IN THE SUPREME COURT
OF THE STATE OF ILLINOIS
No.121241

In re ESTATE OF THOMAS SHELTON, Deceased, (Ruth Ann Alford, Executor, Petitioner-Appellant v. Rodney I. Shelton, Respondent-Appellee).	) On Petition for Leave Appeal from the Appellate Court Third District, Case No. 3-14-0163) Date of Appellate Judgment Appealed from: August 1, 2016)) There on Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois, Case 2013-P-17)) Honorable Lance R. Peterson Presiding

Consolidated with:
No. 121199

RUTH ANN ALFORD, as executor of the ESTATE OF DORIS E. SHELTON, Plaintiff-Appellant RODNEY I. SHELTON, Defendant-Appellee	) Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County Illinois, Case 2014-L-13)) Appellate Court Third District, Case No 3-14-0685)) Honorable Lance R. Peterson Presiding

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

The Trial Court erred in finding, as a matter of law, a successor agent under a power of attorney cannot be retroactively activated by showing the first successor agent was incompetent on a previous date.

NATURE OF THE ACTION

Independent Executor of the Estate brought an Amended Estate Citation seeking turn-over of Real Estate to the Estate from Respondent, successor Power of Attorney of the Decedent, arising out the presumptively fraudulent transaction. The Trial Court denied Respondent's Motion to Dismiss the pleading pursuant to 735 ILCS 5/2-615 and granted Respondent's Motion to Dismiss the pleading pursuant to 735 ILCS 5/2-619. The Appellate Court, Third District, affirmed.

ISSUES PRESENTED FOR REVIEW

The issue is whether the Trial Court erred in granting Respondent's Motion to Dismiss the Estate's Amended Citation pursuant to 735 ILCS 5/2-619. In doing so the Court held that a secondary successor power of attorney cannot be retroactively activated by showing the first successor agent was *in fact* incompetent on a previous date in question.

STANDARD OF REVIEW

Appellate review of ruling on dismissal by the Trial Court pursuant to a Motion brought under 735 ILCS 5/2-619 is *de novo. Krilich v. American Nat. Bank and Trust Co. of Chicago* 334 Ill.App.3d 563, 569, 778 N.E.2d 1153, 1160, 268 Ill.Dec. 531, 538 (2nd Dist., 2002)

JURISDICTION

This appeal is taken as of right, pursuant to Illinois Supreme Court Rules 301 & 304, from a final and appealable Order entered on February 4, 2014 in favor of the Respondent-Appellee. (C. 899; R. 33-35; A 39-41). Notice of Appeal required under Illinois Supreme

Court Rule 303 (a) & (b), was timely filed on February 21, 2014 (C. 901; A 6). Thereafter upon the Decision rendered by the Appellate Court, Third District, on August 1, 2016, a timely Petition for Leave to Appeal pursuant to Illinois Supreme Court Rule 315 was filed and allowed on November 23, 2016. This Brief is timely filed pursuant to the Rule 315(h).

STATUTES INVOLVED

755 ILCS 45/2-10.3 (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."

STATEMENT OF FACTS

Pursuant to a Power of Attorney executed on or about January 18, 2005, Respondent (hereinafter "Rodney") held successor Power of Attorney for the Decedent (hereinafter "Thomas". (C. 104-105; R.19; A 25, 54-55). On December 1, 2011, Rodney was a grantee in deeds executed on December 1, 2011 and recorded January 3, 2012; Grantor of which was Thomas. (C. 99-103). Prior to the Execution of the Deeds in question, Thomas's primary Power of Attorney had been his spouse, Doris Shelton (hereinafter "Doris"). (C. 104-105; A 54-55). It is uncontroverted that on December 1, 2011 Doris was *in fact* incompetent and unable to manage her own affairs. (C.120-883, C. 894-895; A 78-79). Doris being in fact incompetent, Rodney as her successor was Thomas's Power of

Attorney. Doris's incompetency further illustrated by the fact that Thomas, as Power of Attorney for Doris, executed one of the Deeds in question transferring Real Property of Doris to the Rodney. (C. 99-100; R.25-26; A 31-32, 49-50). Petitioner, (hereinafter "Ruth Ann") brought an Amended Estate Citation seeking turn-over of Real Estate to the Estate from Rodney, successor Power of Attorney of Thomas. (C. 93-105; A 43-55). Rodney brought Motions to Dismiss pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619. (C. 109-119; A 56-66). After briefing and oral argument, the Trial Court denied Rodney's Motion to Dismiss pursuant 735 ILCS 5/2-615, finding said incompetency to have been properly pled; and nonetheless, granted Rodney's Motion to Dismiss pursuant 735 ILCS 5/2-619. (C. 899; R. 33-35; A-5, 39-41)

ARGUMENT

This case is about fraud. It is about the presumption of fraud that exists when a principal makes a gift to an agent under his power of attorney. This case is about a man, Rodney, who is claimed to have denied his sister, Ruth Ann, of her inheritance from her father (Thomas) by defrauding the father. The Trial Court by its ruling on the Motion to Dismiss pursuant to 735 ILCS 5/2-619, affirmed by the split decision of the Appellate Court, has imposed an unreasonable and unrealistic burden on Ruth Ann, as well as each and every heir, administrator, executor or person in interest by requiring there be a certification of the prior agent's competency in existence at the time of the presumed fraudulent transaction by holding that proof of the incompetency of the first agent could not be proven later. How is such a person who has been wronged by such fraud ever able to overcome such a hurdle

since such things are usually only discovered after the fact and without the cooperation of the defrauder?

In a perfect world, no would defraud anyone, and everything would be above board and not hidden. But there are those that engage in fraudulent activities, and they do so in such a manner that the fraud will not be discovered. As such fraudulent activity is discovered some time *after* the fraud has been perpetrated. This is undoubtedly the reason why limitations periods for bringing actions based on fraud do not start to run until the fraud is discovered.

The uncontroverted fact reflected by the record is that Doris, the first agent under Thomas's Power of Attorney, was incompetent at the time Thomas signed the deed giving a farm to the Rodney. (C.120-883, 894-895; A 78-79). The treatment records of Doris, authored at or about the time the records were generated, reflect as such; the Physician's Report of Dr. Jurak, while later authored, reflects as such. Nothing to the contrary has been presented by Rodney, nor does Rodney appear to dispute that fact.

Whether such incompetency was established at the time the deed was signed or a few years later doesn't change the fact that Doris Shelton *was* incompetent. (C.120-883, C. 894-895; A 78-79). Thus, the second named agent under that Power of Attorney, Rodney, was in fact Thomas's agent when the deed conveying the farm to him was signed by Thomas. (C.104-105; A 54-55). Thus, the presumption of fraud arises.

The law recognizes the existence of a fiduciary duty owed by agents under powers of attorney to the principal even though the agent in question was not the first named agent. "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...[t]he *mere existence [emphasis added]* 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 Ctr., L.P. v. Allen*, 2012 IL App (3d) 110915, 977 N.E.2d 1230, 1233, 365 Ill.Dec.131, 134 (3rd Dist. 2012). 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*. *Id.* This rule applies not only to conveyances of the principal's property by the agent to a third party on behalf of the principal, but also to conveyances made by the principal directly to the agent. *Id* at 1234, 135.

In *Spring Valley*, as in this case, the person who ended up with the Property at issue is the one who was named in a Power of Attorney. Contrary to the assertion of Rodney, the Law in Illinois imposes a duty on Rodney by virtue of being named on said POA. While an agent is under no duty to exercise the powers granted by a POA, when exercised the agent shall act in good faith for the benefit of the principal. 755 ILCS 45/2-7(a). Once a person has accepted appointment said agent "must act in accordance with the principal's expectations to the extent actually known to the agent and otherwise in the principal's best interests" 755 ILCS 45/2-7 (b). If a court finds that an agent is not acting for the benefit of the principal said Agent may be removed. 755 ILCS 45/2-10 (b). And "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 for health care under Article IV, (755 ILCS 45/2-10.5).

The general fiduciary relationship between the grantor of the power and the grantee is "as a matter of law". *In re Elias*, 408 Ill.App.3d 301, 946 N.E.2d 1015, 349 Ill.Dec. 519 (1st Dist. 2011) *citing White v. Raines*, 215 Ill.App.3d 49, 59, 158 Ill.Dec. 478, 574 N.E.2d 272, 279 (5th Dist. 1991). This duty attaches whether or not the Power of Attorney designee is "activated" or not. *Id.* at 320, 1033. And, the duty attaches absent any evidence the Power of Attorney was used. *In re Estate of Lashmett*, 874 N.E.2d 65, 369 Ill. App.3d 1013, 314 Ill. Dec. 155 (4th Dist. 2007).

In re Elias, 408 Ill.App.3d 301, 320, 946 N.E.2d 1015, 1033, 349 Ill.Dec. 537 (1st Dist. 2011) Respondent was POA under both a health care power of attorney and a "durable general power of attorney" that "granted broad powers to [the POA] to handle and dispose of [the Principal's] real and personal property" *In re Elias* at 306, 1022, 526. To avoid liability Respondent claimed in part that she had not "activated" her POA until some seventeen (17) months after being named as POA. *Id.* at *320, 1033, 537.* The Court found this claim to be "neither legally nor factually sound". *Id.* at *320, 1033, 537.* The Court went on the state:

> "Second, Elias [Decedent] executed a separate health care power of attorney to govern any medical decisions. The durable power of attorney granted broad powers to McDonnell [Respondent] to handle and dispose of Elias' real and personal

property. The LPL transfer-on-death document was executed after Elias' grant of the general durable power of attorney to McDonnell. Likewise, the alleged gifting of the personal property occurred *after the power of attorney was executed [emphasis added]* and McDonnell became Elias' fiduciary. Thus, McDonnell was Elias' fiduciary *at the time of the execution [emphasis added]* of the LPL transfer-on-death document and the disposition of the personal property."

The LPL transfer-on-death document, naming Respondent as sole beneficiary, had been executed prior to Respondent's claimed POA activation and a portion of the disposition of personal property had occurred prior to Respondent's claimed activation. *Id.*

In this case, since Rodney was in fact named as a successor POA well before the date the deed(s) in question were executed conveying the real property to him, Rodney, as a matter of law was a fiduciary on the date the deed(s) were executed. Combined with the undisputed fact that Thomas's primary POA (Doris) was incompetent thus placing Rodney in the primary position, there was well more than "mere existence of a fiduciary relationship" with the Decedent. As such there can be no doubt Rodney, the successor Power of Attorney, can be "retroactively" activated as Power of Attorney of Decedent, Thomas Shelton.

Moreover, in the companion case to this matter, 03-14-0685 (121199), the Third District further recognized the duty of a successor agent under 755 ILCS 45/2-10.3(b) to protect the principal when that successor agent is aware of the first agent breaching his fiduciary duty to the principal. § 2-10.3(b) states:

"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].*

This demonstrates that successor agent *does owe* a duty to a principal, *"activated" or not* as reflected by statute

Looked at in the light of *Spring Valley, In re Elias,* and 755 ILCS 45/2-10.3, Rodney, by virtue of being named successor Power of Attorney for Thomas, *was* a fiduciary of Thomas whether "activated" or not. Combined with the undisputed fact Thomas's primary POA, Doris, was incompetent thus placing Rodney in the primary position, there was well more than "mere existence of a fiduciary relationship" with the Decedent. As such it is clear Rodney, the successor Power of Attorney, can be "retroactively" activated as Power of Attorney of Decedent, Thomas Shelton. The danger of holding otherwise is well stated by Justice Schmidt of the Third District in his dissent:

"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." (A102-103).

CONCLUSION

The undisputed facts of this case clearly show Respondent-Appellee was the fiduciary of the Decedent who ended up Decedent's Real Property. Coupled with the application of Law the burden shifts to him to prove the transaction transferring the Real Estate to him was not fraudulent. He may or may not be able to rebut that presumption. However, it was error for the Trial and Appellate Court to relieve him of that burden.

