The trial court correctly construed the POA at issue and ruled that section 2-10.3(b) of the Act did not apply.

2. Plaintiff's reliance upon the decision of *In re Elias* is erroneous and misplaced.

In the trial court proceedings and her original appeal, Plaintiff relied on one authority, the *Elias* decision, to support her contention that the designation of Defendant as a successor agent gave rise to a fiduciary relationship between Defendant and Doris and the fiduciary duty of an agent under a POA. This position is wholly unsupported by the holding and authorities cited in that decision. *In re Elias*, 408 Ill.App.3d 301, 946 N.E.2d 1015 (1st Dist. 2011). As the trial court recognized, *Elias* bears no factual or legal similarity to the case at bar. In *Elias*, as with every reported Illinois decision regarding principal-agent transactions under a power of attorney, the person against whom recovery was sought was the acting agent appointed in the POA, not a successor agent. In *Elias*, the agent under a POA claimed that there was no fiduciary duty or presumption of fraud in the transactions at issue because she had not "invoked" or "activated" the power of attorney in connection with the transactions. The reviewing court confirmed the long-standing principle that a power of attorney gives rise to a general fiduciary relationship between the grantor (principal) of the power and the grantee (agent) as a matter of law, which invokes a presumption of fraud as to any transaction between the principal and agent (citing *White v. Raines*, 215 Ill.App.3d 49, 574 N.E.2d 272 [1991]). *In re Elias*, 946 N.E.2d at 1032. There is no mention and no involvement in the *Elias* decision of a "successor agent" or "secondary agent".

The trial court correctly found that *Elias* had no application to the allegations of the Complaint or to Defendant as a successor agent.

B. The Third District erred in reversing the dismissal of the Complaint and in holding that section 2-10.3(b) of the Act applies to a "successor agent" named in a durable property power of attorney before he becomes an acting agent.

On an issue recognized as one of first impression, the Third District held that a successor agent designated in a POA, before becoming an acting agent under the POA, has a statutory duty to the principal under section 2-10.3(b) of the Act [755 ILCS 45/2-10.3(b)]. The decision effects a significant modification of Illinois law relating to property powers of attorney, agency, and fiduciary duty. In its analysis, the court engaged in statutory construction of the provision at issue. Defendant submits that the Third District erred in its holding, the decision being clearly contrary to established principles of statutory construction, specific term definitions contained in the involved statute, and the intent and purposes of the Illinois Power of Attorney Act (755 ILCS 45/1-1 et seq.).

1. Section 2-10.3(b) of the Act is clear, certain and unambiguous in its language, rendering statutory construction unnecessary and inappropriate; a court is required in such case to apply the statutory language as written.

The holding that a "successor agent" is an "agent" under section 2-10.3(b), and thus has the statutory duties enumerated in that provision, directly violates established canons of statutory construction long recognized in Illinois.

Where the language of a statute is clear and unambiguous, the following principles apply:

(a) A court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express. A court must give the statute effect as written, without reading into it

exceptions, limitations or conditions that the legislature did not express. *Garza v. Navistar International Transportation Corp.*, 172 Ill.2d 373, 666 N.E.2d 1198, 1200 (1996); *Kraft, Inc. v. Edgar*, 138 Ill.2d 178, 561 N.E.2d 656, 661 (1990).

(b) Where there is no ambiguity its language, the statute will be given effect without resort to other interpretive aids and applied as written. *People v. Sheehan*, 168 Ill.2d 298, 305, 659 N.E.2d 1339 (1995); *People v. Perry*, 224 Ill.2d 312, 864 N.E.2d 196, 204 (2007).

(c) Where the language of the act is certain and unambiguous, the only legitimate function of the courts is to enforce the law as enacted by the legislature. *Abrahamson v. Ill. Dept. of Prof. Regulation,* 153 Ill.2d 76, 91, 606 N.E.2d 1111 (1992).

Only where the language of the statute is ambiguous may the court may resort to other aids of statutory construction. ***People v. Glisson*, 202 Ill.2d 499, 782** N.E.2d 251, 255 (2002); ***People v. O'Brien*, 197 Ill.2d 88, 90-91, 754 N.E.2d 327 (2001).** A statute is ambiguous if it is "susceptible to two equally reasonable and conflicting interpretations". *Land v. Board of Education of City of Chicago*, 202 Ill.2d 414, 781 N.E.2d 249, 257 (2002). Interpretive aids, such as legislative history, may then be considered to resolve the ambiguity and determine legislative intent. In construing a statute, a court must take the entire statute into account, considering each section with every other section. *Bonaguro v. County Officers Electoral Board*, 158 Ill.2d 391, 634 N.E.2d 712, 714 (1994). If the language is ambiguous, making construction of the language necessary, a court should construe the statute so that no part of it is rendered superfluous or meaningless. *People v. Perry*, 224 Ill.2d 312, 864 N.E.2d 196, 204 (2007); *Hernon v.*

E.W. Corrigan Construction Co., 149 Ill.2d 190, 195, 595 N.E.2d 561 (1992). A court presumes in construing a statute that the legislature did not intend to create absurd, inconvenient, or unjust results. *People v. Christopherson*, 231 Ill.2d 449, 454, 859 N.E.2d 257 (2008).

The statutory provision at issue is clear and unambiguous, rendering judicial construction inappropriate and unnecessary. Section 2-10.3(b) provides that "an agent" is not liable for the actions of "another agent", including a "predecessor agent", unless "the agent" participates in or conceals a breach of fiduciary duty committed by "the other agent". 745 ILCS 45/2-10.3(b). There is no ambiguity as to the meaning or definition of "agent"; the term is used throughout the Act and is specifically defined in section 2-3(b) as "the attorney-in-fact or other person designated to act for the principal in the agency". 745 ILCS 45/2-3(b). This key statutory term is not susceptible to two equally reasonable and conflicting interpretations. Section 2-10.3(b) does not refer to a "successor agent" named in the agency, but only to an "agent" designated in it by the principal. The word "successor" is not mentioned in section 2-10.3(b); a "predecessor agent" is included as a prior agent capable of breaching a duty to the principal, thereby triggering the potential liability of another "agent" who participated in or concealed the breach. This inclusion is logical, since a "predecessor agent", by definition, was once an actual agent. A "successor agent", by definition, is not yet an "agent". If the legislature had desired to provide that a "successor agent" designated in a POA, as such, also had the described statutory duties and liability to the principal, it could have done so in the text of section 2-10.3(b). If it had wanted to include a "successor agent" as an "agent" for any purpose in

the Act, it could have done so in the definition of "agent" in section 2-3(b). The legislature did neither.

The Third District majority disagreed with the argument of Defendant, and with the dissent of Justice Carter, that "the references to 'agent' in section 2-10.3(b) are limited solely to the acting agent or attorney in fact". *Alford v. Shelton (In re Estate of Shelton)*, 2016 IL App (3d) 140163, ¶47 (2016). The court reasoned that such a "strained reading" would render section 2-10.5(c), regarding "co-agents", superfluous. *Alford v. Shelton*, ¶37. This analysis is flawed under established principles of statutory construction. First, the provision at issue and the definition of an "agent" are not ambiguous so as to make construction of the language necessary or proper. Only when a statute is ambiguous can a part of it potentially be rendered superfluous or meaningless, justifying construction to avoid such a result. *People v. Perry*, 224 Ill.2d 312, 864 N.E.2d 196, 204 (2007). Secondly, the court's reasoning wrongly assumes that excluding a "successor agent" under section 2-10.3(b) would somehow limit its application to only co-agents, i.e., agents acting simultaneously. In fact, section 2-10.3(b) is easily read and understood to apply to a person who was a successor agent under a POA and subsequently becomes empowered as an acting agent under the instrument and the Act. In such a case, there may be no co-agents, but a predecessor agent could engage, with the knowledge or participation of the now acting agent (the former "successor agent"), in wrongful conduct against a principal under the agency instrument. In such event, the former successor agent, as present and actual "agent" at the time of the breach, could be liable under the statute. The imposition of these statutory duties upon present and

predecessor agents [section 2-10.3(b)] as well as co-agents [section 2-10.5(c)] does not render either provision superfluous or meaningless. The former provision does not mention "co-agents", and the latter does not mention "successor agents". The legislature rationally applied the same standards of conduct, duties and liabilities to actual agents, predecessor agents and co-agents, all of whom by definition are or were duly empowered "agents" under an agency instrument and the Act. If possible, as is the case here, statutory provisions in an act can and should be read in concert and harmonized by a court. *Hartney Fuel Oil Co. V. Hamer*, 2013 IL 115130, 998 N.E.2d 1227, 1235 (2013).

The Third District erroneously engaged in statutory interpretation which rewrote section 2-10.3(b) and redefined the term "agent" under the Act and the POA at issue.

2. The appellate court erred in construing a material statutory term ("agent") that was particularly defined by the legislature, in a manner directly contrary to its definition.

Where the legislature has seen fit to define a particular statutory term, courts are bound by the definition so long as it is reasonable. *Texaco- Cities Service Pipeline Co. v. McGaw*, 182 Ill.2d 262, 275, 695 N.E.2d 481 (1998). It is well established that when a statute defines the very terms it uses, those terms "must be construed according to the definitions contained in the act." *Garza v. Navistar International Transportation Corp.*, 172 Ill.2d 373, 666 N.E.2d 1198, 1201 (1996) [quoting *People ex rel. Scott v. Schwulst Building Center*, 89 Ill.2d 365, 371, 432 N.E.2d 855 (1982)]; *Robbins v. Board of Trustees of Carbondale Police Pension Fund,* 177 Ill.2d 533, 687 N.E.2d 39, 43 (1997).

It is fundamental that where a word or phrase is used in different sections of the same legislative act, a court presumes that the word or phrase is used with the same

meaning throughout the act, unless a contrary legislative intent is clearly expressed. *People ex rel Scott v. Schwulst Building Center*, 89 Ill.2d 365, 371-72, 432 N.E.2d 855 (1982).

In holding that a "successor agent" is an "agent" under section 2-10.3(b), the Third District ignored or declined to apply the statutory definition of "agent" in section 2-3(b). The court also ignored the statutory description of a "successor agent" contained in section 2-10.3(a), which is thoroughly consistent with the definition of "agent" contained in section 2-3(b) of the Act.

3. The statutory provision at issue is in derogation of the common law and should be strictly construed.

The recognition of a fiduciary relationship created between principal and agent under a POA is long established in Illinois. When a person is designated as an agent under a power of attorney, he has a fiduciary duty to the person who made the designation. *Spring Valley Nursing Center v. Allen*, 2012 IL App (3d) 110915, 977 N.E.2d 1230, 1233 (2012). Section 2-10.3(b) confirms the principle that an actual agent is not *per se* or vicariously liable for the wrongful actions of another agent, but creates an exception where an "agent" participates in or conceals a breach of fiduciary duty committed by "another agent", including a "predecessor agent". Section 2-10.3(b) thus substantively modifies the common law regarding the principal-agent relationship created by a power of attorney, and is therefore in derogation of common law. Statutes in derogation of the common law are to be strictly construed, and nothing is to be read into such statutes by intendment or implication. *Bank v. Earth Foods, Inc.*, 238 Ill.2d 455,

939 N.E.2d 487, 491 (2010); *Summers v. Summers*, 40 Ill.2d 338, 342, 239 N.E.2d 795 (1968). Even if a statute has remedial measures but is in derogation of the common law, it will be strictly construed when determining what persons come within its operation. *Bank v. Earth Foods, Inc.*, 939 N.E.2d at 491; *In re W.W.*, 97 Ill.2d 53, 57, 454 N.E.2d 207 (1983).

