No. 126956

IN THE SUPREME COURT OF ILLINOIS

In re ESTATE OF JOHN W. McDONALD, III, Deceased.	On Appeal from the Appellate Court of Illinois, Second Judicial District, Gen. No. 2-19-1113
SHAWN McDONALD, *Petitioner-Appellant/Cross-Appellee,* v. ELLIZZETTE McDONALD, *Respondent-Appellee/Cross-Appellant.*	There Heard on Appeal from the Circuit Court of the 16th Judicial Circuit, Kane County, Illinois Case No. 17-P-744 The Honorable **James R. Murphy**, Judge Presiding.

BRIEF OF APPELLEE/CROSS-APPELLANT ELLIZZETTE McDONALD
CROSS-RELIEF REQUESTED

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BRIEF OF RESPONDENT-APPELLEE/CROSS-APPELLANT ELLIZZETTE McDONALD

POINTS AND AUTHORITIES

STATEMENT OF FACTS

A. Introductory Statement.

Supreme Court Rule 341(i) directs that a Statement of Facts is not required in an appellee's brief "except to the extent that the presentation by the appellant is deemed unsatisfactory." S.Ct.R. 341(i). Because of insufficiencies in the brief of appellant Shawn McDonald, Administrator of the Estate of John W. McDonald, III (Shawn), a Statement of Facts is offered here, and to supplement the Statement required by the request for cross-relief of appellee Ellizzette McDonald (Ellizzette).

Rule 341(h)(6) mandates that a Statement of Facts in an appellant's brief contain necessary facts "stated accurately and fairly without argument and comment, and with appropriate reference" to the pages of the record where these asserted facts can be found. S.Ct.R. 341(h)(6). Shawn's Statement of Facts does not fully meet these requirements.

All too often, Shawn's brief makes supposed factual statements without direct reference or citation to the record on appeal. His Statement also contains improper commentary, editorializing, and argument. Apparently written to follow the bromide, "brief by character assassination," Shawn's brief repetitively directs this Court's attention to irrelevant supposed "bad acts," rather than focusing on the relevant facts necessary to an understanding of that appellant's case.

The supposed "bad acts" Shawn highlights are not borne out by the record. For example, Shawn spends much time lamenting a purported lack of fingerprinting of Ellizzette as somehow indicative of some unproven identity issue for the appellee, suggesting she has a "felony" conviction. These tedious discussions have no bearing on any decision or judgment order appealed from. They are also misleading.

The record on appeal Shawn attaches to his brief reveals during a hearing on May 1, 2019, Ellizzette's counsel described to the trial court she had "already tried to comply twice" with fingerprinting (R78), and all that was necessary to obtain her fingerprints was "written authorization" (R 79). Shawn's counsel nevertheless deemed this "not * * * acceptable," even after Ellizzette's counsel advised the court the fingerprints "already exist." Counsel for appellant nevertheless asserted, "we need our own fingerprints." (R 80) The trial court responded it had "no faith in the Sheriff's Office in getting the fingerprints," despite Ellizzette having already been fingerprinted there, at least once or twice. (R 80)

None of this has any apparent relevance to whether the legislature in 1973 changed the Dead Man's Act to prevent a trial court from barring Ellizzette's testimony of heirship at trial, or whether the trial court correctly directed a finding against Ellizzette on her petition for letters of administration based on the reasons it gave for granting the motion.

Shawn also attempts to suggest a "felony conviction" following Ellizzette's attempts to volunteer assistance in the aftermath of the September 11, 2001, attack on New York City. The actual State of New York documentation he references, however, does not show any felony conviction; it shows an inadmissible misdemeanor plea, involving probation almost 17 years before the trial. (C 1955-59) And that probation was terminated early. (*Id.*)

The instances where the appellant failed to meet Rule 341(h)(6) – and by extension Rule 341(h)(7), within the Argument portion – are too prolix to set out with sufficient detail in this brief. Ellizzette respectfully suggests that this Court disregard statements in the appellant's brief made without supporting record references, or that countervail the record.