Respectfully Submitted,
ESTATE OF THOMAS SHELTON
Petitioner-Appellant,

By One of Her Attorneys

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IN THE SUPREME COURT
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RUTH ANN ALFORD, as executor of the ESTATE OF DORIS E. SHELTON, Plaintiff-Appellant RODNEY I. SHELTON, Defendant-Appellee	) Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County Illinois, Case 2014-L-13)) Appellate Court Third District, Case No 3-14-0685)) Honorable Lance R. Peterson Presiding

APPENDIX TO BRIEF OF APPELLANT

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APPENDIX TO BRIEF OF APPELLANT

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GRUNDY COUNTY, ILLINOIS
INVENTORY OF APPEAL
13-P-17
IN THE MATTER OF THE ESTATE OF THOMAS SHELTON, DECEASED, RUTH ANN ALFORD, PETITIONER-APPELLANT, VS. RODNEY I. SHELTON, RESPONDENT-APPELLEE

VOLUME 1- COMMON LAW RECORD
VOLUME 2 – COMMON LAW RECORD
VOLUME 3- COMMON LAW RECORD
VOLUME 4- COMMON LAW RECORD AND
REPORT OF PROCEEDINGS

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

GRUNDY COUNTY, ILLINOIS

FILED

FEB 04 2014

Kaun E. Slattery
GRUNDY COUNTY CIRCUIT CLERK

NO.

Estate of Thomas Shelton

2013-P-17

CONSOLIDATED

Estate of Dora Shelton

2013-P-18

ORDER

Cause coming on for hearing on Respondent Rodney Shelton's Motion to Dismiss, the Court having heard the arguments and being fully advised, it is ORDERED:

(1) Motion to Dismiss under Section 2-615 is denied, for the reasons stated on the record.

(2) Motion to Dismiss under Section 2-619(a)(9) is granted, for the reasons stated on the record.

This is a final and appealable order.

SO ORDERED.

DATE 2/4/14

Lawrence

JUDGE

C 898

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FILED

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

FEB 21 2014

Karen E. Slattery
GRUNDY COUNTY CIRCUIT CLERK

ESTATE OF THOMAS SHELTON Petitioner-Appellant	))	2013-P-17

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 February 4, 2014, ruling as a matter of law that a successor agent under a power of attorney cannot be retroactively activated by showing the first successor agent was incompetent on a previous date.

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 THOMAS SHELTON
Petitioner-Appellant,

By one of its/her attorneys

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STATE OF ILLINOIS)

COUNTY OF GRUNDY)

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

GRUNDY COUNTY, ILLINOIS

FILED

MAR 07 2014

GRUNDY COUNTY CIRCUIT CLERK

ESTATE OF THOMAS SHELTON) 2013-P-17

ESTATE OF DORIS SHELTON) 2013-P-18

REPORT OF PROCEEDINGS had in the above-entitled cause before the HONORABLE LANCE R. PETERSON, Judge of said Court, on the 13th day of October, 2013.

APPEARANCES:

MR. GEORGE C. HUPP

Attorney At Law

Appeared on behalf of Ruth Ann Alford;

MR. DARRELL K. SEIGLER

Attorney At Law

Appeared on behalf of Rodney I. Shelton.

THE COURT: This is 13 P 18, estate of Doris Shelton. There's also 13 P 17, estate of Thomas Shelton.

MR. HUPP: Correct. They're consolidated, your Honor.

THE COURT: Correct. This cause comes before the Court on Mr. Seigler's motion to dismiss amended citation (petition) pursuant to 2-615 of the Code of Civil Procedure. Okay. Mr. Seigler.

MR. SEIGLER: Thank you, your Honor. May I sit while I argue?

THE COURT: Yes, that's fine.

MR. SEIGLER: Thank you. This is coming for hearing on my motion to dismiss amended citation filed previously, your Honor. Mr. Hupp has filed a response to my motion. I did not file a reply. I chose to stand on my petition in light of his response.

In terms of these proceedings, your Honor, the document originally filed is entitled citation. I take that to mean a citation petition in conformity with the probate code, a petition before the court is required in order to seek the issuance of a citation by the court against third parties. That being said and that assumption being made, I have filed a

motion to dismiss pursuant to Section 2-615 of the amended citation petition. I'm certain that the Court has had an opportunity to review. We have all submitted courtesy copies to you. I will just hit the high points in what I think is the real thrust of the issue or issues in the case.

Mr. Hupp's petition for citation critically alleges that Rodney Shelton, my client, was the actual empowered agent under the power of attorney executed by Thomas Shelton, which is attached to his petition as Exhibit C. Now, your Honor, this actual proceeding is only in the estate of Thomas Shelton, in the estate of Doris Shelton, so we are only concerned with the power of attorney of Thomas Shelton, that Exhibit C. He has alleged that by reason of the existence of principle agent relationship under that written power of attorney that fiduciary relationship existed between Thomas and Rodney Shelton at the time the December 1, 2011 deed was executed by Thomas Shelton on his own behalf. The apparent basis for the assertion that a fiduciary relationship existed is in Paragraph 6 of his amended citation petition where it is alleged that at the time of the execution of the deed, and I quote, "Doris Shelton was incompetent." This is the

allegation in its entirety. There are no other allegations pertaining to other facts that might support the conclusion, be it legal or factual or both, that this woman --

THE COURT: I think it's both.

MR. SEIGLER: It's both. That this woman was incompetent. The basis for my motion is that he has to do more than that. Because this is a citation petition doesn't mean under the probate code that the issuance of that citation is automatic. You're not able to just request on behalf of an interested person that the court issue a citation without depending upon the nature of the citation meeting your burden of proof. And --

THE COURT: Hold on. It isn't that they meet their burden of proof. You're saying that the pleading requirements that would apply to any other complaint pursuant to the Civil Procedure Act fact pleading state as we are, also apply to these petitions. In essence, I'm looking at this just like I would a complaint in saying is this a legal conclusion or is it a fact, it is fact specific enough to give you some reasonable basis to know what you're defending against. What are they saying is wrong?

MR. SEIGLER: I believe that's correct, your Honor.

You do have to look at it as any other complaint under Illinois law; however, there's an added aspect to this which I think changes the landscape very much so and that is that this is a fiduciary relationship allegation. And under the citation proceeding, under the structure of citation proceeding under the probate code, if a citation is issued at least under the document that's been filed here, Mr. Hupp is asking you to issue that citation, try the right and title to property and, in essence, shift that burden onto my client as if the incompetent allegation is absolutely true. It is only -- that burden has shifted to him in terms of the presumption of fraud only if the fiduciary relationship is pleaded and proven. That is their burden.

THE COURT: So it has to be proven.

MR. SEIGLER: At least a prima facie case.

THE COURT: It's almost like a summary judgment proceeding. In other words, the pleading itself has to have sufficient proof under the probate code to establish a basis.

MR. SEIGLER: I think so. I think the prima facie description that you see in the case law is what is meant. In other words, enough to survive a motion for a

directed finding. And that's critical because of the fact that the power of attorney itself, which under Illinois law has to be strictly construed, defines when someone is incompetent for purposes of that power of attorney, so the confines of that instrument have to be construed strictly and that is what dictates what happens to the people that are inside that document. He doesn't become an empowered agent unless the things that are described in the instrument occur.

THE COURT: Okay. Incompetence is defined legally notwithstanding this power of attorney anyway, but I understand what you're saying. In addition, it's specifically defined in the power of attorney. Okay. Mr. Hupp?

MR. HUPP: Your Honor, the Court has recognized this. We're at the pleading stage here. We're not at the proof stage. We pled that Doris Thomas's incompetency removed her as agent under her husband's power of attorney thus making Rodney Shelton agent under said power of attorney. There was a deed; therefore, a presumption would arise if proven. We intend to prove that, your Honor.

At this point we are simply at the pleading stage and really his motion to dismiss is

really a motion to strike because it's pursuant to 615. He's not bringing in other affirmative matters. It's simply a pleading stage and we have pled the necessary things to establish a prima facie case, so I think for that reason the motion should be denied and they should be required to answer the petition.

THE COURT: Okay.

MR. SEIGLER: May I just say one thing? I understand exactly what he's saying and a part of me certainly wants to recognize that that's where we should be. I'm a little concerned because this is a citation petition and if we're going to have an evidentiary hearing on his petition for the issuance of a citation where he still has the burden, then I understand what he's saying.

MR. HUPP: Exactly.

MR. SEIGLER: But the request that he has made is that based on his petition you issue a citation. That is a little bit different than the average complaint with an answer and a trial on the merits. That's the only confusion I have here.

MR. HUPP: Look, it's my understanding if they file an answer we are going to have a hearing where I have the burden of proving the facts which lead you to issue

the citation.

THE COURT: You're almost in a contempt mode. Not contempt. What I'm saying is in a contempt proceeding verified petition the burden shifts. If it isn't, you can still have a contempt proceeding but the burden stays on the movant, the petitioner, and I think what Mr. Hupp is saying is he agrees that he has the burden of proof. If we get beyond the pleading stage that his pleading does not shift the burden to you that apparently -- I don't know if his position is it isn't sufficient enough to do that, but it is sufficient enough to state an action for the citation proceeding. I'm not sure, but here's what I'm going to do today: I agree with Mr. Seigler's assessment of the pleading itself. I'm going to strike it without prejudice to just state someone is incompetent is both a legal conclusion and a factual conclusion. It's one of those situations where the law and facts sort of intertwine. There's definition of what incompetent means. I'm not going to say what needs to be pled, but how about the physical or mental condition that caused incompetence. Incompetence isn't a medical condition. It's a status based on the law. And if this were a complaint, a pleading, I agree, right now the only thing in this

complaint in this petition is a legal conclusion. I think you have to state some basis why -- without having to prove them at this stage, what happened that caused you to conclude that she's incompetent. I think you have to put diagnosed with Alzheimer's or dementia, these events occurred at this point in time. There was a limited guardianship in place. I don't know. Do you see what I mean though?

MR. HUPP: Well, we are gathering medical records. One doctor is giving us a little trouble, but we do have records. We can plead facts. I felt for fact pleading that this was sufficient.

THE COURT: I don't think you need to attach all the medical records. I think that, for instance, and again, I don't want to prejudge anything that might be coming on down the line, but if you at least had a diagnosis from a doctor of a condition that at least reasonably could cause someone to be legally incompetent, that's probably enough. Now, that doesn't get Mr. Hupp beyond this hurdle that you're concerned with, Mr. Seigler, and he's acknowledging that.

MR. SEIGLER: There's another hurdle that I may perceive, and I may be wrong on this, but I don't know how. This is a time-based problem. It is temporal in

nature and the actual power of attorney defines for its purposes and for the status of the parties under that power of attorney what incompetency is and I have to disagree. I don't think that if we pull some doctor to say well, you know, I think she's incompetent on November of 2011, but I never made a record of it and I never said so, I don't think that's at all sufficient to get him past his hurdle because the entire premises of his case is based on this power of attorney and nothing else.

THE COURT: Judicial declaration or certification by a physician, and if that happens, then this man steps from successor to attorney-in-fact. Let's read it.

MR. SEIGLER: It's Paragraph 8 of Exhibit C, your Honor. Last page actually of the exhibits of the amended citation petition. That's where he's named as successor.

THE COURT: Okay. Person is unable to give prompt and intelligent consideration to business matters, as certified by a licensed physician. Can someone do that postmortem? I have no idea and I'm not going to judge today.

MR. SEIGLER: The problem, your Honor, is I think that the status of Rodney Shelton as of December 1,

2011, has to be determined by this instrument and I just -- I cannot imagine that a physician can now say actually on November 30th I don't think she could make those decisions and now his fiduciary status arises as a result of a yet heretofore unrecorded opinion from some doctor who is looking back two years.

THE COURT: I don't know. You might be right. Perhaps one of the doctors did come to that conclusion.

MR. SEIGLER: Well, true. I'm not saying that -- all I'm saying is that proof, that fact needs to be within the strict construction language of this power of attorney for this man to have become an attorney-in-fact. So if it's there, it's there, but I think we have to look at this definition of incompetence in order to make that final determination.