The Third District, instead of applying strict construction to section 2-10.3(b), effectively rewrote the statutory provision, so as to modify and expand the meaning of "agent" under the Act and impose statutory duties upon an additional class of persons, successor agents under a POA designated to serve as an agent only contingently in the future.

4. The appellate court erred in relying upon the title of the heading of section 2-10.3 to support its interpretation of subsection at issue.

In support of rewriting section 2-10.3(b) to include a "successor agent" as an "agent", the Third District relied upon the title of the heading of section 2-10.3, "Successor agents." That reliance was misplaced and erroneous under Illinois law, which warrants against putting undue emphasis on organizational devices such as headings and section titles, recognizing that headings cannot limit the plain meaning of the text of a statute. Headings have been noted to be "mere catchwords", not meant to take the place of the detailed provisions of the text of a statute. When the legislature enacts an official title or heading to accompany a statutory provision, that title or heading is considered only as a short-hand reference to the general subject matter involved in that statutory section, and cannot limit the plain meaning of the text. Official headings or titles are of

use only when they shed light on some ambiguous word or phrase within the text of the statute, and they cannot undo or limit that which the text makes plain. *Land v. Board of Education of City of Chicago*, 202 Ill.2d 414, 781 N.E.2d 249, 259 (2002); *Michigan Avenue National Bank v. County of Cook*, 191 Ill.2d 493, 732 N.E.2d 528, 536 (2000) [citing *Brotherhood of Railroad Trainmen v. Baltimore and Ohio Railroad Co.*, 331 U.S. 519, 528 (1947)].

Here there is no possible ambiguity as to the operative term ("agent"), defined clearly in the Act. Section 2-10.3(a) describes the nature and purpose of a "successor agent", alone justifying the title of the heading. Section 2-10.3(b) does not mention the term "successor" in any manner, but only the duties and liability of an "agent" in connection with the wrongful actions of another "agent", including a predecessor agent. The court erred in relying upon the heading title as an interpretive aid, or as justification for rewriting the definitions of "agent" and "successor agent" in the Act.

5. The Third District's interpretation of Section 2-10.3(b) is contrary to and inconsistent with the express legislative applicability and purpose provisions of the Act, none of which refer to any powers granted or duties imposed on a contingently appointed "successor agent" named in a POA.

The Act contains the following statements of purpose and applicability:

> **755 ILCS 45/2-1 Sec. 2-1. Purpose.** The General Assembly recognizes that each individual has the right to appoint an agent to make property, financial, personal, and health care decisions for the individual but that this right cannot be fully effective unless the principal may empower the agent to act throughout the principal's lifetime, including during periods of disability, and have confidence that third parties will honor the agent's authority at all times.

755 ILCS 45/3-1 Sec. 3-1. Purpose. The General Assembly finds that the public interest requires a standardized form of power of attorney that individuals may use to authorize an agent to act for them in dealing with their property and financial affairs.

755 ILCS 45/2-4. Sec. 2-4. Applicability.

(a) The principal may specify in the agency the event or time when the agency will begin and terminate, the mode of revocation or amendment and the rights, powers, duties, limitations, immunities and other terms applicable to the agent and to all persons dealing with the agent, and the provisions of the agency will control notwithstanding this Act, except that every healthcare agency must comply with Section 4-5 of this Act.

(b), (c), (d) [Omitted here.]

The stated legislative purposes and applicability provisions of the Act refer only to the appointment and authorization of an "agent" by a principal in a POA, without reference to the term or concept of a "successor agent". Notably, under the Act the provisions of the agency instrument (POA) control over the provisions of the Act itself. No provision of the Act empowers or burdens a "successor agent" with authority or duties under a POA. No Illinois case law holds or suggests that a successor agent named in a power of attorney has a fiduciary duty to the principal.

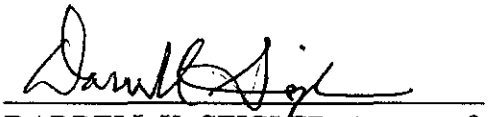
The Third District has unsupportably rewritten Section 2-10.3(b) to include persons with no recognized agent status or authority under a POA or the Act. The court did so despite its stated recognition that a successor agent is appointed under a POA "only contingently", and that here the Defendant's "attendant powers" as a successor agent "would be triggered if, and only if, the designated attorney-in-fact....died, became incompetent, or refused to accept the agency." *Alford v. Shelton*, 2016 IL App (3d)

140163 (2016), ¶23. The decision of the appellate court is contrary to the stated legislative purposes and scope of the Act.

CONCLUSION

In conclusion, Appellant, Defendant Rodney I. Shelton, submits that the trial court's dismissal of the Complaint was correct, and that the appellate court erred in reversing same. Accordingly, Defendant requests that this Honorable Court reverse the decision of the Third Distinct Appellate Court, affirm the judgment of the trial court, and grant such other relief as may be deemed proper.

Respectfully Submitted,



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DEFENDANT RODNEY I. SHELTON

RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1)statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twenty five (25) pages

DARRELL K. SEIGLER,
Attorney for Appellant

No. 121199

IN THE SUPREME COURT OF ILLINOIS

RUTH ANN ALFORD, as executor of the ESTATE OF DORIS E. SHELTON, Appellee (Plaintiff) v. RODNEY I. SHELTON, Appellant (Defendant)	)	On Petition for Leave to Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-14-0685 There on Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois No. 14-L-13 Honorable Lance R. Peterson, Judge Presiding

consolidated with:

In re ESTATE OF THOMAS F. SHELTON,) (Ruth Ann Alford, Executor, Petitioner v. Rodney I. Shelton, Respondent).	)	Appeal from the Circuit Court of the 13th Judicial Circuit Grundy County, Illinois Appeal No. 3-14-0163 Circuit No. 13-P-17 Honorable Lance R. Peterson, Judge Presiding

APPENDIX TO BRIEF OF APPELLANT

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APPENDIX TO BRIEF OF APPELLANT, DEFENDANT RODNEY I. SHELTON

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GRUNDY COUNTY, ILLINOIS
INVENTORY OF APPEAL
14-L-13
RUTH ANN ALFORD AS EXECUTOR OF THE ESTATE OF DORIS E. SHELTON, DECEASED, PLAINTIFF-APPELLANT VS. RODNEY SHELTON, DEFENDANT-APPELLEE

VOLUME 1 – COMMON LAW RECORD
AND
REPORT OF PROCEEDINGS

APPEAL TO THE THIRD DISTRICT APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF THE CIRCUIT COURT OF THE THIRTEENTH
JUDICIAL CIRCUIT, GRUNDY COUNTY, ILLINOIS

RUTH ANN ALFORD AS EXECUTOR OF THE)
ESTATE OF DORIS E. SHELTON)
Plaintiff)
V.)
) 2014-L-13
RODNEY SHELTON)
Defendant)

FILED

SEP 04 2014

Karen E. Slattery
GRUNDY COUNTY CIRCUIT CLERK

NOTICE OF APPEAL

NOW COMES Petitioner-Appellant, Ruth Ann Alford as Executor of the ESTATE OF THOMAS SHELTON, by its and through her/its attorneys, George C. Hupp, III and the law firm of Hupp, Lanuti, Irion & Burton, P.C., and hereby appeals from the Order of the Court entered on August 29, 2014 ruling as a matter of law that a successor agent under a power of attorney was not an agent and therefore has no duty to the principal.

WHEREFORE, the Petitioner-Appellant pray this Honorable Court reverse the Order entered by the Circuit Court; and, for all other relief the Court deems appropriate.

Respectfully Submitted by

ESTATE OF DORIS E. SHELTON
Petitioner-Appellant,

By one of its/her attorneys

George C. Hupp III
Michael W. Fuller
Hupp, Lanuti, Irion & Burton P.C.
227 W. Madison St.
Ottawa, IL 61350
815-433-3111

C 57 A-1

FILED

MAR 2 4 2014

Karen E. Shelton
GRUNDY COUNTY CIRCUIT CLERK

IN THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

RUTH ANN ALFORD AS EXECUTOR OF THE ESTATE OF DORIS E. SHELTON, Deceased Plaintiff,	)	General No.: 2014 L 13
V.	)	
RODNEY SHELTON Defendant.	)	

COMPLAINT AT LAW

COMES NOW Ruth Ann Alford, executor of the estate of Doris E. Shelton, deceased, by her attorneys, Hupp, Lanuti, Irion & Burton P.C., and for her complaint against Rodney Shelton, states:

1. The Plaintiff is the executor of the estate of Doris E. Shelton, deceased, now pending in the Thirteenth Judicial Circuit Court of Grundy County, Illinois, under Docket Number 13 P 18.
2. Defendant is, and was at all times relevant hereto, a resident of Grundy County, Illinois.
3. Doris E. Shelton on January 18, 2005 executed a certain Power of Attorney-Property in which she named her husband, Thomas F. Shelton, as primary agent (or attorney in fact), and named her son, the defendant herein, Rodney Shelton, as first successor agent. A copy of said Power of Attorney-Property is attached hereto marked Exhibit A.
4. On December 1, 2011, the said Thomas F. Shelton as agent of Doris E. Shelton executed a quitclaim deed to the defendant and his wife, Regina Shelton, conveying all of Doris E. Shelton's interest in a farm described in said deed, a copy of said deed which is attached here marked Exhibit B.

5. That said deed was upon information and belief signed by the said Thomas F. Shelton at his home in Grundy County, Illinois.

6. That upon information and belief, the defendant knew he was the first successor agent under the said power of attorney for Doris Shelton.

7. That upon information and belief, the defendant was present at the time of the execution of said Exhibit B, or was at least aware that Thomas F. Shelton was going to execute said deed, or was aware that Thomas F. Shelton had executed said deed as the same was accepted by he and his said wife.

8. That Plaintiff was unaware of the execution of said deed marked Exhibit B as she was in the state of Texas at such time and was not told that such deed was going to be executed.

9. That 755 ILCS 45/2-10.3 provides:

> Sec. 2-10.3. Successor agents.
> (a) A principal may designate one or more successor agents to act if an initial or predecessor agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to another person, designated by name, by office, or by function, including an initial or successor agent, to designate one or more successor agents. Unless a power of attorney otherwise provides, a successor agent has the same authority as that granted to an initial agent.
> (b) **An agent is not liable for the actions of another agent, including a predecessor agent, unless the agent participates in or conceals a breach of fiduciary duty committed by the other agent. An agent who has knowledge of a breach or imminent breach of fiduciary duty by another agent must notify the principal and, if the principal is incapacitated, take whatever actions may be reasonably appropriate in the circumstances to safeguard the principal's best interest.** (emphasis ours)

10. That the said Thomas F. Shelton by executing Exhibit B and delivering the same to the defendant and defendant's wife violated his duty as agent to the principal, Doris E. Shelton, in that he transferred all of her interest in the real property described in Exhibit B to the defendant and Regina Shelton without reserving for Doris E. Shelton a life estate

therein at a time when Doris E. Shelton was incompetent and in need of the income from said real property to sustain her.