B. The Court appoints Shawn as John's Guardian.

John McDonald III, M.D, Ph.D. (John) was a world-renowned physician and scientist, an associate professor of neurology at the Johns Hopkins University School of Medicine, and the director of the International Center for Spinal Cord Injury at the Kennedy Krieger Institute. Shawn is John's younger brother.

On March 7, 2017, Shawn filed an *ex parte* Petition for Appointment of Guardian for a Disabled Person with the Clerk of the Circuit Court of Kane County, to obtain guardianship over John's person and estate. (C 145) In support of his petition, Shawn submitted a physician's report that stated John suffered from "bipolar disorder with manic and depressive episodes" and "alcohol use disorder." (C 546)

On May 30, 2017, the trial court granted Shawn's petition (C 145), and John was declared a disabled person *in absentia.* (C 404). When made aware of these proceedings, John promptly objected to the order appointing Shawn his plenary guardian. (*Id*.) No trial on guardianship ever took place, however.

C. John Marries Ellizzette.

On July 11, 2017, John married Ellizzette. (C 763-64) Raymond Carl Bement (Bement) solemnized the marriage. (R 337–38, C 351-54) The wedding ceremony occurred in Paris, Edgar County, Illinois, and a Marriage Application and Record, Marriage Certificate, and Marriage License were issued by Edgar County. (C 760-65) The trial court took judicial notice of the Edgar County Marriage Application and Record, Marriage Certificate, and Marriage License. (C 760-65, C 1058)

D. John's Death and Shawn's *ex parte* Appointment as Administrator.

On December 11, 2017, John died intestate in Paris, Illinois. (C 21) Four days later, on December 15, 2017, Shawn filed a Petition for Letters of Administration (petition for letters) seeking his appointment as administrator of John's estate. (C 19-22)

Shawn's petition for letters omitted Ellizzette from the list of John's heirs. (C 21) Shawn's Affidavit of Heirship, though, conceded and affirmed that "on July 11, 2017, the decedent [John] participated in a wedding ceremony with Ellizzette Duvall Minnicelli." (C 21, ¶6) The petition nevertheless concluded "at the time the wedding ceremony was performed, the decedent lacked the capacity to consent to the marriage and the marriage was therefore void *ab initio.*" (*Id.* ¶7.)

The record fails to depict any notice by Shawn to anyone, let alone Ellizzette, that he filed his petition for letters, despite Shawn's sworn admission that Ellizzette and John participated in a wedding ceremony on July 11, 2017. (C 19-23) Nor did Shawn provide notice to anyone of when he intended to present this petition. (*Id.*)

The following Monday, December 18, 2017 – the same day John was cremated in accordance with his wishes in Edgar County (C 111-12) – Shawn's counsel presented the petition for letters on an *ex parte* basis in Kane County, some 225 miles and 3½ hours away. (C 24) An Order Appointing Administration, bearing the date December 18, 2017, was entered by Judge John Noverini, then "filed and entered" on December 19, 2017. (*Id.*). Despite the lack of notice of any time and date for presentment to the court, the Order states "THE COURT FINDS due notice has been given to all parties according to law." (*Id.*)

At the same time, also without notice to Ellizzette, Shawn presented a proposed Order Declaring Heirship (the heirship order). This heirship order, also containing the date

December 18, 2017, was "filed and entered" on December 19, 2017. (C 26) The order states, "[a]fter considering evidence of heirship," John's only surviving heirs were his siblings and parents. (*Id.*) The heirship order omitted any mention of Ellizzette. (*Id.*)

On December 22, 2017, Letters of Office Decedent's Estate were issued which advised that Shawn had been appointed independent administrator of John's estate. (C 27)

E. Shawn's Verified Petition for Declaration of Invalidity of a Marriage under the Illinois Marriage and Dissolution of Marriage Act, and Further Motions and Pleadings.