THE COURT: Well, for now I agree.

MR. HUPP: His argument is premature, your Honor.

THE COURT: I agree.

MR. HUPP: I think there's other opinions besides from the doctor they treated Doris Shelton as incompetent by having her husband sign a deed without her power of attorney.

THE COURT: You're going to need some law that would basically eliminate some clear language. For

purposes of Paragraph 8, a person shall be considered incompetent if, and it gives you three ways. So whether some other person has an opinion, I don't know that that will ever matter, but I'll leave that to you and I think this is all premature and academic.

Today my decision is this: The pleading that is on file I believe bears only a conclusion. I think it needs some more factual allegations than are there. And I understand what you're saying, Mr. Seigler. The argument will come if and when Mr. Hupp files his amended pleading. Now, under these unique circumstances, I don't know that discovery is what he needs to determine exactly what he can plead factually is complete yet.

MR. HUPP: Well, I'm going to need to get the rest of the medical records, and I may be back here, your Honor, in the next week or so with a contempt request on one particular doctor that we have not heard from. We sent out subpoenas two months ago. One doctor said that they were going to be providing us the records and he has not done that and we're trying to deal with them to find out to comply. If not, I'm going to be back in here.

THE COURT: You're going to file a petition for

contempt and we're going to issue or set it for hearing on the rule. We're dealing with a doctor. My inclination will be you fill out your contempt petition, we notice it up first for an issuance of a rule if that gets the doctor here. If the doctor doesn't show up for the rule, then maybe it gets issued if it's a verified petition and the reality of what can happen if the rule is issued and you fail to show up or do something we'll take baby steps, but I understand what you're saying.

MR. HUPP: I would like 30 days to amend to give me time to do that with the doctor.

THE COURT: I was actually going to suggest 45.

MR. SEIGLER: I don't have a problem, Judge. I'll be gone for much of November anyway.

THE COURT: Normally 30 would be what you would get even if you already had enough to just amend, but I know that you're collecting at least some more information.

MR. HUPP: I'm hopeful that the doctor will come around.

THE COURT: I think you can dismiss it without prejudice with leave to file or strike it, either one. It's the initial pleading stage. Call it whatever you want.

MR. HUPP: It's a 615 motion. It's not a motion to

dismiss.

THE COURT: I don't know if I agree with that. It's a motion to dismiss.

MR. SEIGLER: Striking or dismissal.

THE COURT: Sure. It can be called dismiss with leave to replead. Okay.

MR. SEIGLER: Thank you, your Honor. Should we set a status?

THE COURT: Sure. Do you want to just set it about 45 days out to see what gets filed?

MR. SEIGLER: Why don't we set it 60 days out. That way I might even be able to do a response and move it along a little bit.

THE COURT: Sure.

MR. SEIGLER: Middle of December.

THE COURT: 12th or the 13th, it's a Thursday, Friday.

MR. HUPP: Either one is all right in my calendar as long as it's in the afternoon.

THE COURT: What about December 11th at 2:15? That's a Wednesday.

MR. HUPP: That's okay with me.

MR. SEIGLER: That's fine.

THE COURT: 2:15 on December 11th.

STATE OF ILLINOIS)
) SS:
COUNTY OF GRUNDY)

I, SARA E. OLSON, hereby certify that I reported stenographically the proceedings had at the hearing in the above-entitled cause, and that the above and foregoing is a true, correct, and complete transcript of my stenographic notes so taken at the time and place hereinbefore set forth.

Date: 3-7-14

Sara E. Olson CSR

SARA E. OLSON, CSR

STATE OF ILLINOIS)

COUNTY OF GRUNDY)

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

GRUNDY COUNTY, ILLINOIS

FILED

MAR 07 2014

GRUNDY COUNTY CIRCUIT CLERK

ESTATE OF THOMAS SHELTON) 2013-P-17

ESTATE OF DORIS SHELTON) 2013-P-18

REPORT OF PROCEEDINGS had in the above-entitled cause before the HONORABLE LANCE R. PETERSON, Judge of said Court, on the 4th day of February, 2014.

APPEARANCES:

MR. GEORGE C. HUPP

Attorney At Law

Appeared on behalf of Ruth Ann Alford;

MR. DARRELL K. SEIGLER

Attorney At Law

Appeared on behalf of Rodney I. Shelton.

R 16

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THE COURT: 13 P 17, the estate of Thomas Shelton and also consolidated with 13 P 18, estate of Doris Shelton. And this cause comes before the Court on a motion to dismiss filed by Rodney Shelton; that's to dismiss an amended citation in the probate proceeding. And that is a two-prong motion, a portion based on 2-615 of the Code of Civil Procedure, a portion based on 2-619 of the Code of Civil Procedure. Gentlemen, are you ready to proceed?

MR. SEIGLER: Yes, your Honor.

MR. HUPP: Yes.

THE COURT: Okay. Mr. Seigler.

MR. SEIGLER: Thank you, your Honor. Do you mind if I stay seated?

THE COURT: Sure, that's fine.

MR. SEIGLER: First, your Honor, just in brief chronology, Mr. Hupp, for the executor, filed an amended citation that's actually a petition for citation on December 2nd, 2013. I filed on behalf of Rodney Shelton a motion to dismiss under 2-615 and 2-619 of the Code. Mr. Hupp filed a response to my motion. I filed a reply to his response and latest Mr. Hupp filed a supplemental exhibit to the response to the motion to dismiss, which is what purports to be a physician's report signed by

Dr. Daniel Jurak, J-u-r-a-k.

THE COURT: I received a copy. Did you file the original, Mr. Hupp?

MR. HUPP: File the original what?

THE COURT: Report, the supplemental report.

MR. HUPP: To my knowledge, we did. You don't have that in the file?

THE COURT: I got courtesy copies. I'm not saying it's not there. Don't panic.

MR. HUPP: To my knowledge, our office did that.

THE COURT: Okay. So the original is in the court file. So I got a copy of it. That's fine. I got courtesy copies. I reviewed all of that. I just want to make sure it's in the court file.

MR. SEIGLER: Shall I continue?

THE COURT: Yes.

MR. SEIGLER: I then filed a supplemental reply based just in specific response to the supplemental exhibit, your Honor. The issues are well briefed I think and I'm certain that the Court is fully familiar with the submissions of both of us. I would like to summarize, if I could, my position. I don't want to take too long. There's a lot of law that's cited. I will try to hit high points.

First, I believe that the court issue here, your Honor, despite the fact that the incompetence of Doris Shelton is factually discussed in the pleadings, I believe that's a key allegation, but the real core issue here is the legal status of Rodney Shelton as of December 1, 2011, not his legal status that might be retroactively looked upon by someone in connection with this court proceeding. The executor's claim is founded solely on the power of attorney of Thomas Shelton. That is Exhibit C of the amended petition. It is completely founded on that, on the face of the pleading itself. Rodney Shelton is alleged to occupy the legal status of successor agent under that power of attorney as of that specific date, the date of the deeds at issue, December 1, 2011. That power of attorney is the legal instrument upon which the claim is founded, and as I have briefed, I think fairly completely requires as any other power or contract or legal instrument of significance it requires construction by the Court. Construction by the Court where the substance and words and meanings of a document are unambiguous is a question of law. Here this particular power of attorney is for the period of time prior to the 2011 amendment to the Power of Attorney Act

is a statutory short form power of attorney for property. It contains all of the language including boilerplate definitions that the statute calls for. This power of attorney as and including statutory language is, I would submit, unambiguous and as such as a matter of law in Illinois for -- I couldn't go earlier than about 140 years ago, your Honor, that power is required to be strictly construed. Strictly construed means that you don't include meaning or substance by attempt or implication. It means exactly what it says. I think that what I've said so far today is indisputable under Illinois law. That being said, the executor has alleged that Mr. Shelton was, as of December 1, 2011, the successor or successor agent under the power of attorney based on an allegation outside of the power of attorney that Doris Shelton was incompetent that day.

The entire thrust of my motions both as to the failure of the amended petition, amended citation as a pleading and the affirmative matter that defeats it under 2-619 which I did not submit affidavits because the submission is based on the face of the pleading, the face of that pleading including of course the power of attorney, which is an instrument on which the claim is founded. Paragraph 8 of the power of attorney has to be

strictly construed. It is the singular paragraph that designates a successor agent, agents actually in order and designates when this agent is empowered and truly occupies that legal status.

Paragraph 8 is very simple. It's the statutory language. If the initial agent dies, not here, becomes incompetent, that's what we're here for, resigns or refuses to accept the office of agent, then the successor agents are named in order and then very definitively Paragraph 8 states for purposes of this Paragraph 8, a person shall be considered to be incompetent if and while the person is a minor, not here, or an adjudicated incompetent, there's no adjudication of incompetent as to Doris Shelton and it's not alleged either, incompetent or disabled person under the Probate Act of Illinois, or the person is unable to give prompt and intelligent consideration to business matters, as certified by a licensed physician. That is not alleged in the original amended citation in any manner.

Now, there is the factor that has come into play as of January 30th that Mr. Hupp has submitted a physician's report of Dr. Daniel Jurak. It is not dated. I have to assume, and hopefully Mr. Hupp can

clarify, that this was done and signed in the last couple of weeks. If it was done before December 1, 2011, then on its face it contains information that would be impossible to be set forth because the doctor says that he is basing his opinion in this report from a time period of March 2011 through -- I'm sorry -- from records from 2008 through the date of Doris Shelton's death, which was December 20th, 2012. I'm not certain as to whether Mr. Hupp is including this as a certification by a licensed physician within the meaning of Paragraph 8, but I'm going to assume that. Assuming that, you can't do that. The legal status of Rodney Shelton and his fiduciary relationship that he would occupy with his father cannot be retroactively determined 13 months or more later based upon a physician's report that did not exist on or prior to December 1, 2011. And under Paragraph 8, a certification by a licensed physician, we all know what certifications are, your Honor. Certification is an official statement that something is true, accurate, genuine, et cetera.

THE COURT: You're saying arguably you have that now but it didn't exist before December 1, 2011?

MR. SEIGLER: Yeah, exactly, it did not exist on

that date or before that date and under Paragraph 8 the legal status has to have arisen as of December 1, 2011, the dates of the deeds. It's impossible for what to have occurred by way of a physician's report that is dated January 30th, 2014. For that reason along with the strict construction are requirements and the general law surrounding powers of attorney and the fact that the entirety of the executor's claim at its core is premised and founded on the power of attorney, the relief that is sought under the allegations contained in the amended citation cannot be granted. It cannot form a cognizable legal claim either as a pleading or if we assume that there is a claim stated then the terms of the power of attorney in Paragraph 8 are affirmative matter that completely defeat that claim and those allegations. That is the heart of it.

There are a variety of cases, your Honor, that I have cited that flesh that out a bit, but the executor has the burden of pleading and proving the existence of a fiduciary relationship and here it is alleged to have existed as a matter of law based on a power of attorney. That power of attorney controls requires strict construction and the executor's claim cannot go forward. Thank you.

THE COURT: All right. Thank you. Mr. Hupp?

MR. HUPP: Your Honor, I've had the pleasure in my 36 year career as an attorney to handle cases that are a first impression and I think this is a case of first impression. We have not had the powers of attorneys along for very long, for about 25 years, 26 years. Mr. Seigler, I think, does a very good job of laying out the issue here before the Court. And the issue is can a doctor's certification three years after the fact retroactively activate an agent under a power of attorney. I think it can. I do think that this is a case of first impression. There's no case on this and we might make some new law depending on how you decide this case, your Honor.

Now, he says strict construction. Truly Paragraph 8 does say that 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. She was never an adjudicated incompetent or disabled person, or the person is unable to give prompt and intelligent consideration to business matters, as certified by the physician. Okay. She does not have to be adjudicated. She can simply be certified as a disabled person or as a person who is unable to

give prompt and intelligent consideration to business matters as certified by the licensed physician. The purpose of the physician certifying is simply to establish the fact. The timing as to when that's done is really irrelevant.