11. That the defendants participated in such breach of fiduciary duty by the said Thomas F. Shelton by failing to notify the principal, Doris E. Shelton, of such breach by Thomas F. Shelton or its intended breach, and furthermore failed to take action to safeguard Doris E. Shelton's best interests.

12. That as result of the foregoing, Doris E. Shelton was damaged in an amount equal to the value of the real property described in Exhibit B and was deprived of the income from said real property during the remainder of her lifetime.

13. That Doris E. Shelton departed this life on December 20, 2012.

WHEREFORE, PLAINTIFF PRAYS THE JUDGMENT OF THIS COURT AGAINST RODNEY SHELTON IN AN AMOUNT NOT LESS THAN $50,000.00 PLUS ATTORNEY'S FEES AND COURT COSTS.

ESTATE OF DORIS E. SHELTON,

By Ruth Ann Alford
Ruth Ann Alford, Executor

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

(x) Ruth Ann Alford
Ruth Ann Alford, Executor

George C. Hupp, ARDC No. 1289128
Hupp, Lanuti, Irion & Burton, P.C.
227 W. Madison Street
Ottawa, Il 61350
(815)433-3111 FAX 433-9109

533928

ILLINOIS STATUTORY SHORT FORM POWER OF ATTORNEY FOR PROPERTY

(NOTICE: THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO HANDLE YOUR PROPERTY, WHICH MAY INCLUDE POWERS TO PLEDGE, SELL OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU. THIS FORM DOES NOT IMPOSE A DUTY ON YOUR AGENT TO EXERCISE GRANTED POWERS; BUT WHEN POWERS ARE EXERCISED, YOUR AGENT WILL HAVE TO USE DUE CARE TO ACT FOR YOUR BENEFIT AND IN ACCORDANCE WITH THIS FORM AND KEEP A RECORD OF RECEIPTS, DISBURSEMENTS AND SIGNIFICANT ACTIONS TAKEN AS AGENT. A COURT CAN TAKE AWAY THE POWERS OF YOUR AGENT IF IT FINDS THE AGENT IS NOT ACTING PROPERLY. YOU MAY NAME SUCCESSOR AGENTS UNDER THIS FORM BUT NOT CO-AGENTS. UNLESS YOU EXPRESSLY LIMIT THE DURATION OF THIS POWER IN THE MANNER PROVIDED BELOW, UNTIL YOU REVOKE THIS POWER OR A COURT ACTING ON YOUR BEHALF TERMINATES IT, YOUR AGENT MAY EXERCISE THE POWERS GIVEN HERE THROUGHOUT YOUR LIFETIME, EVEN AFTER YOU BECOME DISABLED. THE POWERS YOU GIVE YOUR AGENT ARE EXPLAINED MORE FULLY IN SECTION 3-4 OF THE ILLINOIS "STATUTORY SHORT FORM POWER OF ATTORNEY FOR PROPERTY LAW" OF WHICH THIS FORM IS A PART (SEE THE BACK OF THIS FORM). THAT LAW EXPRESSLY PERMITS THE USE OF ANY DIFFERENT FORM OF POWER OF ATTORNEY YOU MAY DESIRE. IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.)

Power of Attorney made this 12 day of JANUARY (month) 2005 (year)

1. I, Doris E. Shelton, 950 N Kinsman Road, Seneca IL 61360 SS#342-28-8150
(insert name and address of principal)

hereby appoint: my husband, Thomas F. Shelton, 950 N Kinsman Road, Seneca IL 61360
(insert name and address of agent)

as my attorney-in-fact (my "agent") to act for me and in my name (in any way I could act in person) with respect to the following powers, as defined in Section 3-4 of the "Statutory Short Form Power of Attorney for Property Law" (including all amendments), but subject to any limitations on or additions to the specified powers inserted in paragraph 2 or 3 below:

(YOU MUST STRIKE OUT ANY ONE OR MORE OF THE FOLLOWING CATEGORIES OF POWERS YOU DO NOT WANT YOUR AGENT TO HAVE. FAILURE TO STRIKE THE TITLE OF ANY CATEGORY WILL CAUSE THE POWERS DESCRIBED IN THAT CATEGORY TO BE GRANTED TO THE AGENT. TO STRIKE OUT A CATEGORY YOU MUST DRAW A LINE THROUGH THE TITLE OF THAT CATEGORY.)

(a) Real estate transactions.
(b) Financial institution transactions.
(c) Stock and bond transactions.
(d) Tangible personal property transactions.
(e) Safe deposit box transactions.
(f) Insurance and annuity transactions.
(g) Retirement plan transactions.
(h) Social Security, employment and military service benefits.
(i) Tax matters.
(j) Claims and litigation.
(k) Commodity and option transactions.
(l) Business operations.
(m) Borrowing transactions.
(n) Estate transactions.
(o) All other property powers and transactions.

(LIMITATIONS ON AND ADDITIONS TO THE AGENT'S POWERS MAY BE INCLUDED IN THIS POWER OF ATTORNEY IF THEY ARE SPECIFICALLY DESCRIBED BELOW.)

2. The powers granted above shall not include the following powers or shall be modified or limited in the following particulars (here you may include any specific limitations you deem appropriate, such as a prohibition or conditions on the sale of particular stock or real estate or special rules on borrowing by the agent):

NO LIMITATIONS

3. In addition to the powers granted above, I grant my agent the following powers (here you may add any other delegable powers including, without limitation, power to make gifts, exercise powers of appointment, name or change beneficiaries or joint tenants or revoke or amend any trust specifically referred to below):

a) Power to make gifts
b) Power to name or change beneficiaries or joint tenants
c) Power to exercise my Trust powers

OUR AGENT WILL HAVE AUTHORITY TO EMPLOY OTHER PERSONS AS NECESSARY TO ENABLE THE AGENT TO PROPERLY EXERCISE THE POWERS GRANTED IN THIS ORM, BUT YOUR AGENT WILL HAVE TO MAKE ALL DISCRETIONARY DECISIONS. IF YOU WANT TO GIVE YOUR AGENT THE RIGHT TO DELEGATE DISCRETIONARY CISION-MAKING POWERS TO OTHERS, YOU SHOULD KEEP THE NEXT SENTENCE, OTHERWISE IT SHOULD BE STRUCK OUT.)

4. My agent shall have the right by written instrument to delegate any or all of the foregoing powers involving discretionary decision-making to any person or persons om my agent may select, but such delegation may be amended or revoked by any agent (including any successor) named by me who is acting under this power of attorney t the time of reference.

JC-5 A-5 Exhibit A

(YOUR AGENT WILL BE ENTITLED TO REIMBURSEME[illegible]R ALL REASONABLE EXPENSES INCURRED IN ACTING UNI[illegible]IS POWER OF ATTORNEY. STRIKE OUT THE NEXT SENTENCE IF YOU DO NOT WANT YOUR AGE[illegible] TO ALSO BE ENTITLED TO REASONABLE COMPENSATION [illegible] SERVICES AS AGENT.)

5. My agent shall be entitled to reasonable compensation for services rendered as agent under this power of attorney.

(THIS POWER OF ATTORNEY MAY BE AMENDED OR REVOKED BY YOU AT ANY TIME AND IN ANY MANNER. ABSENT AMENDMENT OR REVOCATION, THE AUTHORITY GRANTED IN THIS POWER OF ATTORNEY WILL BECOME EFFECTIVE AT THE TIME THIS POWER IS SIGNED AND WILL CONTINUE UNTIL YOUR DEATH UNLESS A LIMITATION ON THE BEGINNING DATE OR DURATION IS MADE BY INITIALING AND COMPLETING EITHER (OR BOTH) OF THE FOLLOWING:)

6. ( ) This power of attorney shall become effective on the date hereof
(insert a future date or event during your lifetime, such as court determination of your disability, when you want this power to first take effect)

7. ( ) This power of attorney shall terminate on my death
(insert a future date or event, such as court determination of your disability, when you want this power to terminate prior to your death)

(IF YOU WISH TO NAME SUCCESSOR AGENTS, INSERT THE NAME(S) AND ADDRESS(ES) OF SUCH SUCCESSOR(S) IN THE FOLLOWING PARAGRAPH.)

8. If any agent named by me shall die, become incompetent, resign or refuse to accept the office of agent, I name the following (each to act alone and successively, in the order named) as successor(s) to such agent: my son Rodney I. Shelton
my daughter Ruth Ann Alford

For purposes of this paragraph 8, a person shall be considered to be incompetent if and while the person is a minor or an adjudicated incompetent or disabled person or the person is unable to give prompt and intelligent consideration to business matters, as certified by a licensed physician.

(IF YOU WISH TO NAME YOUR AGENT AS GUARDIAN OF YOUR ESTATE, IN THE EVENT A COURT DECIDES THAT ONE SHOULD BE APPOINTED, YOU MAY, BUT ARE NOT REQUIRED TO, DO SO BY RETAINING THE FOLLOWING PARAGRAPH. THE COURT WILL APPOINT YOUR AGENT IF THE COURT FINDS THAT SUCH APPOINTMENT WILL SERVE YOUR BEST INTERESTS AND WELFARE. STRIKE OUT PARAGRAPH 9 IF YOU DO NOT WANT YOUR AGENT TO ACT AS GUARDIAN.)

9. If a guardian of my estate (my property) is to be appointed, I nominate the agent acting under this power of attorney as such guardian, to serve without bond or security.

10. I am fully informed as to all the contents of this form and understand the full import of this grant of powers to my agent.

Signed Doris E. Shelton (principal)
Doris E. Shelton

(YOU MAY, BUT ARE NOT REQUIRED TO, REQUEST YOUR AGENT AND SUCCESSOR AGENTS TO PROVIDE SPECIMEN SIGNATURES BELOW. IF YOU INCLUDE SPECIMEN SIGNATURES IN THIS POWER OF ATTORNEY, YOU MUST COMPLETE THE CERTIFICATION OPPOSITE THE SIGNATURES OF THE AGENTS.)

Specimen signatures of agent (and successors)

(agent)

(successor agent)

(successor agent)

I certify that the signatures of my agent (and successors) are correct.

(principal)

(principal)

(principal)

(THIS POWER OF ATTORNEY WILL NOT BE EFFECTIVE UNLESS IT IS NOTARIZED AND SIGNED BY AT LEAST ONE ADDITIONAL WITNESS, USING THE FORM BELOW.)

State of Illinois)
) ss.
County of La Salle)

The undersigned, a notary public in and for the above county and state, certifies that Doris E. Shelton known to me to be the same person whose name is subscribed as principal to the foregoing power of attorney, appeared before me and the additional witness in person and acknowledged signing and delivering the instrument as the free and voluntary act of the principal, for the uses and purposes therein set forth (, and certified to the correctness of the signature(s) of the agent(s)).

Dated: JANUARY 18, 2005

(SEAL)

Notary Public

"OFFICIAL SEAL"
LAWRENCE W. BAXTER
NOTARY PUBLIC STATE OF ILLINOIS
My Commission Expires 10/24/2007

My commission expires

The undersigned witness certifies that Doris E. Shelton known to me to be the same person whose name is subscribed as principal to the foregoing power of attorney, appeared before me and the notary public and acknowledged signing and delivering the instrument as the free and voluntary act of the principal, for the uses and purposes therein set forth. I believe him or her to be of sound mind and memory.