Also on Friday, December 22, 2017, Shawn filed a verified "Petition for Declaration of Invalidity of a Marriage" (petition to invalidate) pursuant to section 5/301 (750 ILCS 5/301(1)) of the Illinois Marriage and Dissolution of Marriage Act (the Marriage Act). (C 29-31) Filed in his capacity of administrator of John's estate, Shawn's petition to invalidate stated "on July 11, 2017, Decedent participated in a marriage ceremony with Ellizzette Duvall Minnicelli in Edgar County, Illinois" and "[a] copy of the Certification of Marriage is attached hereto as Exhibit 'A'." (C 29 ¶¶2-3) Shawn's petition to invalidate further alleged "due to the fact that the Decedent was under plenary guardianship of his person and estate at the time he participated in the marriage ceremony, he lacked the legal capacity to consent to the marriage." (*Id.* ¶3.) Shawn's verification attested he "has full knowledge of the facts relating to the foregoing Petition and that he has read the foregoing Petition and knows the contents thereof and the same are true." (C 30)

On Wednesday, December 27, 2017, Shawn filed a notice of hearing advising that his Petition for Declaration of Invalidity of a Marriage was scheduled for January 4, 2018, at 9:30 a.m. before Judge Noverini. (C 36) Shawn's notice affirmed under oath he served Ellizzette by mail at her Paris, Illinois, address. (C 36-37)

On January 4, 2018, Ellizzette filed her notice of appearance and a motion for substitution of judge. (C 39, 41-42) The matter was then assigned to Judge James R. Murphy. (C 40)

On February 17, 2018, Ellizzette filed her verified Response to Petition for Declaration of Invalidity of a Marriage. (C 113-16) In her response, Ellizzette affirmed she and John participated in a marriage ceremony, and "further aver[red] that, beyond 'participating in a marriage ceremony' with the Decedent, she and the Decedent were in fact married on the referenced date, as is demonstrated by the referenced Certification of Marriage" attached to the verified petition. (C 113, ¶2)

Ellizzette "den[ied] that the Decedent was disabled prior to his death, and further denie[d] that the purported appointment of Shawn as guardian was in any way warranted by fact or law." (C 113, ¶1) She also denied "[t]hat due to the fact that the Decedent was under plenary guardianship of his person and estate at the time he participated in the marriage ceremony, he lacked the legal capacity to consent to the marriage." (C 114, ¶3)

Ellizzette affirmed that she and John were well "aware of Shawn's years-long, extensive, improper, and unjustified pattern and practice of attempting to wrongfully seize control of [John's] assets and otherwise harass [John and Ellizzette], including but not limited to his efforts to obtain an unjustified guardianship over the Decedent's person and estate." (*Id.* ¶¶4-5) Ellizzette denied that Shawn had first learned on November 16, 2017, that she and John were married. (*Id.* ¶6)

On March 7, 2018, Shawn filed a "Notice of Voluntary Withdrawal of Pleading," stating he "voluntarily withdraws without prejudice his Petition to Declare the Invalidity

of a Marriage filed in this cause on December 22, 2017." (C 193) No order actually allowing Shawn to withdraw his verified petition to invalidate was ever sought or entered.

F. Ellizzette's Motions to Vacate Order Appointing Administration and Order of Heirship and to Reconsider Order Appointing Administration and Order of Heirship.

On January 17, 2018, Ellizzette filed a Motion to Vacate Order Appointing Administration and Order of Heirship (motion to vacate) (C 50-70), and a parallel Motion to Reconsider Order Appointing Administration and Order of Heirship (motion to reconsider) (C 74-94). Ellizzette's two motions, and the combined reply she filed in support of them (C 210-220), explained that the identified orders should be vacated and/or reconsidered because, among other things:

a. The orders were void as the circuit court did not have jurisdiction over the parties to enter them and were entered without joining all necessary parties. (C 78-81)

b. John's and Ellizzette's marriage enjoyed and enjoys a strong presumption of validity under Illinois law, including under the Second District's controlling decision in *Larson v. Larson,* 42 Ill.App.3d 467, 472-73 (2d Dist. 1963) (C 215);