Okay. The doctor is saying on December 1st, 2011, Doris Shelton was incompetent; therefore, that meant that on December 1st of 2011, Rodney Shelton is the activated agent under the power of attorney. Now, I think Mr. Seigler's argument here is did Rodney Shelton know that his mother was incompetent so as to -- for him to have knowledge that he now had a duty under the agent, under the power of attorney. And I'm going to point to two specifics things that are already in the court file, your Honor. Number one, the medical records that we have attached to our first response to the motion to dismiss, which, if you look through those, you will see that Rodney Shelton was quite active in the care of his mother around that time. So he was aware of the fact that his mother was in need of that type of care and very likely was aware of the fact that she was incompetent.

Secondly, the deed that forms the basis for this cause of action where he was deeded the farm

was signed by his father, but we also attached a deed in which Doris Shelton was the grantor and Thomas Shelton as her agent under the power of attorney for the property is signing the deed to Rodney Shelton and Regina Shelton. Okay. Further evidence that Rodney Shelton was aware of the fact that his mother was incapable of signing a deed at the time. Because why else would he have his father sign the deed to him for Doris's interest in the farmland? And so we have here a certification by a doctor definitely showing that Doris Shelton was incompetent as a person who was not able to make decisions at the time and therefore that activated Rodney Shelton and, furthermore, Rodney Shelton knew at the time that his mother was incompetent and I think that is very critical here. The whole basis of our basing this on the power of attorney for property, your Honor, is the fact that of the law that says that if he has received a gift when he is the agent under a power of attorney the burden of proving the validity of that gift shifts to him and that's why this was brought in the first place. That's all I have to say.

MR. SEIGLER: Briefly, your Honor.

THE COURT: Yes. So just to clarify, so you're acknowledging, Mr. Hupp, the certification letter from

Dr. Jurak was obviously done after 12/1/11 and I think sometime recently probably as a result of what you discovered in your discovery process thus far?

MR. HUPP: Correct. It's taken some time, your Honor, to get the records. It's taken some time. As you know, doctors are slow to do these things.

THE COURT: I just wanted to clear that up for the record because you asked a question and it wasn't specifically answered.

MR. HUPP: I appreciate that. Thank you.

MR. SEIGLER: What Mr. Hupp submitted to the Court, frankly, I believe it ignores all the law that I have cited, every bit of it. First of all, this isn't about Rodney Shelton's knowledge of his mother's incompetence. If we go to knowledge, your Honor, actually that's kind of an important point because let's say that someone deals with an attorney-in-fact, a third party in a transaction where that attorney-in-fact is acting on behalf of the principle under the power of attorney. How would that third party ever, ever know that they were actually dealing with the person they were supposed to be dealing with other than the terms and descriptions in the power of attorney and that successor agent status? So you would say well, was there an

adjudication? The answer is no. Was there a certified finding by a licensed physician that you can show me? The answer is no. So any knowledge would be whether one of those two things existed, not whether or not someone knew or suspected that Mrs. Shelton was incompetent, because, again, we're confined to this power of attorney and the legal status of this man on the date that the deeds were signed.

Now, it truly is a case of first impression. If the submission by the executor is that you can retroactively make someone something they weren't at the time of the operative event, there is absolutely no law to that effect and it is counter intuitive in every regard. It does not make sense. And let's remember what the burden and questions of fact and law are here; the existence of a fiduciary relationship at the time of a transaction is what kicks in this fraudulent presumption. In other words, an agent under these circumstances under a power of attorney where that's the basis for the fiduciary relationship has to do some self dealing or receive some benefit from the transaction at a time when fiduciary relationship actually exists under this power of attorney; that fiduciary relationship cannot exist unless Paragraph 8

is satisfied. If this were a guardianship or an adjudication of disability, your Honor, for disabled adult, the physician's report would be as a matter of law, statutory law insufficient. It's not within 90 days in terms of evaluation, none of that.

THE COURT: We're not there. This is separate. I understand that argument.

MR. SEIGLER: I just want to clarify that argument, your Honor.

THE COURT: Sure.

MR. SEIGLER: In brief summary, I disagree wholeheartedly that this could be a fact of first impression or that any law in Illinois supports the position of the executor. Thank you.

THE COURT: Okay. This all comes down to that very second line, the person is unable to give prompt and intelligent consideration to business matters, as certified by a licensed physician. It's a very narrow issue. The certification, does it need to have happened before or -- in essence, I think what Mr. Hupp's argument is is that because she was in fact incompetent and that you can have a certification later that retroactively satisfies the requirement of the power of attorney document. That's the argument. Whether or not

we ever make any law with this I think is certainly yet to be determined because are we all going to acknowledge that this is just step one? The only issue that the Court is deciding today is who impacts whose burden down the line.

MR. SEIGLER: I don't agree. This is an issue for citation and they have to prove.

THE COURT: I'm a pragmatist. You two are mired in probate law at this moment. Let's say I grant your motion. It's an issue preclusion. That's all it is. It doesn't end this case. All that does is say he -- he doesn't get the presumption under the POA. If Mrs. Shelton was incompetent at the time she transferred real estate, it's a void transaction, is it not?

MR. HUPP: Your Honor, we're dealing here with Thomas's transfer to Rodney. We have not dealt yet with the issue of Doris. That's separate.

THE COURT: Okay. And Thomas you're saying was not yet -- he was still fit?

MR. SEIGLER: Right. The essential fact is, your Honor, Thomas Shelton signed deeds under -- for his own benefit for himself and for his wife who had appointed him for power of attorney. The attack is on -- because it has to be based on a fiduciary relationship that this

man occupied with someone. The only way that can happen from the executor's perspective is under the Thomas Shelton power of attorney. If Doris Shelton was incompetent, Thomas Shelton and this man stood in a fiduciary relationship. That's what counts and anything he received is presumed to be fraudulent. That's the essence of it.

THE COURT: Okay. Got it. I understand.

MR. SEIGLER: So --

THE COURT: It does resolve the entire cause.

MR. SEIGLER: It does. Okay.

THE COURT: Okay.

MR. HUPP: But we are at the pleading stage here?

THE COURT: Sure.

MR. HUPP: We set forth enough to have a valid pleading, your Honor.

THE COURT: Well, there's two separate issues. There's two separate bases here.

MR. HUPP: I understand. Just for clarification, we have not brought anything in the estate of Doris Shelton to set aside the deed that was done on her farm.

THE COURT: No, I understand.

MR. HUPP: That's not one of the issues here.

THE COURT: I know. The issue I have to decide is

based on 2-615 when you file a pleading that is based entirely on a document, a power of attorney and the specific language that deals with the specific issue that the whole thing hinges on in that very document defeats your claim, then you have not pleaded a case under 2-615. And then I think Mr. Seigler has also just, belt and suspenders, filed a 2-619 motion. If you want to look at it from the 2-619 angle, this pleading, this proceeding is based on, again, a document and the specific language in the document again defeats the claim. So he's saying the document itself requires another attachment to your pleading under 2-615 that you better attach the certification or adjudication to fully plead it, this proceeding under 2-615, and he says if you don't like that, Judge, it doesn't matter under 2-619. When you read the document itself, this certification or adjudication had to occur before 12/1/11, and that's plain language and that's the end of it. Those are the two issues that I have to decide.

MR. HUPP: I don't agree with the Court's statement that that adjudication had to occur before December 1st.

THE COURT: I said that was his argument. I haven't ruled. I fully understand. I understand. I'm saying that is what Mr. Seigler's position is on those

two sections of the Code of Civil Procedure.

Okay. On the 615 motion I'm going to deny that. I'm going to grant the 2-619 motion. I'm going to deny the 615 motion, Paragraph 8, as Doris Shelton was incompetent at the time of the execution of the deeds Rodney Shelton had succeeded. The form, the POA in the first paragraph before the definition says, Paragraph 8, if any agent named by me shall die, become incompetent, resigned, so he's plugged the triggering event which I think takes it out of 615. I think he can leave that and he doesn't have to attach the certification that you say had to happen before. But after reading everything, I agree with Mr. Seigler's argument that I don't think you can retroactively a year or two years later submit a certification or the document that is specifically referred to in the POA and have retroactive effect. I think that we all acknowledge that no doctor certified her as being unable to manage her financial affairs at the time. We all acknowledge there was no adjudication at the time that, in essence, the certification that would trigger that POA has occurred two years later. It's occurred two years after the event. I think the law allows it from everything I've read. So I'm going to deny the 2-615

motion for the reasons I stated, but grant the 2-619 motion. I think that's what you cited.

MR. SEIGLER: It is, your Honor.

MR. HUPP: For clarification purposes, your Honor, this is a final order that is appealable? You don't feel we need certifying language in this?

THE COURT: No. Now that you clarified -- I did understand the potential for future proceedings, but I think I agree with you both.

MR. HUPP: I just needed to know this is a case of first impression I believe.

THE COURT: Right. I agree. I think you both have stated and I think I agree there's no case out there. I think the way Mr. Seigler has put it, the reason it's a case of first impression because there's no case out there that has taken your position, Mr. Hupp. Is that a fair way?

MR. SEIGLER: Or there is no case, yeah, that approaches it, correct.

MR. HUPP: Well, the problem is the power of attorney law was passed in 1987, so that's not a very long time for cases to come up. This is a unique case.

THE COURT: Sure.

MR. HUPP: I think it's an interesting one. The

appellate court needs to make a decision.

THE COURT: I agree. And the appellate court is the place to make new law more so than the trial court usually.

MR. SEIGLER: Do you want an order?

THE COURT: Yes. Thank you, gentlemen.

(Proceeding concluded.)

STATE OF ILLINOIS)
) SS:
COUNTY OF GRUNDY)

I, SARA E. OLSON, hereby certify that I reported stenographically the proceedings had at the hearing in the above-entitled cause, and that the above and foregoing is a true, correct, and complete transcript of my stenographic notes so taken at the time and place hereinbefore set forth.

Date: 3-7-14

Sara E Olson CSR

SARA E. OLSON, CSR

IN THE CIRCUIT COURT OF THE THIRTEEN JUDICIAL DISTRICT
GRUNDY COUNTY, ILLINOIS

FILED

DEC 02 2013

Karen E. Hatty
GRUNDY COUNTY CIRCUIT CLERK

ESTATE OF THOMAS SHELTON	)	
	)	2013-P-17 ✓ consolidated with
ESTATE OF DORIS SHELTON	)	
	)	2013-P-18

AMENDED CITATION PURSUANT TO 755 ILCS 5/16-1

Comes now ESTATE OF THOMAS SHELTON, by its Executor Ruth Ann Alford, by and through her attorneys, Hupp, Lanuti, Irion & Burton, P.C., and for Petition of this court to issue a citation to discover information and/or to recover property against Rodney Shelton and Regina Shelton states as follows:

1. By Order of June 5, 2013 Petitioner was named as Executor of the above captioned estate.

2. At all times relevant and material, including December 1, 2011, on Petitioner's best information and belief, Citation Respondent Rodney Shelton held Power of Attorney as agent of THOMAS SHELTON; and, successor POA for Doris Shelton. See attached **Exhibit A**

3. Citation Respondents were grantees in deeds executed on December 1, 2011 and recorded January 3, 2012; Grantor of which was decedent, THOMAS SHELTON. See attached **Exhibit B.**

4. At the time of the execution of the deeds by THOMAS SHELTON, on information and belief, Citation Respondent Rodney Shelton was still the agent under the power of attorney-property aforesaid.

5. As set forth in pleadings previously filed by Rodney Shelton in this matter, Rodney Shelton held successor POA for THOMAS SHELTON pursuant to Power of Attorney executed on or about January 18, 2005. See **Exhibit C.**

6. Prior to the execution of the deeds in question:
   a) From March 2011 Doris Shelton was observed to have confusion and lack of short term memorization;
   b) Medical treatment records through, and beyond, December 1, 2011 reflect Doris Shelton's continued confusion and cognitive impairment;
   c) Abnormal EEG of 9-15-2011 found "features that would be consistent with diffuse cerebral dysfunction";
   d) On or about October 4, 2011 Doris Shelton was diagnosed with Dementia;
   e) Records for Doris Shelton thereafter reflect progressive decline in cognitive level, disorientation and hallucinations.