Dated: JANUARY 18, 2005 (SEAL)

Witness

(THE NAME AND ADDRESS OF THE PERSON PREPARING THIS FORM SHOULD BE INSERTED IF THE AGENT WILL HAVE POWER TO CONVEY ANY INTEREST IN REAL ESTATE.)

This document was prepared by:

Lawrence W. Baxter, 417 W Madison Street Ottawa IL 61350 Ph# 815-433-0363

NAME
STREET ADDRESS
CITY STATE ZIP

OR RECORDER'S OFFICE BOX NO. _____

(The Above Space for Recorder's Use Only)

LEGAL DESCRIPTION:

5389928
FILED
FOR RECORD
2012 NOV 21 PM 12:51

STREET ADDRESS: _____

PERMANENT TAX INDEX NUMBER: _____

THE SPACE ABOVE IS NOT PART OF OFFICIAL STATUTORY FORM. IT IS ONLY FOR THE AGENT'S USE IN RECORDING THIS FORM WHEN NECESSARY FOR REAL ESTATE TRANSACTIONS.

Section 3–4 of the Illinois Statutory Short Form Power of Attorney for Property Law

Section 3–4. Explanation of powers granted in the statutory short form power of attorney for property. This Section defines each category of powers listed in the statutory short form power of attorney for property and the effect of granting powers to an agent. When the title of any of the following categories is retained (not struck out) in a statutory property power form, the effect will be to grant the agent all of the principal's rights, powers and discretions with respect to the types of property and transactions covered by the retained category, subject to any limitations on the granted powers that appear on the face of the form. The agent will have authority to exercise each granted power for and in the name of the principal with respect to all of the principal's interests in every type of property or transaction covered by the granted power at the time of exercise, whether the principal's interests are direct or indirect, whole or fractional, legal, equitable or contractual, as a joint tenant or tenant in common or held in any other form; but the agent will not have power under any of the statutory categories (a) through (o) to make gifts of the principal's property, to exercise powers to appoint to others or to change any beneficiary whom the principal has designated to take the principal's interests at death under any will, trust, joint tenancy, beneficiary form or contractual arrangement. The agent will be under no duty to exercise granted powers or to assume control of or responsibility for the principal's property or affairs; but when granted powers are exercised, the agent will be required to use due care to act for the benefit of the principal in accordance with the terms of the statutory property power and will be liable for negligent exercise. The agent may act in person or through others reasonably employed by the agent for that purpose and will have authority to sign and deliver all instruments, negotiate and enter into all agreements and do all other acts reasonably necessary to implement the exercise of the powers granted to the agent.

(a) Real estate transactions. The agent is authorized to: buy, sell, exchange, rent and lease real estate (which term includes, without limitation, real estate subject to a land trust and all beneficial interests in and powers of direction under any land trust); collect all rent, sale proceeds and earnings from real estate; convey, assign and accept title to real estate; grant easements, create conditions and release rights of homestead with respect to real estate; create land trusts and exercise all powers under land trusts; hold, possess, maintain, repair, improve, subdivide, manage, operate and insure real estate; pay, contest, protest and compromise real estate taxes and assessments; and, in general, exercise all powers with respect to real estate which the principal could if present and under no disability.

(b) Financial institution transactions. The agent is authorized to: open, close, continue and control all accounts and deposits in any type of financial institution (which term includes, without limitation, banks, trust companies, savings and building and loan associations, credit unions and brokerage firms); deposit in and withdraw om and write checks on any financial institution account or deposit; and, in general, exercise all powers with respect to financial institution transactions which the principal uld if present and under no disability.

(c) Stock and bond transactions. The agent is authorized to: buy and sell all types of securities (which term includes, without limitation, stocks, bonds, mutual funds d all other types of investment securities and financial instruments); collect, hold and safekeep all dividends, interest, earnings, proceeds of sale, distributions, shares, certificates d other evidences of ownership paid or distributed with respect to securities; exercise all voting rights with respect to securities in person or by proxy, enter into voting usts and consent to limitations on the right to vote; and, in general, exercise all powers with respect to securities which the principal could if present and under no disability.

C.7 A-7

(d) Tangible personal property transactions. The agent is authorized to: buy and sell, lease, exchange, collect, possess, take title to all tangible personal property; move, store, ship, restore, maintain, repair, improve, manage, preserve, insure and safekeep tangible personal property; and, in general, exercise all powers with respect to tangible personal property which the principal could if present and under no disability.

(e) Safe deposit box transactions. The agent is authorized to: open, continue and have access to all safe deposit boxes; sign, renew, release or terminate any safe deposit contract; drill or surrender any safe deposit box; and, in general, exercise all powers with respect to safe deposit matters which the principal could if present and under no disability.

(f) Insurance and annuity transactions. The agent is authorized to: procure, acquire, continue, renew, terminate or otherwise deal with any type of insurance or annuity contract (which terms include, without limitation, life, accident, health, disability, automobile casualty, property or liability insurance); pay premiums or assessments on or surrender and collect all distributions, proceeds or benefits payable under any insurance or annuity contract; and, in general, exercise all powers with respect to insurance and annuity contracts which the principal could if present and under no disability.

(g) Retirement plan transactions. The agent is authorized to: contribute to, withdraw from and deposit funds in any type of retirement plan (which term includes, without limitation, any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and other retirement plan, individual retirement account, deferred compensation plan and any other type of employee benefit plan); select and change payment options for the principal under any retirement plan; make rollover contributions from any retirement plan to other retirement plans or individual retirement accounts; exercise all investment powers available under any type of self-directed retirement plan; and, in general, exercise all powers with respect to retirement plans and retirement plan account balances which the principal could if present and under no disability.

(h) Social Security, unemployment and military service benefits. The agent is authorized to: prepare, sign and file any claim or application for Social Security, unemployment or military service benefits; sue for, settle or abandon any claims to any benefit or assistance under any federal, state, local or foreign statute or regulation; control, deposit to any account, collect, receipt for, and take title to and hold all benefits under any Social Security, unemployment, military service or other state, federal, local or foreign statute or regulation; and, in general, exercise all powers with respect to Social Security, unemployment, military service and governmental benefits which the principal could if present and under no disability.

(i) Tax matters. The agent is authorized to: sign, verify and file all the principal's federal, state and local income, gift, estate, property and other tax returns, including joint returns and declarations of estimated tax; pay all taxes; claim, sue for and receive all tax refunds; examine and copy all the principal's tax returns and records; represent the principal before any federal, state or local revenue agency or taxing body and sign and deliver all tax powers of attorney on behalf of the principal that may be necessary for such purposes; waive rights and sign all documents on behalf of the principal as required to settle, pay and determine all tax liabilities; and, in general, exercise all powers with respect to tax matters which the principal could if present and under no disability.

(j) Claims and litigation. The agent is authorized to: institute, prosecute, defend, abandon, compromise, arbitrate, settle and dispose of any claim in favor of or against the principal or any property interests of the principal; collect and receipt for any claim or settlement proceeds and waive or release all rights of the principal; employ attorneys and others and enter into contingency agreements and other contracts as necessary in connection with litigation; and, in general, exercise all powers with respect to claims and litigation which the principal could if present and under no disability.

(k) Commodity and option transactions. The agent is authorized to: buy, sell, exchange, assign, convey, settle and exercise commodities futures contracts and call and put options on stocks and stock indices traded on a regulated options exchange and collect and receipt for all proceeds of any such transactions; establish or continue option accounts for the principal with any securities or futures broker; and, in general, exercise all powers with respect to commodities and options which the principal could if present and under no disability.

(l) Business operations. The agent is authorized to: organize or continue and conduct any business (which term includes, without limitation, any farming, manufacturing, service, mining, retailing or other type of business operation) in any form, whether as a proprietorship, joint venture, partnership, corporation, trust or other legal entity; operate, buy, sell, expand, contract, terminate or liquidate any business; direct, control, supervise, manage or participate in the operation of any business and engage, compensate and discharge business managers, employees, agents, attorneys, accountants and consultants; and, in general, exercise all powers with respect to business interests and operations which the principal could if present and under no disability.

(m) Borrowing transactions. The agent is authorized to: borrow money; mortgage or pledge any real estate or tangible or intangible personal property as security for such purposes; sign, renew, extend, pay and satisfy any notes or other forms of obligation; and, in general, exercise all powers with respect to secured and unsecured borrowing which the principal could if present and under no disability.

(n) Estate transactions. The agent is authorized to: accept, receipt for, exercise, release, reject, renounce, assign, disclaim, demand, sue for, claim and recover any legacy, bequest, devise, gift or other property interest or payment due or payable to or for the principal; assert any interest in and exercise any power over any trust; estate or property subject to fiduciary control; establish a revocable trust solely for the benefit of the principal that terminates at the death of the principal and is then distributable to the legal representative of the estate of the principal; and, in general, exercise all powers with respect to estates and trusts which the principal could if present and under no disability; provided, however, that the agent may not make or change a will and may not revoke or amend a trust revocable or amendable by the principal or require the trustee of any trust for the benefit of the principal to pay income or principal to the agent unless specific authority to that end is given, and specific reference to the trust is made, in the statutory property power form.

(o) All other property powers and transactions. The agent is authorized to: exercise all possible powers of the principal with respect to all possible types of property and interests in property, except to the extent the principal limits the generality of this category (o) by striking out one or more of categories (a) through (n) or by specifying other limitations in the statutory property power form.

PREPARED BY:
Thomas Justice
719 Canal Street
Suite A
Ottawa, IL 61350

MAIL TAX BILL TO:
Rodney and Regina Shelton
925 N. Kinsman Road
Seneca, IL 61350

MAIL RECORDED DEED TO:
Rodney and Regina Shelton
925 N. Kinsman Road
Seneca, IL 61350

525385
FILED
FOR RECORD
2012 JAN -3 PM 3:37
Dana J. Phillips
GRUNDY COUNTY
CLERK & RECORDER

1/3/12
RHSP
Surcharge
$10.00

QUITCLAIM DEED
Statutory (Illinois)

THE GRANTOR(S), Thomas F. Shelton and Doris Shelton, husband and wife, of 950 N. Kinsman Road, Village of Seneca, State of Illinois, for and in consideration of Ten Dollars ($10.00) and other good and valuable considerations, in hand paid, CONVEY(S) AND QUITCLAIM(S) to Rodney Shelton and Regina Shelton, husband and wife of 925 N. Kinsman Road, Village of Seneca, State of Illinois all interest in the following described real estate situated in the County of GRUNDY, State of Illinois, to wit:

SEE ATTACHED EXHIBIT A.

Permanent Index Number(s): 04-31-200-014 and 04-31-200-015
Property Address: Unincorporated Farmland

Hereby releasing and waiving all rights under and by virtue of the Homestead Exemptions Laws of the State of Illinois.

Dated this 1 Day of December 20 11

Thomas F. Shelton

Doris Shelton

Doris Shelton by Thomas Shelton as attorney in fact

STATE OF Illinois)
) SS.
COUNTY OF LaSalle)

I, the undersigned, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Thomas F. Shelton and Doris Shelton, husband and wife, personally known to me to be the same person(s) whose name(s) is/are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he/she/they signed, sealed and delivered the said instrument, as his/her/their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal, this 1 Day of December 20 11

Notary Public
My commission expires: 10/15/13

"OFFICIAL SEAL"
THOMAS L. JUSTICE, JR.
Notary Public, State of Illinois
My Commission Expires 10/15/13

Exempt under the provisions of paragraph e

12-1-11

C 8 A-9 Exhibit B

Exhibit A 525385

Parcel 1:

The Northeast Quarter (N.E. ¼) of the Northeast Quarter (N.E. ¼) of Section Thirty-one (31), Township Thirty-three (33) North, Range Six (6) East of the Third Principal Meridian, situated in the County of Grundy in the State of Illinois.