c. Shawn's order of guardianship over John did not compel the conclusion that John was unable to consent to marriage in Illinois, citing this Court's decision in *Pape v. Byrd*, 145 Ill.2d 13, 21 (1991) (C 213-14);

d. Ellizzette, as John's spouse, had a right superior to Shawn to act as John's administrator and was entitled to the notice the Probate Act required of any petition to appoint an administrator (C 54-56, C 78-80);

e. Shawn specifically and intentionally failed to provide any notice to Ellizzette of his petition for letters, let alone the 30 days' notice the Probate Act required for such petitions (*id.*);

f. Despite his knowledge of John's and Ellizzette's marriage, Shawn failed to challenge the marriage based on John's purported lack of capacity during John's lifetime (C 216);

g. Section 302(b) of the Marriage Act prevents any attempt to invalidate John and Ellizzette's marriage based on an alleged incapacity to consent after John's death. *See* 750 ILCS 5/302(b) (C 215-16); and

h. Because the Marriage Act bars any attempt to declare Ellizzette's and John's marriage invalid on the basis that John did not have capacity to consent, the marriage was and is valid as a matter of law and Ellizzette is John's sole heir at law. (C 216)

G. Shawn's Response to Ellizzette's Motions to Vacate and Reconsider, and The Trial Court's Order Denying the Motions.

On March 7, 2018, Shawn filed his Response to Ellizzette's Motion to Reconsider the Order Appointing Administration and Order of Heirship. (C 194-97) Shawn's Response again admitted Ellizzette participated in a marriage ceremony with John, but contended John lacked the capacity to enter a "marriage contract" solely because of the guardianship order. (C 194) Declining to address the controlling authority Ellizzette cited (C 194-97), Shawn only relied upon Section 22(b) of the Probate Act (755 ILCS 5/11a-22(b)). (*Id.*) Under the heading, "Trade and contracts with a person with a disability," Section 22(b) as cited provides, "[e]very note, bill, bond or other contract by any person for whom a plenary guardian has been appointed or who is adjudged to be unable to so contract is void as against that person and his estate, but a person making a contract with the person so adjudged is bound thereby." (C 194-96) Shawn thus argued that pursuant to this section, "the 'marriage' contract entered into on July 11, 2017, is void," that "the Decedent was not married at the time of his death and his heirs at law are his parents and siblings," and Ellizzette was "legally a stranger to the Decedent" not entitled to any notice of his petition for letters. (*Id.*)

Shawn's response further contended that Judge Noverini, originally hearing the matter, "was well aware of Ellizzette's existence as she had been in his courtroom on a

number of occasions during the guardianship proceedings," and "Ellizzette's claim to be married was revealed by her then current counsel in Judge Noverini's courtroom on November 16, 2017." (C 195), Shawn specifically stated, "[w]ith full knowledge of the circumstances of the Decedent, Judge Noverini signed the order declaring the Decedent's sole heirs at law to be his parents and siblings. If the judge had not believed the information contained on the affidavit of heirship to be accurate, he would not have signed the order declaring heirship." (*Id.*)

On April 18, 2018, the trial court entered an order stating only "the motion to vacate is denied." (C 240) The record does not reflect any basis for this ruling. The same order directed that "Ellizzette McDonald shall file her Petition for Appointment of Administration and Affidavit of Heirship on or before May 2, 2018; pursuant to section 9-7 of the Probate Act." (*Id.*)

H. Ellizzette's Petition for Letters of Administration and Shawn's Response.

On May 1, 2018, Ellizzette filed her verified Petition for Letters of Administration (Ellizzette's petition) and her Affidavit of Heirship, affirming that she "is a surviving spouse of the decedent and is legally qualified to act, or to nominate a resident of Illinois to act, as Administrator." (C 275-77) Since John had no children, Ellizzette alleged she was John's sole heir. (*Id*.)