7. For reasons, including but not limited to, the progressive effects of the diagnosed Dementia as set forth above, Doris Shelton was unable to manage her affairs due to said mental deficiency and was incompetent at the time of the execution of the foregoing deeds.

8. As Doris Shelton was incompetent at the time of the execution of the foregoing deeds, Rodney Shelton had succeeded to and was the POA under the power of attorney (**Exhibit C**) which created a fiduciary relationship between THOMAS SHELTON and Rodney Shelton.

9. Therefore the conveyances from THOMAS SHELTON to Rodney Shelton, the fiduciary, was presumptively fraudulent.

10. It is the burden of Rodney Shelton to show by clear and convincing evidence that the transaction was fair and equitable, and failing such showing, Petitioner request the said deeds be set aside.

11. Petitioner is unable to prepare a full inventory of the estate and properly administer the estate without initiating a citation action against Rodney Shelton and Regina Shelton.

WHEREFORE, Petitioner prays that a citation issue against Rodney Shelton and Regina Shelton commanding them as follows:

A. To appear to answer questions relevant to the inventory and administration of the estate.
B. Enter an Order setting aside the foregoing deeds and conveyance; and, conveying the subject real estate in to the deceased's Estate; and,
C. For such other relief as the Court may direct.

(x) _____
Executor Ruth Ann Alford,
By one of her attorneys

Michael W Fuller ARDC 6278799
Hupp, Lanuti, Irion & Burton P.C.
Attorney for the Executor
227 W. Madison St.
Ottawa, IL 61350
815-433-3111
815-433-9109

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ILLINOIS STATUTORY SHORT FORM POWER OF ATTORNEY FOR PROPERTY

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

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

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

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

rney-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 Short Form Power of Attorney for Property Law" (including all amendments), but subject to any limitations on or additions to the specified powers inserted 2, or 3 below:

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

a transactions.
institution transactions.
d bond transactions.
ersonal property transactions.
t box transactions.
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.

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

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 tems appropriate, such as a prohibition or conditions on the sale of particular stock or real estate or special rules on borrowing by the agent):

ITATIONS

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

Power to make gifts

wer to name or change beneficiaries or joint tenants

Power to exercise my Trust powers

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

t 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 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 ice.

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Exhibit A

YOUR AGENT WILL BE ENTITLED TO REIMBURSEMEN[T] X ALL REASONABLE EXPENSES INCURRED IN ACTING UND[ER] [TH]IS POWER OF ATTORNEY. STRIKE OUT THE NEXT SENTENCE IF YOU DO NOT WANT YOUR AGEN[T] TO ALSO BE ENTITLED TO REASONABLE COMPENSATION FO[R] 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)

OU WISH TO NAME SUCCESSOR AGENTS, INSERT THE NAME(S) AND ADDRESS(ES) OF 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, e order named) as successor(s) to such agent: my son Rodney I. Shelton
daughter Ruth Ann Alford

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 erson is unable to give prompt and intelligent consideration to business matters, as certified by a licensed physician.

U 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 EQUIRED TO, DO SO BY RETAINING THE FOLLOWING PARAGRAPH. THE COURT WILL APPOINT YOUR AGENT IF THE COURT FINDS THAT SUCH APPOINTMENT 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.

). 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

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

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)

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

Illinois
La Salle } ss.

rsigned, a notary public in and for the above county and state, certifies that Doris E. Shelton 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 d 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 or the agent(s)).

JANUARY 18, 2005

(SEAL)

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

Notary Public

My commission expires

signed witness certifies that Doris E. Shelton 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 vering 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.

JANUARY 18, 2005 (SEAL)

Witness

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

as prepared by:

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

C 96

A46

NAME
STREET ADDRESS
CITY STATE ZIP

OR RECORDER'S OFFICE BOX NO. _____

(The Above Space for Recorder's Use Only)

DESCRIPTION:

5396928
FILED
FOR RECORD
2012 NOV 21 PM 12:51
Paul J. O'Brien
COUNTY RECORDER

ADDRESS: _____

TAX INDEX NUMBER: _____

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

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 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 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 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 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 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 but the agent will not have power under any of the statutory categories (a) through (e) to make gifts of the principal's property, to exercise powers to appoint, 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 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 s 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 le 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 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.

estate transactions. The agent is authorized to: buy, sell, exchange, rent and lease real estate (which term includes, without limitation, real estate subject nd 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 eal estate; grant easements, create conditions and release rights of homestead with respect to real estate; create land trusts and exercise all powers under possess, maintain, repair, improve, subdivide, manage, operate and insure real estate; pay, contest, protest and compromise real estate taxes and assessments; exercise all powers with respect to real estate which the principal could if present and under no disability.

cial institution transactions. The agent is authorized to: open, close, continue and control all accounts and deposits in any type of financial institution es, without limitation, banks, trust companies, savings and building and loan associations, credit unions and brokerage firms); deposit in and withdraw cks on any financial institution account or deposit; and, in general, exercise all powers with respect to financial institution transactions which the principal nd under no disability.

d bond transactions. The agent is authorized to: buy and sell all types of securities (which term includes, without limitation, stocks, bonds, mutual funds of investment securities and financial instruments); collect, hold and safekeep all dividends, interest, earnings, proceeds of sale, distributions, shares, certificates 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 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.

A-47

C 97

(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; 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; 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 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 and compensate others and enter into contingency agreements and other contracts as necessary in connection with litigation; and, in general, exercise all powers with respect to 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 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 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 exercise 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, retailing or other type of business operation) in any form, whether as a proprietorship, joint venture, partnership, corporation, trust or other legal entity; invest in, 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 powers 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 therefor; 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 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 fiduciary account; 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 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 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 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 in all possible ways, 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 limitations in the statutory property power form.

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

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

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

By 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 2011

Thomas F. Shelton

Doris Shelton by Tom 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 Homestead.

Given under my hand and notarial seal, this 1 Day of December 2011

Notary Public
My commission expires: 10/10/13

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

Under the provisions of paragraph C

12-1-11

A 49

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.

A50

C 100

525386

FILED
FOR RECORD

2012 JAN -3 PH 3:38

GRUNDY COUNTY
AUDITOR & RECORDER

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

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): 04-31-200-01A
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

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

Dated this 1st Day of December 2011

Thomas F. Shelton

Thomas F. Shelton

A51

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

Prepared by ATG REsource®

FOR USE IN ALL STATES
Page 2 of 2

452

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 Prinoipal 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.

ILLINOIS STATUTORY SHORT FORM POWER OF ATTORNEY FOR PROPERTY

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

Power of Attorney made this 15 day of FEBRUARY (month) 2005 (year).

Thomas F. Shelton, 950 N Kinsman Road, Seneca IL 61360 SS#359-24-0526
(insert name and address of principal)

my wife, Doris E. Shelton, 950 N Kinsman Road, Seneca IL 61360
(insert name and address of agent)

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 Short Form Power of Attorney for Property Law" (including all amendments), but subject to any limitations on or additions to the specified powers inserted 2 or 3 below:

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

nsactions.
tution transactions.
nd transactions.
sonal property transactions.
x transactions,
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.

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

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

ITATIONS

o the powers granted above, I grant my agent the following powers (here you may add any other delegable powers including, without limitation, xercise powers of appointment, name or change beneficiaries or joint tenants or revoke or amend any trust specifically referred to below):

Power to make gifts

Power to name or change beneficiaries or joint tenants

Power to exercise my Trust powers

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

y have the right by written instrument to delegate any or all of the foregoing powers involving discretionary decision-making to any person or persons t, 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

1.04 Exhibit C

54

(REFERENCE IF YOU DO NOT WANT YOUR AGENT TO ALSO BE ENTITLED TO REASONABLE COMPENSATION FOR SERVICES AS AGENT.)

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

POWER OF ATTORNEY MAY BE AMENDED OR REVOKED BY YOU AT ANY TIME AND IN ANY MANNER. ABSENT AMENDMENT OR REVOCATION, THE AUTHORITY TED IN THIS POWER OF ATTORNEY WILL BECOME EFFECTIVE AT THE TIME THIS POWER IS SIGNED AND WILL CONTINUE UNTIL YOUR DEATH UNLESS A LIMITATION 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)

( ) 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)

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

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, rder named) as successor(s) to such agent: my son Rodney I. Shelton

ughter Ruth Ann Alford

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

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

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.

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 Thomas F. Shelton (principal)

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

natures of agent (and successors)

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

(agent) (principal)

(successor agent) (principal)

(successor agent) (principal)

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

Illinois
La Salle) ss.

ned, a notary public in and for the above county and state, certifies that Thomas F. Shelton
e 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 ing 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 gent(s)).

JANUARY 18 ,2005

(SEAL)

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

My commission expires

d witness certifies that Thomas F. Shelton
he same person whose name is subscribed as principal to the foregoing power of attorney, appeared before me and the notary public and acknowledged 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.

JANUARY 18 2005 (SEAL)

Witness

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

pared by:

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

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

FILED

DEC 11 2013

Karen E. Matting
GRUNDY COUNTY CIRCUIT CLERK

ESTATE OF THOMAS F. SHELTON, Deceased.	)	No. 2013-P-17 Consolidated with
ESTATE OF DORIS SHELTON Deceased.	)	No. 2013-P-18

MOTION TO DISMISS AMENDED CITATION [PETITION FOR CITATION] PURSUANT TO 735 ILCS 5/2-615 & 735 ILCS 5/2-619(a)(9)

Now comes RODNEY I. SHELTON, by his attorney, Darrell K. Seigler of Darrell K. Seigler, Ltd., and for his Motion to Dismiss Amended Citation [Petition for Citation] Pursuant to 735 ILCS 5/2-615 & 735 ILCS 5/2-619(a)(9), states as follows:

ALLEGATIONS OF AMENDED CITATION

1. The most recent Amended Citation (properly characterized as a petition for citation) filed by the Executor is identical in its allegations to the Amended Citation dismissed by this Court on October 16, 2013, except for the following:

A. In paragraph 6 thereof, the Executor alleges various medical matters pertaining to Doris Shelton, occurring prior to the execution of the deeds on December 1, 2011.

B. The medical matters alleged include apparent descriptions from medical records referring to Doris Shelton as having "confusion and lack of short term memorization"; "continued confusion and cognitive impairment"; "features that would be consistent with diffuse cerebral dysfunction" per "abnormal EEG"in September 2011; diagnosis of "dementia"; and a general and conclusory allegation that medical records after October 4, 2011, reflect "progressive decline" in Doris Shelton's "cognitive level, disorientation and hallucinations".

2. From the foregoing allegations, the Executor again conclusorily alleges in paragraph 7 that Doris Shelton was "unable to manage her affairs due to said mental deficiency" and "was incompetent" at the time of the execution of the deeds at issue. In paragraph 8, the Executor alleges a legal conclusion that Rodney Shelton, by reason of the incompetence of Doris Shelton at the time of the execution of the deeds, "had succeeded to and was the POA" under Thomas Shelton's executed Power of Attorney (Exhibit C), thereby rendering the conveyances from Thomas Shelton to Rodney Shelton presumptively fraudulent.

3. The Executor asserts further that the burden is upon Rodney Shelton to show that the transactions at issue are fair and equitable and requests that the Court enter an order setting aside the deeds and conveyances.

4. No citation petition has been filed in the Estate of Doris Shelton as to the conveyance of her interest in the subject properties.