EXCEPT
That part of the NE ¼ NE ¼ Section 31, lying West of County Highway 6, also known as Kinsman Road, in Township 33 North, Range 6 East of the Third Principal Meridian (Norman Twp.) Grundy County, Illinois.

m

PREPARED BY:
Thomas Justice
719 Canal Street
Suite A
Ottawa, IL 61350

MAIL TAX BILL TO:
Rodney and Regina Shelton
925 N. Kinsman Road
Seneca, IL 61360

MAIL RECORDED DEED TO:
Rodney and Regina Shelton
925 N. Kinsman Road
Seneca, IL 61360

525386
FILED
FOR RECORD
2012 JAN -3 PM 3:38
Diane J. Principi
GRUNDY COUNTY
TAX & RECORDER

1/3/12
RHSP
Surcharge
$10.00

QUITCLAIM DEED
Statutory (Illinois)

THE GRANTOR(S), Thomas F. Shelton, of 950 N. Kinsman Road, Village of Seneca, State of Illinois, for and in consideration of Ten Dollars ($10.00) and other good and valuable considerations, in hand paid, CONVEY(S) AND QUITCLAIM(S) to Rodney Shelton and Regina Shelton, husband and wife of 925 N. Kinsman Road, Village of Seneca, State of Illinois all interest in the following described real estate situated in the County of GRUNDY, State of Illinois, to wit:

SEE ATTACHED EXHIBIT A.

~~Permanent Index Number(s): 04-31-200-014~~
~~Property Address: 950 N. Kinsman Road, Seneca, IL 61360~~

~~Permanent Index Number(s): 04-31-200-015~~
~~Property Address: Unimproved Farmland~~

Permanent Index Number(s): 04-32-100-003
Property Address: Unimproved Farmland

Permanent Index Number(s): 04-32-100-004
Property Address: Unimproved Farmland

Permanent Index Number(s): 04-32-200-001
Property Address: Unimproved Farmland

Hereby releasing and waiving all rights under and by virtue of the Homestead Exemptions Laws of the State of Illinois.

Dated this 1 Day of December 20 11

Thomas F. Shelton

Thomas F. Shelton

C 11 A-11

525386

STATE OF Illinois)
) SS.
COUNTY OF LaSalle)

I, the undersigned, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Thomas F. Shelton, personally known to me to be the same person(s) whose name(s) is/are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he/she/they signed, sealed and delivered the said instrument, as his/her/their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal, this 1 Day of December 20 11

Notary Public

My commission expires: 10/15/13

"OFFICIAL SEAL"
THOMAS L. JUSTICE, JR.
Notary Public, State of Illinois
My Commission Expires 10/15/13

Exempt under the provisions of paragraph e

12-1-2011

Exhibit A 525386

Parcel 1 & 2:

The Northwest Quarter, except the West 100 acres thereof, in Section 32, Township 33 North, Range 6 East of the Third Principal Meridian, in Grundy County, Illinois.

ALSO EXCEPTING
That part of the North Half of Section 32, Township 33 North, Range 6 East of the Third Principal Meridian described as follows: Commencing at the Southeast corner of the Northwest Quarter of said Section 32; thence South 89 degrees 28 minutes 08 seconds West, along the south line of the Northwest Quarter of said Section 32 for a distance of 575.29 feet; thence North 00 degrees 31 minutes 52 seconds West, 421.50 feet; thence North 89 degrees 28 minutes 08 seconds East, 575.29 feet; thence South 00 degrees 31 minutes 52 seconds East, 421.50 feet to point of beginning, containing 5.567 acres, more or less, in Norman Township, Grundy County, Illinois.

Parcel 3:

The West Half of the West Half of the Northeast Quarter of Section 32, Township 33 North, Range 6 East of the Third Principal Meridian, in Grundy County, Illinois.

FILED

UNITED STATES OF AMERICA
STATE OF ILLINOIS COUNTY OF GRUNDY
IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

MAY 06 2014

Karen E. Slattery
GRUNDY COUNTY CIRCUIT CLERK

RUTH ANN ALFORD AS EXECUTOR OF THE ESTATE OF DORIS E. SHELTON, Deceased, Plaintiff,	)	
vs.	)	No. 2014-L-13
RODNEY SHELTON, Defendant.	)	

MOTION FOR JUDGMENT ON THE PLEADINGS [735 ILCS 5/2-615(e)] OR, IN THE ALTERNATIVE, MOTION TO DISMISS COMPLAINT [735 ILCS 5/2-615(a)]

Now comes Defendant, RODNEY SHELTON, by and through his attorney, Darrell K. Seigler of Darrell K. Seigler, Ltd., and for his Motion for Judgment on the Pleadings [735 ILCS 5/2-615(e)] or, in the Alternative, Motion to Dismiss Complaint [735 ILCS 5/2-615(a)], states as follows:

A.
NATURE OF ACTION AND ALLEGATIONS OF COMPLAINT

The "Complaint at Law" on its face alleges that Thomas F. Shelton was the "primary agent (or attorney in fact)" for Doris Shelton under her 2005 power of attorney (Exhibit A), and that by executing a quitclaim deed conveying her interest in real estate to Defendant Rodney Shelton and his wife, "violated his duty as agent" by failing to reserve a life estate in Doris Shelton. Plaintiff further alleges that Rodney Shelton was named "first successor agent" under the power of attorney, and that he "participated in such breach of fiduciary duty" by Thomas F. Shelton, by failing to notify Doris of the breach of duty by Thomas and by failing to "take action to safeguard [her] best interests". The Executor seeks compensatory damages on behalf of the

Estate of Doris E. Shelton against Rodney Shelton, for an alleged loss of value of real property and deprivation of income from that property during Doris Shelton's lifetime. The Executor also seeks attorney fees without any allegation as to the basis therefor.

Based upon the foregoing, the complaint apparently alleges an action for breach of fiduciary duty, brought against Rodney Shelton as a "successor agent" under the power of attorney. The complaint on its face bases the alleged liability of Rodney Shelton upon a specific statutory provision contained in the Illinois Power of Attorney Act, i.e., 755 ILCS 45/2-10.3, which became effective on July 1, 2011, and which provides as follows:

> **An agent is not liable for the actions of another agent, including a predecessor agent, unless the agent participates in or conceals a breach of fiduciary duty committed by the other agent. An agent who has knowledge of a breach or imminent breach of fiduciary duty by another agent must notify the principal and, if the principal is incapacitated, take whatever actions may be reasonably appropriate in the circumstances to safeguard the principal's best interest.**

B.

MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO SECTION 2-615(e)

Defendant Rodney Shelton submits that judgment on the pleadings should be entered in his favor and against Plaintiff, pursuant to Section 2-615(e) of the Illinois Code of Civil Procedure, for the reason that the pleadings (Complaint) disclose no genuine issue of material fact and that Defendant Shelton is entitled to judgment as a matter of law.

C.

MOTION TO DISMISS COMPLAINT PURSUANT TO SECTION 2-615(a)

Defendant Rodney Shelton submits that the Complaint should be dismissed with prejudice pursuant to Section 2-615(a) of the Illinois Code of Civil Procedure, in that the Complaint is substantially insufficient in law and fails to state a cause of action upon which relief

may be granted.

D.

SUBMISSION OF AUTHORITIES AND ARGUMENT BY MEMORANDUM

Defendant Rodney Shelton submits, in support of both motions set forth herein, his Memorandum in Support of Motion for Judgment on the Pleadings and Motion to Dismiss, filed contemporaneously with this Motion.

WHEREFORE, Defendant, RODNEY SHELTON, requests the following relief:

A. That this Honorable Court enter an order granting judgment on the pleadings in favor of Defendant and against Plaintiff;

B. In the alternative, enter an order dismissing the Complaint at Law with prejudice; and

C. For such other and further relief as the Court deems just and proper.

Respectfully Submitted,

DARRELL K. SEIGLER, Attorney for Defendant, Rodney Shelton

Darrell K. Seigler, LTD.
434 Pearl Street
Ottawa, IL 61350
(815) 433-3333
Attorney Reg. No: 03124470

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

GRUNDY COUNTY, ILLINOIS

NO. 2014-L-13

Alford

vs.

Shelton

FILED

AUG 29 2014

Karen E. Lottery
GRUNDY COUNTY CIRCUIT CLERK

ORDER

The Court having heard argument and being fully advised, it is ORDERED:

(1) Defendant's Motion for Judgment on the Pleadings or, in the Alternative, Motion to Dismiss is granted, for the reasons stated on the record. Motion is granted, pursuant to 735 ILCS 5/2-615(a), with prejudice.

SO ORDERED.

DATE 8/29/14

JUDGE

C 56 A-17

2016 IL App (3d) 140163

Opinion filed August 1, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

In re ESTATE OF THOMAS F. SHELTON, Deceased, (Ruth Ann Alford, Executor, Petitioner-Appellant, v. Rodney I. Shelton, Respondent-Appellee).	)	Appeal from the Circuit Court of the 13th Judicial Circuit Grundy County, Illinois
	)	Appeal No. 3-14-0163
	)	Circuit No. 13-P-17
	)	Honorable Lance R. Peterson Judge, Presiding

RUTH ANN ALFORD, as executor of the ESTATE OF DORIS E. SHELTON,	)	Appeal from the Circuit Court of the 13th Judicial Circuit Grundy County, Illinois
Plaintiff-Appellant	)	
	)	Appeal No. 3-14-0685
v.	)	Circuit No. 14-L-13
RODNEY I. SHELTON,	)	Honorable Lance R. Peterson Judge, Presiding
Defendant-Appellee.	)	

JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion.
Justice Carter concurred in part and dissented in part, with opinion.
Justice Schmidt concurred in part and dissented in part, with opinion.

OPINION

¶ 1 In these consolidated cases, Ruth Ann Alford, as the executor of the estates of her late parents, Thomas and Doris Shelton, sued her brother, Rodney Shelton, to recover real estate that

she alleged Rodney had wrongly received from both estates and for damages resulting from Rodney's alleged violation of his legal duties as successor power of attorney for Doris. In case No. 3-14-0144, Ruth Ann, as executor of Thomas's estate, filed an amended estate citation seeking the return to Thomas's estate of a farm that Thomas had conveyed to Rodney in December 2011. Ruth Ann alleged that the conveyance was presumptively fraudulent because it occurred while Rodney was named as the successor power of attorney under Thomas's Illinois Statutory Short Form Power of Attorney for Property (POA), and while Doris, Thomas's primary power of attorney under the POA, was incompetent. Rodney moved to dismiss the complaint under sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2010)). The trial court granted Rodney's motion to dismiss under section 2-619 because it found that Ruth Ann had failed to establish that Doris was incompetent at the time of the conveyance and that Rodney owed Thomas a fiduciary duty at that time.