Shawn's Response to Ellizzette's Petition for Letters did not contest any of Ellizzette's factual allegations, including that she is "a surviving spouse of the decedent." (C 297-300) Instead, Shawn contended Ellizzette's petition should be denied because it was untimely. (*Id.*) Shawn argued that, although Ellizzette's petition was filed within the time allowed by the trial court, it was filed more than three months after letters of

administration were issued, and the trial court lacked jurisdiction to extend the time Ellizzette could file her petition. (C 298-99)

I. Shawn Moves the Trial Court to Take Judicial Notice of the Marriage Documents filed of Record.

On October 2, 2018, Shawn filed a motion for the court to take judicial notice of the "Certified Copy of the Edgar County, Illinois Marriage Application and Record of John Wood McDonald, III and Ellizzette Duvall Minnicelli" for the trial on Ellizzette's petition. (C 760) Shawn's motion attached John and Ellizzette's Certification of Marriage (C 762); their Marriage License (C 763-64); and their Marriage Application and Record. (C 765)

Ellizzette's response argued the motion either "should be denied or, to the extent the Motion is granted in whole or part, the resulting Order should be extremely clear that the Marriage Documents themselves – and not the factual contents thereof – are being judicially noticed." (C 969) The trial court overruled these objections; its order granting Shawn's motion stated only "[t]he Motion for Judicial Notice is granted and the Court hereby takes judicial notice of the exhibits attached thereto." (C 1058)

J. Ellizzette's Counsel Withdraws.

On September 18, 2019, just over two months prior to the trial date on Ellizzette's petition, her counsel withdrew. (C 1978, 1986)[1]

K. Shawn's Motion *in limine* to Bar Ellizzette from Testifying.

On October 16, 2019, Shawn moved *in limine* to prevent Ellizzette from testifying "that she is the surviving spouse of John." (C 2005-2039) Shawn argued allowing Ellizzette to testify to her marriage would violate the Dead Man's Act. (C 2005-06) His motion cited

[1] The record reveals that Ellizzette's attorneys withdrew because she was unable, at that time, to pay the more than $80,000 in attorneys' fees she owed them. (C 2229)

Laurence v. Laurence, 164 Ill. 367 (1896), *In re Estate of Diak*, 70 Ill.App.2d 1 (1st Dist. 1966), and *In re Estate of Enoch*, 52 Ill.App.2d 39 (1st Dist. 1964). (*Id.*)

On October 30, 2019, Ellizzette, now acting *pro se*, filed her response to Shawn's motion *in limine*. (C 2045-51) Ellizzette argued "the plain text of 735 ILCS 5/8-201(d) states that, 'No person shall be barred from testifying as to any fact relating to the heirship of the decedent,'" and therefore her testimony as to her marriage to John, relating directly to heirship, was not barred by the Dead Man's Act. (C 2047) The trial court granted Shawn's motion *in limine,* stating, "Illinois law says that the spouse cannot testify as to heirship, and there's cases cited, and they weren't responded to." (C 2224) Its order *in limine* barred Ellizzette from testifying "to the extent [she] is going to testify as to the purported marriage." (*Id.*)

L. The Trial on Ellizzette's Petition.

Trial on Ellizzette's petition was held November 18, 2019. (R 243) She presented three witnesses: Diane Boyer, Dr. Visar Belagu, and Raymond Bement. (R 276-388)

1. Diane Boyer.

Diane Boyer testified she lived in Paris, Illinois. (R 277) Ms. Boyer knew John but was prevented on foundation grounds from testifying whether she was aware of his intention to marry Ellizzette. (*Id*.) After the trial court directed her to establish when, where and how the witness knows Ellizzette or John, Ellizzette asked "when was the first time you met Dr. McDonald, to the best of your recollection?" (R 278) Although Boyer testified "when you and John and several other people I knew were at the U of I," the trial court struck the answer as non-responsive and lacking foundation. (*Id*.)