MOTION TO DISMISS WITH PREJUDICE PURSUANT TO 735 ILCS 5/2-615

Respondent submits that the "Amended Citation" before the Court should be dismissed with prejudice as failing to state a cause of action upon which relief may be granted. In support thereof, Respondent submits the following authorities and argument:

Applicable Law

A. A motion to dismiss under Section 2-615 tests the legal sufficiency of a pleading, and a court must accept all well-pleaded facts as true. *Doe v. Calumet City*, 161 Ill.2d 374, 641 N.E.2d 498 (1994); *Estate of Goldstein*, 293 Ill.App.3d 700, 688 N.E.2d 684 (1st Dist. 1997). If, after disregarding any legal and factual conclusions, a complaint does not allege sufficient facts to state a cause of action, the motion should be granted. *Anderson v. Vanden Dorpel*, 172 Ill.2d

399, 667 N.E.2d 1296 (1996). The motion should be granted only if it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. Mere conclusions of law or facts unsupported by specific factual allegations in a complaint are insufficient to withstand a section 2-615 motion to dismiss. *Pooh-Bah Enterprises v. Cook County*, 232 Ill.2d 463, 905 N.E.2d 781 (2009).

B. If a probate citation petition seeks the recovery of property, it must make out cognizable legal claims against the respondent just like any other complaint. *Estate of Hoellen*, 367 Ill.App.3d 240, 854 N.E.2d 774 (1st Dist. 2006). The burden of pleading and proving the existence of a fiduciary relationship lies with the party seeking relief. Once that fiduciary relationship has been shown, then the law presumes that any transaction between the parties by which the fiduciary has profited is fraudulent. Based upon that presumption, the burden devolves upon the dominant party to prove by clear and convincing evidence that the transaction was fair and equitable and did not result from undue influence. *Clark v. Clark*, 398 Ill. 592, 76 N.E.2d 446 (1947); *Lemp v. Hauptmann*, 170 Ill.App.3d 753, 525 N.E.2d 203 (5th Dist. 1988).

To recover property in a citation proceeding, an executor must initially establish a *prima facie* case that the property at issue belongs to the decedent's estate; only then does the burden shift to the respondent to prove his right to possession. *Estate of Casey*, 155 Ill.App.3d 116, 507 N.E.2d 962 (1987).

Where a complaint alleges that a transaction is invalid by reason of a fiduciary relation and on that basis seeks to recover property, the complainant must establish the claim of fiduciary relation by proof that is clear and convincing, establishing not only the existence and period of

the relationship, but also that the transaction occurred at a time when that relationship existed. *Hogg v. Eckhardt*, 343 Ill.246, 175 N.E. 382 (1931).

C. 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, 365 Ill. Dec. 131 (3d Dist. 2012) [citing 755 ILCS 45/2-7(a) and (b) as in effect in 2010]; *Clark v. Clark*, 398 Ill.592, 76 N.E.2d 446 (1947). The 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. *Clark v. Clark*, supra; *Estate of Rybolt*, 258 Ill.App.3d 886 (1994).

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. *Apple v. Apple*, 407 Ill. 464, 95 N.E.2d 334 (1950); *Stahling v. Koehler*, 2013 IL App (4th) 120271 (4th Dist. 2013); *Estate of DeJarnette*, 286 Ill.App.3d 1082, 677 N.E.2d 1024 (1997).

D. In Illinois, 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 (2000); *Carlson v. Glueckert Funeral Home*, 407 Ill.App.3d 257, 943 N.E.2d 237 (1st Dist. 2011); *Amcore Bank v. Hahnaman-Albrecht*, 326 Ill.App.3d 126, 759 N.E.2d 174 (2001); *Estate of Romanowski*, 329 Ill.App.3d 769, 771 N.E.2d 966 (1st Dist. 2002); *Crawford Savings & Loan Assoc. v. Dvorak*, 40 Ill.App.3d 288, 352 N.E.2d 261 (1976); *McHarry v. Bowman*, 274 Ill.App. 487 (1934).

The cited cases engaged in strict construction of powers in connection with the scope, nature and specificity of the powers granted in the instrument. In *Ft. Dearborn Life Insurance*

Co., supra, the issue, required to be determined by strict construction of the instrument, was whether the subject power of attorney was governed by the provisions of the Short Form Act (755 ILCS 45/3-1 et seq. West 1998), which in turn determined whether the agent was statutorily precluded from changing a beneficiary on a life insurance policy because such authority was not expressly granted in the power. In *Amcore Bank v. Hahnaman-Albrecht*, supra, the reviewing court noted that a POA fiduciary relationship results from the creation of an agency relationship by the principal, who has the right to control the agent's conduct. A party alleging the existence of an agency relationship must prove it. Whether such an agency relationship exists, and the scope of the purported authority, are questions of fact which are determined through strict construction of the instrument.

E. The power of attorney at issue was executed by Doris Shelton in 2005 and on its face is an "Illinois Statutory Short Form Power of Attorney for Property", modeled upon the statutory form prescribed in 755 ILCS 45/3-1 et seq., then in full force and effect. 755 ILCS 45/3-3 precisely sets forth the form of a statutory Short Form Power of Attorney, including the exact language contained in paragraph 8 of Thomas Shelton's POA (Exhibit C), regarding successor agent designation and the definition of an "incompetent" agent.

Regarding adjudication of an agent as incompetent or a "disabled person", the Illinois Power of Attorney Act contains a relevant definition: 755 ILCS 45/2-3(c) defines "disabled person" as having "the same meaning as in the Probate Act of 1975". In 755 ILCS 5/11a-2, the Probate Act defines "disabled person" as an adult who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental illness or

developmental disability is not fully able to manage his person or estate. This definition is integral in the statutory procedure for disabled adult guardianships, which requires the filing of a guardianship petition and adjudication by the court that the respondent is a "disabled person", requiring the appointment of a guardian. The Probate Act further provides that a petition for adjudication of disability and appointment of guardian "should be accompanied by a report" which contains the following: (1) a description of the nature and type of the disability and an assessment of how the disability impacts on the ability of the person to make decisions or to function independently; (2) an analysis and results of evaluations of the respondent's mental and physical condition conducted within three (3) months of the date of the filing of the petition; (3) an opinion as to whether guardianship is needed and the type and scope thereof; recommendation as to the most suitable living arrangement and treatment plan; and (4) signatures of all persons who performed the evaluations, one of whom "shall be a licensed physician", and accompanied by a statement of certification, license or other credentials. If for any reason no report accompanies the petition, the court is mandated to order appropriate evaluations to be performed by qualified persons, and a report prepared and filed at least 10 days prior to hearing.

F. Apart from the requirements of statutory guardianship proceedings, in Illinois it is axiomatic that an adult is presumed to be competent to manage his or her legal affairs until the contrary is shown. *Drury v. Catholic Home Bureau*, 34 Ill.2d 84, 213 N.E.2d 507 (1966); *J.H. v. Ada S. McKinley Community Services*, 369 Ill.App.3d 803, 861 N.E.2d 320 (1st Dist. 2006). Under the Mental Health Code of Illinois, no recipient of services shall be presumed legally disabled. This presumption of competence is based on the distinction between mental illness and the specific decisional capacity to exercise or waive legal rights. The presumption of legal

competency, notwithstanding mental illness, attaches even in the criminal context. *In re Phyllis P.*, 182 Ill.2d 400, 695 N.E.2d 851 (1998).

Argument

Critically, the present petition does not contain an allegation that on or before December 1, 2011, Doris Shelton had been adjudicated incompetent or a disabled person, or that a licensed physician had certified that she was unable to give prompt and intelligent consideration to business matters. The language of paragraph 8 of Exhibit C contains the clear, unambiguous and *statutory* definition of an "incompetent" agent.

The power of attorney at issue is a statutory short form power of attorney in the precise form created by statute, containing the exact language as the model paragraph 8 in Section 45/3-3. Paragraph 8 specifically and directly determines the issue of the empowerment or activation of a successor agent. In Illinois, it is well settled that a written power of attorney must be strictly construed so as to reflect the clear and obvious intent of the parties, particularly that of the principal making and executing the instrument. "Strict construction" in Illinois means the confinement of construction to those subjects or applications that are obviously within the terms and purposes of an instrument (or a statute as well). *Khan v. Seidman*, 408 Ill.App.3d 564, 948 N.E.2d 132 (2011). In other words, nothing is to be read into the subject content by intendment or implication; where the language is unambiguous, strict construction mandates that the document or statute "means exactly what it says". *Associated Cotton Shops v. Evergreen Park Shopping Plaza*, 27 Ill.App.2d 467, 170 N.E.2d 35 at 38 (1960).

The crucial issue before the Court is the legal status of Rodney Shelton on December 1, 2011, in relation to his father's power of attorney. Was he at that time an empowered successor

agent? No duty, fiduciary or otherwise, can be attributed to Rodney Shelton unless he achieved that status under the specific terms of the power of attorney signed by his father. Paragraph 8 dictates precisely the manner by which a successor agent is designated and empowered. Doris Shelton was not deceased as of the date of the deeds at issue. She had not resigned or refused to accept the office of agent. Therefore, Rodney Shelton could only become the successor agent by reason of Doris Shelton being "incompetent", as to which paragraph 8 (and Section 45/3-3 of the Short form POA Act) is very specific, definite and precise. Doris Shelton could be considered "incompetent" only through the means specified in paragraph 8, i.e., by adjudication or certification by a licensed physician. Neither have been alleged by the Executor. Without one of those events, Rodney Shelton did not and could not become successor agent under Thomas Shelton's power of attorney (Exhibit C). The Executor instead asks this Court to retroactively adjudicate that Doris Shelton was incompetent on December 1, 2011, thus retroactively creating a fiduciary relationship between Thomas Shelton and Rodney Shelton, all without the knowledge or intent of either of them. Such a result would be entirely inequitable and contrary to Illinois law.

In conclusion, the Executor has failed to plead the existence of a fiduciary relationship between Thomas Shelton and Rodney Shelton created through a power of attorney. The Executor has apparently conducted discovery, including collection of medical records of Doris Shelton, which were presumably utilized to prepare the petition for citation. If Doris Shelton had been adjudicated "incompetent" or certified by a physician to be "unable to give prompt and intelligent consideration to business matters" on or prior to December 1, 2011, the Executor would have presumably mentioned such an event in her petition. If that evidence does not exist

and has not been alleged, Respondent submits that the Amended Citation before the Court should be dismissed with prejudice, since no set of facts could be proved that would entitle the Executor to relief.

MOTION TO DISMISS WITH PREJUDICE PURSUANT TO 735 ILCS 5/2-619(a)(9)

Respondent further submits that the petition before the Court should be dismissed with prejudice pursuant to Section 2-619(a)(9) of the Illinois Code of Civil Procedure, for the reason that the claim asserted is barred by other affirmative matter avoiding the legal effect of or defeating the claim. In support thereof, Respondent submits the following authorities and argument:

Applicable Law

A. The purpose of a Section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact early in the litigation. *Zedella v. Gibson*, 165 Ill.2d 181 (1995). Section 2-619(a)(9) permits involuntary dismissal where the alleged claim is barred by other affirmative matter avoiding the legal effect of or defeating the claim. "Affirmative matter", for purposes of Section 2-619(a)(9), is something in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 639 N.E.2d 1282 (1994). A motion under Section 2-619(a)(9) admits the legal sufficiency of the complaint, admits all well-pleaded facts and reasonable inferences therefrom, and asserts that an affirmative matter outside the complaint bars or defeats the cause of action. *Kean v. Walmart Stores, Inc.*, 235 Ill.2d 351, 919 N.E.2d 926 (2009). An affirmative matter does not include

evidence upon which the defendant expects to contest an ultimate fact stated in the complaint. *Smith v. Waukegan Park District*, 231 Ill.2d 111, 896 N.E.2d 232 (2008). The affirmative matter asserted must be apparent on the face of the complaint; otherwise, the motion must be supported by affidavits or certain other evidentiary matters. The movant carries the initial burden of going forward on the motion as to the affirmative matter; the burden then shifts to the plaintiff, who must establish that the affirmative matter asserted either is unfounded or requires the resolution of an essential element of material fact before it is proven. *Van Meter v. Darien Park District*, 207 Ill.2d 359, 799 N.E.2d 273 (2003).