¶ 2 In case No. 3-14-0685, Ruth Ann, as executor of Doris's estate, sued Rodney for damages allegedly caused by Rodney's breach of a duty to Doris as a successor power of attorney. Ruth Ann alleged that, while Rodney was named as a successor power of attorney for Doris, and while Doris was incompetent to manage her own affairs, Rodney colluded with Thomas, Doris's primary power of attorney, to transfer Doris's interest in certain real estate to Rodney in violation of section 2-10.3(b) of the Illinois Power of Attorney Act (Act) (755 ILCS 45/2-10.3(b) (West 2010). Rodney moved to dismiss the complaint under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)). The trial court granted Rodney's motion and found as a matter of law that, at the time of the transaction at issue, Rodney had no duty to Doris. This appeal followed.

¶ 3 FACTS

¶ 4 On January 18, 2005, Thomas Shelton executed an Illinois Statutory Short Form Power of Attorney for Property (POA) appointing his wife, Doris Shelton, as his "attorney-in-fact" or "agent." The POA form states that Doris has the power to act for Thomas and in his name in any way Thomas could act in person with respect to several enumerated powers, including: (1) the power to "pledge, sell, and otherwise dispose of any real or personal property without advance notice" to Thomas; (2) the power to make Estate transactions, gifts, and "all other property powers and transactions"; (3) the power to name or change beneficiaries or joint tenants; and (4) the power to exercise trust powers. It was a "durable" power of attorney in that it provided that Thomas's appointed agent "may exercise the powers given here throughout [Thomas's] lifetime, after [he] become[s] disabled" (unless Thomas or a court otherwise limited or terminated the agent's power, which did not occur).

¶ 5 In paragraph 8, Thomas's POA provided:

> "If any agent named by me shall die, become incompetent, resign or refuse to accept the office of agent, I name the following (each to act alone and successively, in the order named) as successor(s) to such agent: my son Rodney I. Shelton -- my daughter Ruth Ann Alford.
>
> For purposes of this paragraph 8, a person shall be considered to be incompetent if and while the person is a minor or an adjudicated incompetent or disabled person or the person is unable to give prompt and intelligent consideration to business matters, as certified by a licensed physician."

¶ 6 On the same day Thomas executed his POA, Doris executed a substantively identical durable POA for property appointing Thomas as her agent (or attorney-in-fact) and Rodney and Ruth Ann, successively, as successor agents.

¶ 7 Thomas and Doris owned a farm together as joint tenants. On December 1, 2011, Thomas executed quitclaim deeds conveying his and Doris's interest in the farm to Rodney and Rodney's wife. Thomas conveyed his own interest in the farm on his own behalf, and he conveyed Doris's interest in the farm as attorney-in-fact under Doris's power of attorney. On the same day, Thomas executed another quitclaim deed conveying to Rodney and Rodney's wife another farm that was titled in Thomas alone.

¶ 8 On December 2, 2013, Thomas's estate (by its executor, Ruth Ann), filed an amended citation under section 16-1 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/16-1 (West 2012)) against Rodney and his wife to recover the farm originally owned by Thomas. The citation alleged that, at the time Thomas conveyed the farm to Rodney, Rodney was Thomas's agent under Thomas' POA because: (1) Thomas's POA designated Rodney as successor POA; and (2) at the time of the conveyance, the predecessor POA (Doris) was incompetent. In support of the latter assertion, the estate alleged that: (a) "[f]rom March 2011 Doris *** was observed to have confusion and lack of short term memorization [*sic*]"; (b) "[m]edical treatment records through, and beyond, December 1, 2011 reflect Doris's *** continued confusion and cognitive impairment"; (c) "[a]bnormal EEG of 9-15-2011 found 'features that would be consistent with diffuse cerebral dysfunction' "; (d) "[o]n or about October 4, 2011, Doris *** was diagnosed with dementia"; (e) "[r]ecords for Doris *** thereafter reflect progressive decline in cognitive level, disorientation and hallucinations." The complaint alleged that, based on "the progressive effects of [Doris's] diagnosed Dementia as set forth above," Doris "was unable to manage her affairs due to said mental deficiency and was incompetent at the time of the execution of the foregoing deeds." The complaint did not attach a physician's report certifying that Doris was unable to conduct her business affairs or otherwise incompetent.

¶ 9 The complaint further alleged that, due to Doris's incompetence at the time the deeds at issue were executed, "Rodney *** had succeeded to and was the POA under the power of attorney which created a fiduciary relationship between Thomas *** and Rodney." Therefore, the complaint maintained, the conveyances from Thomas to Rodney were "presumptively fraudulent" and Rodney was required show by clear and convincing evidence that the "transaction was fair and equitable." Absent such showing, the complaint asked that the deeds be set aside.

¶ 10 On December 11, 2013, Rodney filed motions to dismiss the estate's amended petition for citation under sections 2-615 and 2-619(a)(9) of the Code. The latter motion noted that Doris had not been adjudicated incompetent or declared incompetent by a physician's certification, as required by paragraph 8 of Thomas's POA. Therefore, Rodney argued, Rodney never assumed a fiduciary duty to Thomas under the POA. Moreover, Rodney contended that "[t]he power of attorney at issue and applicable principles of Illinois law do not permit a retroactive adjudication of incompetence or the creation of a fiduciary relationship *nunc pro tunc*." The estate filed a response to Rodney's motions to dismiss and Rodney filed a reply.

¶ 11 On January 30, 2014, the estate filed the "Physician's Report" of Dr. Daniel M. Jurak, Doris's former treating physician, as a supplemental exhibit to its response to Rodney's motions to dismiss. In his report, Dr. Jurak stated under oath that Doris had suffered from "[d]ementia, diagnosed on or before October 4, 2011, associated with Parkinson's Disease with a start of care date of October 13, 2011." Dr. Jurak further stated that Doris had an "onset of confusion in March 2011" and had "exhibited continuing diminishment of mental and cognitive ability with progressive worsening through the date of her death in 2012." Dr. Jurak opined that "[a]s of, and including, December 1, 2011, *** Doris Shelton was incompetent, unable to manage her

personal affairs, unable to give prompt and intelligent consideration [to] her personal affairs and unable to give prompt and intelligent consideration to business matters." Dr. Jurak stated that he based these observations on: (1) "[his] own examinations(s), continuing care and observations(s), of Doris Shelton from 2008 through the date of her death"; and (2) "[r]eview and examination of treatment records kept in the ordinary course of business, created by persons with independent knowledge of their personal observations and assessments, made at or near their personal observations and assessments[,] *** records of which [Dr. Jurak had] found to be accurate and reliable."

¶ 12 The trial court held a hearing on Rodney's motions to dismiss on February 4, 2014. After reading the parties' briefs and hearing oral arguments, the trial court denied Rodney's motion to dismiss under Rule 2-615 but granted his motion to dismiss under rule 2-619(a)(9). The court reasoned that, at the time of the conveyance on December 1, 2011, no doctor had certified that Doris was unable to manage her financial affairs, and the doctor's certification that "would trigger that POA" occurred two years after the event. The court concluded that "I don't think you can retroactively a year or two years later submit a certification *** that is specifically referred to in the POA and have retroactive effect."

¶ 13 On March 24, 2014, Ruth Ann, as executor of Doris's estate, filed a complaint against Rodney seeking damages for Rodney's alleged breach of fiduciary duty to Doris. The complaint alleged that, on December 1, 2011, Thomas violated his duty as Doris's agent under Doris's POA by transferring all of Doris's interest in the farm to Rodney and Rodney's wife without reserving a life estate in Doris at a time when Doris was incompetent and in need of income from the property. The complaint further alleged that Rodney "participated in such breach of fiduciary duty" by Thomas in violation of section 2-10.3 of the Act (755 ILCS 45/2-10.3 (West 2010)) by

failing to notify Doris of such breach and by failing to take action to safeguard Doris's best interests. The complaint sought damages "in an amount not less than $50,000" plus attorney's fees and court costs.

¶ 14 Rodney filed a motion for judgment on the pleading pursuant to section 2-615(e) of the Code or, in the alternative, a motion to dismiss the complaint under section 2-615(a) of the Code. In both motions, Rodney argued that he was not an "agent" as alleged in the complaint under either Doris's POA or section 2-10.3 of the Act. Rodney maintained that he had no fiduciary duty to act as alleged in the complaint, and that the complaint thereby failed to state a cause of action for breach of fiduciary duty. In its response to Rodney's motions, Ruth Ann argued that, as a designated successor agent under Doris's POA, Rodney was a fiduciary as a matter of law and therefore had a duty to Doris on the date the deeds were executed. During oral argument, Ruth Ann argued that section 2-10.3 of the Act and Illinois case law stand for the proposition that a "secondary agent could be liable" if he "sees the primary agent violate his duty to the principal," and that a successor POA has a duty to take action under such circumstances to protect the principal from harm.

¶ 15 After oral argument, the trial court took the matter under advisement. On August 29, 2014, the trial court issued a ruling from the bench finding as a matter of law that Rodney never became an agent of Doris's under Doris's POA, and therefore no fiduciary duty ever arose. The court found that, at the time of the conveyance at issue, Thomas was Doris's agent with all of the discretion that Doris chose to give him. Accordingly, the trial court granted Rodney's motion to dismiss Ruth Ann's complaint with prejudice under section 2-615(a).

¶ 16 Thomas's estate appealed the trial court's dismissal of its amended petition for citation to recover property from Rodney under section 16-1 (appeal No. 3-14-0163), and Doris's estate

appealed the trial court's dismissal of its complaint for damages against Rodney (appeal No. 3-14-0685). We consolidated the appeals.

¶ 17 ANALYSIS

¶ 18 1. The Dismissal of the Amended Estate Citation filed by Thomas's Estate

¶ 19 In appeal No. 3-14-0163, Ruth Ann, as executor of Thomas's estate, argues that the trial court erred in granting Rodney's motion to dismiss the amended estate citation under section 2-619(a)(9) because Rodney was Thomas's fiduciary at the time Thomas conveyed his farm to Rodney, thereby rendering the conveyance presumptively fraudulent. A motion for involuntary dismissal under section 2-619(a)(9) of the Code admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint bars or defeats the cause of action. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31. When ruling on a section 2-619(a)(9) motion, the court construes the pleadings "in the light most favorable to the nonmoving party" (*Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55), and should only grant the motion "if the plaintiff can prove no set of facts that would support a cause of action" (*Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8). We review a trial court's dismissal of a complaint under section 2-619(a)(9) *de novo*. *Reynolds*, 2013 Il App (4th) 120139, ¶ 31.

¶ 20 Ruth Ann argues that Rodney had a fiduciary relationship with Thomas at the time of the conveyance in December 2011 because Thomas had designated Rodney as a successor agent in his POA. She also maintains that, because Doris was incompetent at the time Thomas conveyed his farm to Rodney in December 2011 (as certified by Doris's treating physician in 2014), Rodney had succeeded Doris as Thomas's attorney-in-fact at the time of the conveyance, which made him Thomas's fiduciary. Ruth Ann argues that, because Rodney was Thomas's fiduciary,

Thomas's conveyance of his farm to Rodney was presumptively fraudulent, and the trial court erred in dismissing the amended estate citation.

¶ 21 A fiduciary relationship is one where a person is under a duty to act for the benefit of another. *In re Estate of Baumgarten*, 2012 IL App (1st) 112155, ¶ 16. A fiduciary relationship can arise as a matter of law or fact. *In re Estate of DeJarnette*, 286 Ill. App. 3d 1082, 1088 (1997). One way in which a fiduciary relationship can exist as a matter of law is through the appointment of a power of attorney. *Id.*; see also *Clark v. Clark*, 398 Ill. 592, 600 (1947); *In re Estate of Elias*, 408 Ill. App. 3d 301, 319 (2011) ("A power of attorney gives rise to a general fiduciary relationship between the grantor of the power and the grantee as a matter of law."); *Spring Valley Nursing Center, L.P. v. Allen*, 2012 IL App (3d) 110915, ¶ 12 ("When a person is designated as an agent under a power of attorney, he has a fiduciary duty to the person who made the designation.").