B. An example of affirmative matter defeating a claim based on contract is set out in *Beesley Realty & Mortgage Co. v. Busalachi*, 28 Ill.2d 162, 190 N.E.2d 715 (1963). There the Illinois Supreme Court held that where the plaintiff failed to satisfy an essential requirement of a contract prior to the agreed-upon closing date, that fact completely defeated his claim for specific performance. The claim was dismissed pursuant to Section 2-619(a)(9).

C. Respondent further adopts and incorporates the authorities cited in subparagraphs B - F of his Section 2-615 motion, as if fully set forth herein. Of particular relevance are the authorities cited which involve fiduciary relationships existing as a matter of law through a power of attorney, and the rule in Illinois that a written power of attorney must be strictly construed so as to reflect the clear and obvious intent of the parties.

Argument

The "affirmative matter" which defeats the Executor's claim are the express terms and definitional provisions of paragraph 8 of Thomas Shelton's power of attorney (Exhibit C). The petition for citation is founded upon that instrument, but its allegations do not refer to any of the

substantive terms or content of paragraph 8, including the definition of "incompetent" as it applies to the disqualification of the initial agent and the empowerment of a successor agent.

Even if the allegations of the petition are deemed true as to all medical matters alleged, the purely conclusory claim that Doris Shelton was "incompetent" on December 1, 2011, is defeated by the requirements of paragraph 8 that an agent be deemed "incompetent" by adjudication or physician certification. The 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*.

In conclusion, Respondent submits that the Executor's claim is defeated by affirmative matter pursuant to Section 2-619(a)(9), and that the Amended Citation should be dismissed with prejudice.

WHEREFORE, Respondent, RODNEY I. SHELTON, requests that this Honorable Court enter an order dismissing the Amended Citation with prejudice, pursuant to Section 2-615; alternatively, that the Court enter an order dismissing the Amended Citation with prejudice pursuant to Section 2-619(a)(9); and for such other and further relief as the Court deems just and proper.

RODNEY I. SHELTON, Respondent

By: _____
DARRELL K. SEIGLER, His Attorney

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FILED

IN THE CIRCUIT COURT OF THE THIRTEEN JUDICIAL DISTRICT JAN 08 2014
GRUNDY COUNTY, ILLINOIS

Karen E. Slattery
GRUNDY COUNTY CIRCUIT CLERK

ESTATE OF THOMAS SHELTON	)	2013-P-17 consolidated with
ESTATE OF DORIS SHELTON	)	2013-P-18

RESPONSE TO MOTION TO DISMISS

Comes now ESTATE OF THOMAS SHELTON, by its Executor Ruth Ann Alford, by and through her attorneys, Hupp, Lanuti, Irion & Burton, P.C., and in response to Certain Citation Respondent's, Rodney Shelton, "Motion to Dismiss Amended Citation (Petition) Pursuant to 735 ILCS 5/2-615" states as follows:

In ruling on a section 2-615 motion to dismiss, the court must accept as true all well-pleaded facts in the complaint and all reasonable inferences which can be drawn therefrom. .. The question presented by a motion to dismiss a complaint for failure to state a cause of action is whether sufficient facts are contained in the pleadings which, if established, could entitle the plaintiff to relief. *Feltmeier v. Feltmeier* 207 Ill.2d 263, 267, 798 N.E.2d 75, 79 (Ill.,2003). Thus the issue on a 2-615 Motion is sufficiency of pleadings, not whether one has proved their case. With respect to a Motion brought pursuant to 735 ILCS 5-2-619, if the grounds do not appear on the face of the pleading attacked a Motion brought "shall be supported by affidavit"

Upon the filing of a petition by the representative of the estate the court shall order a citation to issue for the appearance before it of any person whom the petitioner believes "(1) to have concealed, converted or embezzled or to have in his possession or control any personal property, books of account, papers or evidences of debt or title to lands which belonged to a person whose estate is being administered in that court or which belongs to his estate or to his representative or (2) to have information or knowledge withheld by the respondent from the representative and needed by the representative for the recovery of any property by suit or otherwise. The petition shall contain a request for the relief sought." 755 ILCS 5/16-1 .

As noted by the Appellate Court, Third District, Petitions under the foregoing statutes "shall contain a request for the relief sought...and [w]here the petitioner seeks to have the right and title to property determined by the court, the petition must be sufficient to state a cause of action and to afford the respondent an opportunity to prepare a defense." *Matter of Shugart's Estate*, , 401 N.E.2d 611, 81 Ill.App.3d 538 (3rd Dist., 1980).

In this case, as alleged in the Estate's Citation and set forth in pleadings filed by Defendant in this matter, Defendant held successor POA for THOMAS SHELTON pursuant to Power of Attorney executed on or about January 18, 2005. As alleged in the Estate's Citation, at the time of the execution of the deeds in question Doris Shelton Doris Shelton 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 allegation is supported by specific allegations of facts regarding DORIS SHELTON's inability to manage her affairs.

As alleged in the Estate's Citation, Doris Shelton therefore being incompetent at the time of the execution of said deeds, the power(s) of attorney created a fiduciary relationship between THOMAS SHELTON and Rodney Shelton, and the conveyance from THOMAS SHELTON to Rodney Shelton was presumptively fraudulent. The alleged facts are clearly spelled out and afford Defendant an opportunity to prepare a defense. Moreover, as a basis for his 2-619 Motion Respondent appears to rely on his 2-615 Motion and fails to include any support by way of Affidavit or otherwise to support said Motion.

By contrast, although not required at the pleading stage, attached hereto as **Exhibit A** are specific records in support of Petitioner's Amended Citation and as **Exhibits B** and **C** full records supporting DORIS SHELTON's inability to manage her affairs before and after the operative date in question. These records are not a conclusory, they clearly reflect Records showing steady decline in cognitive ability since at least March of 2011. And, a care read of said records finds the Citation Respondents were aware of said decline.

Similarly as cited by Respondent, in *Estate of Hollen* 367 Ill.App.3d 240, 854 N.E.2d 774 (1st Dist 2006), wherein the Petitioner presented uncontroverted evidence that the decedent at issue

was suffering from progressive dementia and incapable of making decisions, the Appellate Court affirmed the lower Court award against Respondent in that case *after evidentiary hearing*. In *Clark v Clark* 398 ILL.592. 76 N.E.2d 446 (IL 1948), cited by Respondent, the Illinois Supreme Court affirmed the Trail Court decree setting aside deeds and leases *after evidentiary hearing*. In *Lemp v Hauptmann*, 170 Ill.App.3d 753, 525 N.E.2d 203 (5th Dist 1988), cited by Respondent. the Appellate Court reversed the Trial Court's directed verdict in favor Defendant *after evidentiary hearing*, and remanded finding Plaintiff had presented sufficient evidence (at hearing) to show a fiduciary relation had existed. In *Estate of Casey*, 155 Ill.App.3d 116, 507 N.E.2d 962 (4th Dist. 1987), cited by Respondent, the Appellate Court affirmed (despite error in the Jury instructions) the Trial Court Jury decision made *after evidentiary hearing* finding property at issue belonged to the Estate.

The alleged fact of Doris Shelton's incompetency, supported by records thereof, if proven effectively removed her as agent under her husband's power of attorney thus making Rodney Shelton agent under said Power of attorney; and, therefore raises the presumption of fraud in the transaction wherein Rodney Shelton was conveyed property by the principal Thomas Shelton.

WHEREFORE, the Estate having met its burden of pleading, the Estate prays this Honorable Court enter an Order denying Respondents Motion; and, for such other relief as the Court deems appropriate.

Executor Ruth Ann Alford,
By one of her attorneys

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

FILED
JAN 27 2014
GRUNDY COUNTY CIRCUIT CLERK

ESTATE OF THOMAS F. SHELTON, Deceased.	)	No. 2013-P-17 ✓
		Consolidated with
ESTATE OF DORIS SHELTON Deceased.	)	No. 2013-P-18

REPLY TO RESPONSE TO MOTION TO DISMISS

Now comes Respondent, RODNEY I. SHELTON, by his attorney, Darrell K. Seigler of Darrell K. Seigler, Ltd., and for his Reply to Response to Motion to Dismiss, states as follows:

1. The crux of the matter is the legal status of Doris Shelton and Rodney Shelton under Thomas Shelton's power of attorney (Exhibit C). In essence, the Executor asserts that Rodney Shelton's legal status as successor agent under the POA can be retroactively determined by this Court, apart from and despite the terms and provisions of the power of attorney itself. In practical effect, the Executor asks this Court to adjudicate *nunc pro tunc* the incompetence of Doris Shelton, thus declaring retroactively an agency (and fiduciary) relationship between Thomas Shelton and Rodney Shelton all pursuant to a power of attorney. Illinois law precludes such an approach. Our courts have no power, even by way of a true order *nunc pro tunc*, to make the record show an order which the court had not previously actually made; such an order is an entry made on a judgment previously rendered to make the record "speak now for what was actually done then". *Gagliano v. 714 Sheridan Venture*, 144 Ill.App.3d 854, 494 N.E.2d 1182 (1986).

A power of attorney creates an agency relationship and thereby a fiduciary relationship as a matter of law. In that relationship, the principal has the right to control the conduct of the

agent, and the agent has the power to act on behalf of the principal. *State Security Insurance Co. v. Frank B. Hall & Co.*, 358 Ill.App.3d 588, 630 N.E.2d 940 (1st Dist. 1994). In the case at bar, such an agency relationship would presume that Rodney Shelton could have acted on behalf of Thomas Shelton with third parties. To verify the existence and extent of such authority, a third party viewing the subject power of attorney would necessarily and rightly assume that Doris Shelton had been adjudicated or physician certified to be incompetent. Neither of those events happened and neither is alleged by the Executor. As a result, Rodney Shelton was not and could not be empowered as successor agent.

2. Further, in asserting that there are sufficient allegations in the citation petition as to Doris Shelton's incompetence, the Executor misapprehends the nature of the dismissal motions filed by Respondent. In Illinois, the construction and legal effect of a written instrument are questions of law. *Estate of Offerman*, 153 Ill.App.3d 299, 505 N.E.2d 413 (3d Dist. 1987). A power of attorney, to properly determine and reflect the clear and obvious intent of the parties, must be strictly construed. *Ft. Dearborn Life Insurance Co. v. Holcomb*, 316 Ill.App.3d 485, 736 N.E.2d 578 (2000). The intention of parties to a contractual instrument must be determined from the instrument itself; the construction to be placed on the instrument, where no ambiguity exists, is a question of law. *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill2d 440, 581 N.E.2d 664 (1991).

The motions to dismiss (Sections 2-615 and 2-619) seek dismissal on the basis that the claim of the Executor, founded completely on Exhibit C, is fatally insufficient as a pleading and also contains on its face affirmative matter which defeats that claim. The Executor erroneously contends that conclusory allegations of "mental deficiency", incompetence and inability to

manage affairs on the part of Doris Shelton, as of the date of the deeds at issue, are sufficient to constitute a proper claim for recovery of property under the circumstances presented.

The Executor acknowledges that to have the right and title to property determined by this Court, her petition must be sufficient to state a cause of action like any other complaint. [*Matter of Shugart's Estate*, 81 Ill.App.3d 538, 401 N.E.2d 611 (3d Dist. 1980)]; she must make out cognizable legal claims against Rodney Shelton, including pleading and proving a fiduciary relationship. [*Clark v. Clark*, 398 Ill.592, 76 N.E.2d 446 (1947)]. On the face of the citation petition, the Executor alleges the existence of a fiduciary relationship by one means only: through the power of attorney signed by Thomas Shelton, which designated Rodney Shelton as a successor agent. Respondent's attack on the pleading is premised upon rules of construction applicable to powers of attorney. As discussed in the Motion (pp. 4 - 6), a power of attorney is required to be strictly construed as to intent and meaning; this rule is well established in Illinois.