¶ 22 "The mere existence of a fiduciary relationship prohibits the agent from seeking or obtaining any selfish benefit for himself, and if the agent does so, the transaction is presumed to be fraudulent." *Spring Valley Nursing Center*, 2012 IL App (3d) 110915, ¶ 12; see also *Clark*, 398 Ill. at 601-02. "Thus, any conveyance of the principal's property that either materially benefits the agent or is for the agent's own use is presumed to be fraudulent." *Spring Valley Nursing Center*, 2012 IL App (3d) 110915, ¶ 12; see also *Clark*, 398 Ill. at 601; *In re Estate of Rybolt*, 258 Ill. App. 3d 886, 889 (1994).[1] This rule applies to conveyances of the principal's

[1] The presumption of fraud is not conclusive and may be rebutted by clear and convincing evidence to the contrary. *Spring Valley Nursing Center*, 2012 IL App (3d) 110915, ¶ 13. The burden is on the agent to rebut the presumption by showing that he acted in good faith and that he did not betray the confidence placed in him. *Id.* If the agent satisfies this burden, the

property by the agent to a third party on behalf of the principal and also to conveyances made by the principal directly to the agent. See, *e.g.*, *Clark*, 398 Ill. at 601; *Estate of Rybolt*, 258 Ill. App. 3d at 889. "[T]he burden of pleading and proving the existence of a fiduciary relationship lies with the party seeking relief." *Lemp v. Hauptmann*, 170 Ill. App. 3d 753, 756 (1988). The trial court's determination whether a POA gives rise to a fiduciary relationship as a matter of law is a legal conclusion that we review *de novo*.

¶ 23 In determining whether Rodney was Thomas's fiduciary at the time of the conveyance at issue, we must first answer a threshold legal question. Specifically, we must decide whether a *successor* agent under a POA has a fiduciary duty to the principal *before he becomes the acting agent* (or the "attorney in-fact") merely by virtue of being named a successor agent in the POA. This is an issue of first impression. Illinois courts have held repeatedly that an appointed agent under a POA (*i.e.*, an agent designated as the principal's attorney-in-fact) has a fiduciary duty to the principal as a matter of law from the time the POA is executed, regardless of whether or when he exercises his powers under the POA. See, *e.g.*, *Estate of Elias*, 408 Ill. App. 3d at 320; see generally *In re Estate of Miller*, 334 Ill. App. 3d 692, 697, 700 (2002). However, no

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transaction in question will be upheld. See 755 ILCS 45/2-7(a) (West 2010); *Clark*, 398 Ill. at 602. However, if the agent fails to rebut the presumption, the transaction will be set aside. See 755 ILCS 45/2-7(a), (f) (West 2010); *Clark*, 398 Ill. at 601. Some of the significant factors to be considered in determining if the presumption of fraud has been rebutted include whether the fiduciary made a frank disclosure to the principal of the information he had, whether the fiduciary paid adequate consideration, and whether the principal had competent and independent advice. *Spring Valley Nursing Center*, 2012 IL App (3d) 110915, ¶ 12; *Estate of DeJarnette*, 286 Ill. App. 3d at 1088.

published Illinois decision holds that a party named a *successor* agent under a POA has such a duty before he becomes the principal's attorney-in-fact. That is not surprising, because a fiduciary relation is created by the "appointment," "granting," or "designation" of a power of attorney (see, *e.g.*, *Estate of DeJarnette*, 286 Ill. App. 3d at 1088; *Estate of Elias*, 408 Ill. App. 3d at 319; *Spring Valley Nursing Center*, 2012 IL App (3d) 110915, ¶ 12), and a successor agent under a POA is appointed, granted, or designated a power of attorney only contingently, *i.e.*, only if the person designated attorney-in-fact under the instrument is unwilling or unable to act on the principal's behalf. In this case, Thomas's POA provided: "*If any agent named by me shall die, become incompetent, resign or refuse to accept the office of agent*, I name the following (each to act alone and successively, in the order named) as successor(s) to such agent: my son Rodney I. Shelton -- my daughter Ruth Ann Alford." (Emphasis added.) Thus, Rodney's designation as Thomas's agent under the POA, and the attendant powers to act on Thomas's behalf, would be triggered if, and only if, the designated attorney-in-fact (Doris) died, became incompetent, or refused to accept the agency. Until any of those events occurred, Rodney had no power of attorney under the document, and therefore no common-law fiduciary duty to exercise such power according to Thomas's interests. In sum, it is the power to act as a principal's attorney-in-fact that creates a fiduciary duty as a matter of law. Until that power is actually conferred, there can be no corresponding fiduciary duty to use that power for the principal's benefit.

¶ 24 Having found that Thomas's designation of Rodney as a successor agent under the POA did not create a common-law fiduciary relationship, we proceed to the second question noted above: namely, whether the estate established that Doris was incompetent at the time of the conveyance in 2011 (and, therefore, that Rodney became Thomas's agent-in-fact at that time

under the POA) through Dr. Jurak's physician's report, even though that report was prepared and signed approximately two years later. The trial court answered this question in the negative. The court concluded that a physician's certification of incompetency had to be rendered prior to the conveyance at issue in order to establish Doris's incompetency under Thomas's POA, and that a physician's certification prepared two years after the fact could not establish Doris's incompetency "retroactively." We agree.

¶ 25 As noted, Thomas's POA names Rodney as a successor agent only if the designated attorney-in-fact (Doris) "shall *** become incompetent." The next sentence states that "[f]or purposes of this paragraph ***, a person shall be considered to be incompetent if and while the person is a minor or an adjudicated incompetent or disabled person or the person is unable to give prompt and intelligent consideration to business matters, *as certified by a licensed physician*." (Emphasis added.) Although the POA does not expressly state when the physician's certification must take place, when the paragraph is read as a whole, the clear implication is that the certification must occur before the successor power of attorney becomes the attorney-in-fact. Unless the originally designated attorney-in-fact is disabled or a minor, she does not "become incompetent" for purposes of the POA unless she is *adjudicated* incompetent or *certified* incompetent by a licensed physician. Moreover, the POA expressly states that the original agent will be considered incompetent "if *and while*" such certification and adjudication takes pace. (Emphasis added.) The most straightforward reading of these provisions is that the physician's certification, like an adjudication of incompetency, is meant to serve as a triggering event that nullifies the primary agent's authority at the time of the certification and in the future, until the certification is rescinded. Nothing in Thomas's POA suggests that a physician's certification prepared years after the fact may retroactively nullify the designated agent-in-fact's authority to

act under the POA. Because written POAs must be strictly construed in Illinois (*In re Estate of Romanowski*, 329 Ill. App. 3d 769 (2002); *Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc.*, 326 Ill. App. 3d 126 (2001)), we will not read such intent into the instrument by implication where the text does not clearly support that interpretation.

¶ 26 Moreover, there are good policy reasons for reading a standard form POA in this manner. Allowing incompetency determinations to be made years after the fact could create uncertainty and lead to situations where an acting power of attorney makes financial decisions for a long period of time before he or she is declared incompetent and replaced with a successor POA. Principals, acting agents, successor agents, and third parties need to know with certainty who has the authority to act on the principal's behalf (and who has fiduciary duties to the principal) at a particular time. If an attorney-in-fact's authority can be nullified retroactively by a doctor's certification years after the fact, the designated successor agents would never be certain when their powers and duties under the POA were triggered. A successor agent under the POA might reasonably believe that the attorney-in-fact is competent, only to discover years later that she had been incompetent for years, and that the successor agent has been inadvertently shirking his duty throughout that entire period. This would create a regime of instability and uncertainty which could upset the settled expectations of principals, attorneys-in-fact, successor agents, and third parties who have transacted business with an attorney-in-fact. Moreover, allowing retroactive certification of an agent's incompetency would likely spawn litigation (complete with conflicting expert testimony) to establish when an attorney-in-fact became incompetent. A bright-line rule

requiring a physician's certification of incompetency *before* the attorney-in-fact is replaced by a successor agent would avoid all of these problems.[2]

¶ 27 Accordingly, we affirm the trial court's dismissal of the amended estate citation in appeal No. 3-14-0163.

¶ 28 2. The Dismissal of Doris's Estate's Claim Against Rodney

¶ 29 In Case No. 3-14-0685, Ruth Ann, as executor of Doris's estate, argues that the trial court erred in dismissing Doris's estate's claim against Rodney for breach of fiduciary duty as a successor trustee under section 2-10.3(b) of the Act (755 ILCS 45/2-10.3(b) (West 2010)). The trial court dismissed Doris's estate's claim under section 2-615(a) of the Code. A section 2-615(a) motion to dismiss tests the legal sufficiency of the complaint on its face. *Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 15. A section 2-615(a) motion argues that the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are insufficient to state a cause of action upon which relief may be

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[2] In his dissent in appeal No. 3-14-0163, Justice Schmidt suggests that most of these problems could be alleviated if we allowed retroactive certifications of incompetency by physicians but limited the effect of such certifications to transactions that benefit the successor agent. See *infra* ¶ 50. That may well be true. However, the language of Thomas's POA does not support retroactive certifications of incompetency, much less the limitation of such certifications to transactions that benefit a successor agent. As noted above, written POAs must be strictly construed in Illinois. *In re Estate of Romanowski*, 329 Ill. App. 3d 769 (2002); *Amcore Bank*, 326 Ill. App. 3d 126. Accordingly, we cannot read provisions or limitations into a POA that are not clearly supported by its text.

granted. *Id.*, ¶ 25. "[A] cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." (Internal quotation marks omitted.) *Id.* We review a trial court's dismissal of a complaint under section 2-615(a) *de novo*. *Id.*

¶ 30 The complaint in this case alleged that, on December 1, 2011, Thomas violated his fiduciary duty as Doris's agent under Doris's POA by transferring all of Doris's interest in the farm to Rodney and Rodney's wife without reserving a life estate in Doris at a time when Doris was incompetent and in need of income from the property. The complaint alleged that Rodney "participated in such breach of fiduciary duty" by Thomas in violation of section 2-10.3 of the Act (755 ILCS 45/2-10.3 (West 2010)) by failing to notify Doris of such breach and by failing to take action to safeguard Doris's best interests.

¶ 31 Section 2-10.3 of the Act is entitled "Successor Agents." Subsection (b) of section 2-10.3 provides that:

> "An agent is not liable for the actions of another agent, including a predecessor agent, *unless the agent participates in or conceals a breach of fiduciary duty committed by the other agent. An agent who has knowledge of a breach or imminent breach of fiduciary duty by another agent must notify the principal and, if the principal is incapacitated, take whatever actions may be reasonably appropriate in the circumstances to safeguard the principal's best interest.*" (Emphasis added.) 755 ILCS 45/2-10.3(b) (West 2010)).

Ruth Ann argues that, under section 2-10.3(b), Rodney is liable for any breach of fiduciary duty committed by Thomas when he conveyed Doris's interest in the farm to Rodney.

¶ 32 In dismissing the complaint, the trial court held that, because Rodney was only a successor agent who never became an actual agent of Doris's under the POA, no fiduciary duty ever arose as a matter of law. However, although we agree that Rodney did not have a fiduciary duty to Doris under the POA or under the common law, that does not resolve the matter. The complaint in this case was based upon section 2-10.3(b) of the Act. That section provides that successor agents may be liable for breaches of fiduciary duty committed by their predecessor agents if they participate in or conceal such breaches. 755 ILCS 45/2-10.3(b) (West 2010). Successor agents are liable for such conduct under section 2-10.3(b) regardless of whether they have independent fiduciary obligations to the principal. Section 2-10.3(b) does not state that successor agents may be liable for breaches committed by predecessor agents only if they themselves become acting agents.

¶ 33 Moreover, section 2-10.3(b) imposes certain affirmative obligations upon successor agents. Specifically, section 2-10.3(b) provides that a successor agent "who has knowledge of a breach or imminent breach of fiduciary duty by another agent" "must notify the principal and, if the principal is incapacitated, take whatever actions may be reasonably appropriate in the circumstances to safeguard the principal's best interest." *Id.* The statute suggests that successor agents who fail to discharge these obligations are liable for any breach of fiduciary duty committed against a principal by a predecessor agent.[3]

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[3] It should be emphasized, however, that the statute only imposes affirmative duties on a successor agent in the event that the successor agent "has knowledge of a breach or imminent breach of fiduciary duty by another agent." *Id.* In that event, and only in that event, the successor agent must notify the principal and, if the principal is incapacitated, take reasonable steps safeguard the principal's best interest. *Id.*

¶ 34 Thus, by its plain terms, section 2-10.3(b) could support a cause of action against a successor agent if the successor agent participated in or concealed a breach of duty by a predecessor agent, or if the successor agent was aware of an imminent breach of fiduciary duty by a predecessor agent but failed to notify the principal or take reasonable steps to safeguard an incompetent principal's interest. In this case, the complaint alleged that: (1) Thomas violated his fiduciary duty as Doris's agent under Doris's POA by transferring all of Doris's interest in the farm to Rodney and Rodney's wife without reserving a life estate in Doris at a time when Doris was incompetent and in need of income from the property; (2) Rodney was aware that Thomas was going to execute a deed accomplishing this wrongful transfer of Doris's property interest; and (3) Rodney "participated in such breach of fiduciary duty" by Thomas in violation of section 2-10.3(b) by failing to notify Doris of such breach and by failing to take action to safeguard Doris's best interests. Thus, the complaint alleged facts sufficient to state a cause of action. We therefore hold that the trial court erred in dismissing the complaint under section 2-615(a).

¶ 35 Rodney argues that, when the Act is read as a whole, it is clear that section 2-10.3(b) does not apply to successor agents. Section 2-10.3(b) states that "[a]n *agent*" may be liable for the actions of another agent under certain specified circumstances; it does not state that a "successor agent" may be liable for such actions. Similarly, section 2-10.3(b) imposes certain duties on an "agent," not a "successor agent." The Act defines "agent" as "the attorney-in-fact or other person designated to act for the principal in the agency." 755 ILCS 45/2-3 (West 2010).[4] By contrast, section 2-10.3 suggests that a "successor agent" is designated to act only "if an initial or predecessor agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve." 755 ILCS 45/2-10.3(a) (West 2010). Thus, Rodney contends that, by using the term

[4] The "agency" is the written power of attorney. See 755 ILCS 45/2-3 (West 2010).

"agent" instead of "successor agent" throughout section 2-10.3(b), the legislature expressed its intent that the duties and potential liability prescribed by that section should apply only to attorneys-in fact, not to successor agents.

¶ 36 We disagree. Section 2-10.3(b) is a subsection within section 2-10.3, which is entitled "Successor agents." The other two subsections within that section both clearly apply to successor agents. See 755 ILCS 45/2-10.3(a), (c) (West 2010). Thus, it stands to reason that section 2-10.3(b) applies to successor agents as well.

¶ 37 Moreover, section 2-10.3(b) imposes certain duties on an agent "who has knowledge of a breach *or imminent breach of fiduciary duty* by another agent." (Emphasis added.) 755 ILCS 45/2-10.3(b) (West 2010). As Rodney acknowledges, only attorneys-in-fact have fiduciary obligations to the principal under a POA, and only attorneys-in-fact are authorized to act for the principal. Accordingly, only an attorney-in-fact could commit an "immanent breach of fiduciary duty." This means that section 2-10.3(b) must intend to impose duties on an agent when certain unlawful acts are performed or about to be performed by an acting attorney-in-fact under a POA. As noted, however, Rodney argues that section 2-10.3(b) imposes duties only on an attorney-in-fact. If that were true, then the statute could apply only in a situation where there are co-agents (*i.e.*, two simultaneously acting attorneys-in-fact) under the POA. However, a careful reading of the Act as a whole establishes that section 2-10.3(b) was not intended to apply to co-agents. First, as noted, section 2-10.3(b) appears in a section of the Act entitled "Successor agents," not "co-agents." More importantly, there is a separate section of the Act entitled "Co-agents" (755 ILCS 45/2-10.5 (West 2010)), and that section contains a subsection that is identical to section 2-10.3(b) (see 755 ILCS 45/2-10.5(c) (West 2010)). If section 2-10.3(b) applied to co-agents, as Rodney maintains, then section 2-10.5(c) would be rendered superfluous. "It is a general rule of

construction that where a statute can be reasonably interpreted so as to give effect to all its provisions, a court will not adopt a strained reading which renders one part superfluous." *Bass v. Cook County Hospital*, 2015 IL App (1st) 142665, ¶ 25. For this additional reason, we reject Rodney's interpretation.

¶ 38 In his partial dissent in case No. 3-14-0685, Justice Carter maintains that our decisions in these two consolidated appeals are inconsistent. See *infra*, ¶ 47. We disagree. In the first appeal (No. 3-14-0163), we hold that a successor agent under a POA has no fiduciary duty to the principal under the common law until he becomes the acting agent (or attorney-in-fact). In the second appeal (No. 3-14-0685), Justice Schmidt and I hold that a successor agent has a limited statutory duty under section 2-10.3(b). That statutory duty is an exception to (*i.e.*, in derogation of) the common law rule that successor agents have no duties to the principal. However, it is a very limited duty. As noted above, the statute imposes a duty on a successor agent to: (1) refrain from participating in or concealing a breach of fiduciary duty committed by another agent; (2) notify the principal of any immanent breach of fiduciary duty by another agent and, if the principal is incapacitated, take whatever actions may be reasonably appropriate under the circumstances to safeguard the principal's best interest. The latter duty is imposed only if the successor agent has knowledge of a breach or imminent breach of fiduciary duty by another agent. Thus, it will apply only in very limited circumstances.

¶ 39 We also disagree with Justice Carter's conclusion that "the references to the 'agent' in section 2-10.3(b) are limited solely to the acting agent or attorney in-in-fact." *Infra* ¶ 47. As explained above, when section 2-10.3(b) is read in conjunction with other relevant provisions of the Act, the only reasonable conclusion is that section 2-10.3(b) was intended to apply to successor agents, not to co-agents or other attorneys-in-fact.

¶ 40 Moreover, contrary to Justice Carter's conclusion (*infra* ¶ 47), our reading of section 2-10.3(b) does not conflict with section 2-7, which provides that an agent has no duty to "assume control of or responsibility for any of the principal's property, care or affairs, regardless of the principal's physical or mental condition." 755 ILCS 45/2-7 (West 2010). Section 2-10.3(b) merely imposes a limited duty under certain narrow and specified circumstances, as discussed above. In any event, even if there were some tension between these two provisions, the specific duties imposed in section 2-10.3(b) would control over the general principle announced in section 2-7. See *Sierra Club v. Kenney*, 88 Ill. 2d 110, 126 (1981); *Calibraro v. Board of Trustees of the Buffalo Grove Firefighters' Pension Fund*, 367 Ill. App. 3d 259, 262 (2006).

¶ 41 For the reasons set forth above, we reverse the trial court's dismissal of Doris's estate's claim.

¶ 42 CONCLUSION

¶ 43 The judgment of the circuit court of Grundy County in appeal No. 3-14-0163 is affirmed. The judgment of the circuit court of Grundy County in appeal No. 3-14-0685 is reversed and remanded for further proceedings.

¶ 44 No. 3-14-0163, Affirmed.
No. 3-14-0685, Reversed and remanded.

¶ 45 JUSTICE CARTER, concurring in part and dissenting in part.

¶ 46 I concur with the majority's decision affirming the trial court's dismissal of the amended estate citation in appeal No. 3-14-0163. Specifically, I agree with the analysis in paragraphs 18 through 27.

¶ 47 However, for the reasons that follow, I also respectfully dissent from the majority's decision reversing the trial court's dismissal of the estate's claim in appeal No. 3-14-0685.

Specifically, I dissent from paragraphs 28 through 41. First, in my opinion, the majority's decisions in the two consolidated appeals are inconsistent with one another as the majority finds in the first appeal (No. 3-14-0163) that a successor agent under a POA has no fiduciary duty to the principal until he becomes the acting agent but reaches the exact opposite conclusion in the second appeal (No. 3-14-0685). Second, I believe that the majority's analysis in the latter appeal is based upon a strained reading of section 2-10.3(b) of the Act, a reading with which I do not agree. In my opinion, the references to the "agent" in section 2-10.3(b) are limited solely to the acting agent or attorney-in-fact and do not include, or apply to, a successor agent. See 755 ILCS 45/2-3(b) (West 2010) (" '[a]gent' means the attorney-in-fact or other person designated to act for the principal in the agency"). The more-limited reading of section 2-10.3(b) that I have suggested here is more in keeping with section 2-7 of the Act, which limits the duties, obligations, and liabilities of an agent acting under a POA and provides, in part, that an agent has no duty to "assume control of or responsibility for any of the principal's property, care or affairs, regardless of the principal's physical or mental condition." 755 ILCS 45/2-7 (West 2010). For the reasons stated, unlike the majority, I would affirm the trial court's dismissal of Doris's estate's claim in appeal No. 3-14-0685.

¶ 48 JUSTICE SCHMIDT, concurring in part and dissenting in part.

¶ 49 Because I would reverse the trial court's dismissal of the amended estate citation in appeal No. 3-14-0163, I respectively dissent from that portion of the majority opinion which affirms it. *Supra* ¶¶ 18-27.

¶ 50 In paragraph 26, *supra*, the majority explains that the sky will fall if we were to read a standard form POA to allow a retroactive declaration of incompetency. I suggest that the majority's view allows a successor agent under a POA, who knows full well that the designated

attorney-in-fact is incompetent, to engage in self-dealing before either seeking a physician's declaration of incompetency, or a court order to the same effect. In a case such as this, we have the opinion and medical records of Doris's former treating physician, not simply a hired expert. If the estate can show that Doris was indeed incompetent at the relevant times, I see no reason, not to allow the estate to challenge the transactions that benefitted Rodney. If a retroactive declaration of incompetency only affects transactions that benefit the successor agent directly, or even indirectly, then that should alleviate most of the majority's concerns. *Supra* ¶ 26.

¶ 51 I concur with Justice Holdridge's analysis and reversal of the trial court with respect to appeal No. 3-14-0685. *Supra* ¶¶ 29-41.