3. Under the foregoing principles and rule of construction, Thomas Shelton's power of attorney, on its face a Statutory Short Form property power, unambiguously and expressly defines an "incompetent" agent for the purpose of empowering a named successor agent (see paragraph 8 of Exhibit C of the Petition). As with any legal instrument, its unambiguous language mandates that the power of attorney be construed to mean "exactly what it says". *Associated Cotton Shops v. Evergreen Park Shopping Plaza*, 27 Ill.App.2d 467, 170 N.E.2d 35 at 38 (1960). Strict construction of powers granting authority to another has been the rule in Illinois for a very long time. In *Morse v. Richmond*, 97 Ill.303 (1881), the Illinois Supreme Court held that where authority is conferred upon an agent by a formal instrument, as by a power of attorney, there are two rules of construction to be carefully attended to: (1) the meaning of general words

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in the instrument will be restricted by the context, and construed accordingly; and (2) the authority will be construed strictly, so as to exclude the exercise of any power which is not warranted, either by the actual terms used or as a necessary means of executing the authority with effect (citing its prior decision in *Bissell v. Terry*, 69 Ill.184 (1873).

A much more recent decision is also instructive. *Estate of Nicholls v. Nicholls*, 2011 IL App (4th) 100871, 355 Ill.Dec. 635, 960 N.E.2d 78 (4th Dist. 2011), involved an action to recover funds obtained by the respondent by changing the beneficiaries on certificates of deposits owned by decedent; the respondent changed the beneficiary on the certificates to himself upon death of the principal. He claimed authority to do so on the basis of his appointment as power of attorney by the decedent during life. The respondent was the primary agent designated, and the question on appeal was whether he had the power and authorization to change beneficiaries of accounts under the terms of the POA. The trial and appellate courts determined that he did not have such authority or power, based upon the express language of the POA itself. The reviewing court noted that a power of attorney must be strictly construed so as to reflect the "clear and obvious intent of the parties" (citing *Ft. Dearborn Life Insurance Co. v. Holcomb*, 316 Ill.App.3d 485 [2000]).

4. The medical records attached by the Executor to her Response, without affidavit or other authentication, cannot form the basis of a cognizable claim that Doris Shelton was incompetent on December 1, 2011, for purposes of her position as agent under Thomas Shelton's power of attorney. That factual and legal conclusion can only be based upon the unambiguous language of the power of attorney itself, which defines an "incompetent" agent in paragraph 8 for the <u>specific purpose</u> of invoking the authority of a named successor.

5. The Executor cited several decisions in her Response, apparently for the proposition that the Petition as filed somehow mandates an evidentiary hearing. Respondent disagrees; the cited authorities do not stand for that proposition.

In *Estate of Hoellen*, 854 N.E.2d 774 (2006), the fiduciary relationship found to exist after evidentiary hearing was not based in any manner on a power of attorney, but instead upon a course of conduct by the respondent designed to manipulate and financially exploit an adjudicated disabled adult while in a trust or dominant position.

Likewise, *Clark v. Clark*, 398 Ill. 592 (1948), did not involve a power of attorney establishing an agency relationship. The decision was mentioned in the Motion to Dismiss only to confirm the burden of pleading and proving a fiduciary relationship, and the "fraudulent transaction" presumption that results once a fiduciary relationship has been shown.

In *Lemp v. Hauptmann*, 170 Ill.App.3d 753 (1988), a power of attorney was involved, but was one which expressly appointed the defendant as the initial agent, who thereafter personally drafted checks on the decedent's account, naming himself as payee. The power of attorney signed by the decedent and directly appointing defendant was drafted by the defendant's nephew, an attorney. A general fiduciary relationship arose through the power and existed between the grantor and the grantee as a matter of law. *Lemp* is critically dissimilar in its facts, since Thomas Shelton's POA did not appoint Rodney Shelton as primary agent, but only as a successor agent under paragraph 8, which expressly provides when an existing agent can be considered "incompetent" for purposes of empowering a named successor agent.

In *Estate of Casey*, 155 Ill.App.3d 116 (1987), no power of attorney was involved. The transactions at issue involved monetary transfers of the decedent's accounts, purportedly on

behalf of the decedent but in fact to the respondents. The *Casey* opinion was cited by Respondent, only for the purpose of discussing the requirement of proving a *prima facie* case that the property belongs to the decedent's estate, and the subsequent shifting of the burden to the respondent that occurs under Illinois law.

6. There is no Illinois appellate decision similar on the key facts presented in this cause, i.e., the designation of a successor agent alleged to have been empowered through the incompetence of the primary agent under the terms of a power of attorney, an instrument indisputably required to be strictly construed in a judicial interpretation.

7. The Executor asserts that Respondent's motion brought under Section 2-619 "fails to include any support by way of affidavit or otherwise". This ignores the express language of Section 2-619 and case law interpreting it. Where the grounds for dismissal "do not appear on the face of the pleading attacked, the motion shall be supported by affidavit". 735 ILCS 5/2-619(a); *Thurman v. Champaign Park District*, 960 N.E.2d 18, 355 Ill.Dec. 575 (4th Dist. 2011). Respondent's grounds under Section 2-619 are based entirely on the face of the citation petition and the attached written instrument upon which the claim is founded (735 ILCS 5/2-606). Thomas Shelton's power of attorney (Exhibit C) is precisely such an instrument.

8. In summary, Respondent submits that the petition is fatally defective as a pleading under Section 2-615. Further, on its face it contains affirmative matter defeating the Executor's claim under Section 2-619, as it does not contain any allegation that Doris Shelton was determined to be "incompetent" by court adjudication or by certification of a licensed physician as required by paragraph 8 of Thomas Shelton's power of attorney. Therefore Rodney Shelton could not be made or considered a successor agent under that power as of December 1, 2011.

WHEREFORE, Respondent, RODNEY I. SHELTON, requests that this Honorable Court enter an order granting his Motion to Dismiss, pursuant to Section 2-615 and 2-619, and for such other and further relief as the Court deems just and proper.

Respectfully Submitted,

DARRELL K. SEIGLER, Attorney for
Respondent, RODNEY I. SHELTON

Darrell K. Seigler, LTD.
Attorney at Law
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Attorney Reg. No: 03124470

FILED

IN THE CIRCUIT COURT OF THE THIRTEEN JUDICIAL DISTRICT
GRUNDY COUNTY, ILLINOIS

JAN 30 2014

Karen E. Slattery
GRUNDY COUNTY CIRCUIT CLERK

ESTATE OF THOMAS SHELTON	)	
	)	2013-P-17 consolidated with
ESTATE OF DORIS SHELTON	)	
	)	2013-P-18

SUPPLEMENTAL EXHIBIT TO RESPONSE TO MOTION TO DISMISS

Comes now ESTATE OF THOMAS SHELTON, by its Executor Ruth Ann Alford, by and through her attorneys, Hupp, Lanuti, Irion & Burton, P.C., and attaches hereto as and for **Exhibit D** to its previously filed "RESPONSE TO MOTION TO DISMISS"[1] the licensed physician certification, verification of DORIS SHELTON's incompetency and inability to manage her personal affairs, inability to give prompt and intelligent consideration her personal affairs and inability to give prompt and intelligent consideration to business matters on December 1, 2011.

Executor Ruth Ann Alford,
By one of her attorneys

Michael W. Fuller
ARDC No. 62787999
Hupp, Lanuti, Irion & Burton P.C.
Attorney for the Executor
227 W. Madison St.
Ottawa, IL 61350
815-433-3111
815-433-9109

[1] Filed in response to In response to Certain Citation Respondent's, Rodney Shelton, "Motion to Dismiss Amended Citation (Petition)..."

IN THE CIRCUIT COURT OF THE THIRTEEN JUDICIAL DISTRICT
GRUNDY COUNTY, ILLINOIS

ESTATE OF THOMAS SHELTON	)	
	)	2013-P-17 consolidated with
ESTATE OF DORIS SHELTON	)	
	)	2013-P-18

PHYSICIAN'S REPORT

The undersigned Licensed Physician, Dr. Daniel M. Jurak, D.O., having a medical office at 935 East Division Street, Diamond, IL 60416, on oath state:

1. The nature and type of disability of the Decedent, Doris Shelton:

Dementia, diagnosed on or before October 4, 2011, associated with Parkinson's disease with a start of care date of October 13, 2011.

2. My evaluations of Respondent's mental, physical, and educational condition, adaptive behavior, and social skills are:

With an onset of confusion in March 2011, Decedent exhibited continuing diminishment of mental and cognitive ability with progressive worsening through the date of her death in 2012.

As of, and including, December 1, 2011, Decedent, Doris Shelton, was incompetent, unable to manage her personal affairs, unable to give prompt and intelligent consideration her personal affairs and unable to give prompt and intelligent consideration to business matters

These evaluations are based upon:

- My own examination(s), continuing care and observation(s) of Doris Shelton from 2008 through the date of her death
- Review 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 I have found to be accurate and reliable

3. Signature(s) of Person(s) performing evaluations (One of which must be a licensed physician):

(X) _____
Dr. Daniel M. Jurak, D.O.

VERIFICATION

I, the below subscribing physician certify under penalties as provided by law pursuant to Section 1-109 of the code of Civil Procedure, that the statements set forth in the above Physicians Report 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 he verily believes the same to be true.

EXHIBIT D

(X) Dr. Daniel M. Jurak, D.O.

Hupp, Lanuti, Irion & Burton P.C.
227 W. Madison St.
Ottawa, IL 61350
815-433-3111
815-433-9109 FAX
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UNITED STATES OF AMERICA
STATE OF ILLINOIS COUNTY OF GRUNDY
IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

FILED

FEB 03 2014

Karen E. Slattery
GRUNDY COUNTY CIRCUIT CLERK

ESTATE OF THOMAS F. SHELTON, Deceased.	)	No. 2013-P-17 Consolidated with
ESTATE OF DORIS SHELTON Deceased.	)	No. 2013-P-18

SUPPLEMENTAL REPLY TO RESPONSE TO MOTION TO DISMISS

Now comes Respondent, RODNEY I. SHELTON, by his attorney, Darrell K. Seigler of Darrell K. Seigler, Ltd., and for his Supplemental Reply to Response to Motion to Dismiss, states as follows:

1. On January 30, 2014, the Executor filed through her attorneys a "Supplemental Exhibit to Response to Motion to Dismiss", incorporating a document purportedly signed by Dr. Daniel M. Jurak, D.O., entitled "Physician's Report". That document is undated. The report takes the form and substance of a statutorily required report as defined in 755 ILCS 5/11a-9. Such a report is required to be submitted to the court with any petition for adjudication of disability and appointment of a guardian under the Illinois Probate Act.

2. There has been no petition for adjudication of disability and appointment of guardian for Doris Shelton, and she is now deceased.

3. Though submitted in the form of a physician's report, the Jurak report notably deviates from the required content of such a report, in that the statute requires that a report be based on analysis and evaluation of mental and physical condition performed within three (3) months of the date of filing of a petition for guardianship. On its face, the Jurak report is based upon Dr. Jurak's examinations and care of Doris Shelton from 2008 "through the date of her death", which

was December 20, 2012. From that period of care and examination of past treatment records, Dr. Jurak rendered an opinion that on December 1, 2011, Doris Shelton was incompetent and unable to manage her personal and business affairs. The operate date (December 1, 2011), critical in this proceeding, is far removed from the statutory time limit for an evaluation by a physician (within three months of filing).

4. As is argued in the Motion to Dismiss and initial Reply of Rodney Shelton, the legal status of Rodney Shelton under Thomas Shelton's power of attorney must be determined by strict construction of that legal instrument. For that reason, Dr. Jurak's report and opinions are not relevant or material to the issues before the Court. Doris Shelton cannot be adjudicated or certified *retroactively* to be incompetent, for purposes of appointment and empowerment of a successor agent, under the POA some 25 months ago.

WHEREFORE, Rodney I. Shelton, Respondent, prays that this Honorable Court grant his Motion to Dismiss, and for such other and further relief as the Court deems just and proper.

Respectfully Submitted,

DARRELL K. SEIGLER, Attorney for
Respondent, RODNEY I. SHELTON

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Attorney Reg. No: 03124470

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
Defendant-Appellee.	)	Judge, Presiding

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

[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.*

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¶ 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).

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"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.

JUSTICE SCHMIDT, concurring in part and dissenting in part.

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.

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.