Boyer testified she had the opportunity to interact with Ellizzette and John in the previous three years. (R 278-79) Boyer was involved in the preparations regarding John and Ellizzette's marriage (R 283), was first made aware of it "probably a month before [Ellizzette] got married." (*Id.*) The trial court prevented Boyer from testifying to any independent conversations with John about his intentions to marry Ellizzette or preparations for the marriage ceremony. (R 284)

Boyer answered "yes" to whether she "believe[d] that my husband knew what it meant to be married, that he was capable of knowing what the duties and responsibilities were to be married." (R 289) When Shawn then objected after the answer was given, the trial court sustained the objection on foundation grounds. (*Id.*) Boyer testified to her opinion that John and Ellizzette were living together happily (R 292), that she took Ellizzette and John to dinner three or four days after their wedding (R 292-93), and other people were aware that John and Ellizzette were to be married. (R 294)

2. Dr. Visar Belagu.

Dr. Visar Belagu testified he is a scientist who lives in Baltimore, Maryland. (R 296) Dr. Belagu was aware of John's and Ellizzette's intention to marry. (R 297) Dr. Belagu had conversations with his and John's friends regarding John's intentions and "John's will, desire, and such to marry" Ellizzette. (R 298)

Dr. Belagu met Ellizzette in March 2004, when he first went to work for John in St. Louis. (R 300) The trial court sustained as irrelevant whether Dr. Belagu was aware after 2004 that Ellizzette was in relationship with John. (R 300) Also sustained on relevance grounds was whether it was Dr. Belagu's "opinion that John and [Ellizzette] understood the responsibility of being husband and wife." (R 300-01) The trial court further sustained

an objection to whether Dr. Belagu ever witnessed "John in any way to be incapacitated or disabled or incapable of rendering astute decisions or everyday decisions or being able to care for himself on a day-to-day basis." (R 301) The trial court further sustained non-specific objections to whether Dr. Belagu had "any concerns that John could not conduct his personal affairs" (R 315), and whether he "believe[d] John was happily married." (R 315) Dr. Belagu was able to testify he had the "opportunity to witness John and [Ellizzette] after [their] marriage interacting with each other." (R 312)

Dr. Belagu discussed the guardianship several times with John (R 320), including that John was being evaluated by healthcare professionals. (R 322) Dr. Belagu testified John was "livid" that "a doctor [John] had never seen wrote a physician's note on behalf of Shawn to the Court." (R 323)

Dr. Belagu worked in a professional capacity with John during 2017 and talked to him two or three times a week. (R 303, 307) The conversations were both personal and professional. (R 307) John kept Belagu "up to date on the things he was doing, and some of it related to work we had done before." (*Id*.) "[A] lot of the imaging stuff was discussed, MRI imaging, human connectome imaging, because that was something we were working on before." (R 307-08)[2] The trial court sustained as irrelevant any answer to whether Dr. Belagu ever felt "responsibility to contact the medical board, the scientific board the IRB, or any institutional board in regard to [John's] ability to conduct his duties professionally." (R 311)

[2] "The human connectome describes the complete set of all neural connections of the human brain. It thus constitutes a network map that is of fundamental importance for studies of brain dynamics and function." O. Sporns, The Human Connectome (2012).

As Dr. Belagu further related in his testimony, in the summer of 2017 John asked him to "do some work evaluating a company on some technology," for which he and John took trips together. (R 308) John and Dr. Belagu also worked on a scientific paper during the summer that was accepted for publication before John died but published posthumously. (R 309-10) Dr. Belagu further testified John accepted a position on an international level commencing in 2018. (R 311)

3. Ray Bement.

Raymond Bement testified he is a licensed clinical social worker. (R 361) Bement knew Ellizzette and John since 1982, when all three attended the University of Illinois. (R 339) Bement was aware that John and Ellizzette were in a relationship after 1985 (R 341), and Bement reconnected with Ellizzette in 2015. (R 343) Bement learned from John in 2017 that John and Ellizzette were engaged, when "John called me on the phone and told me." (R 345)

Bement participated in preparations for a marriage ceremony between John and Ellizzette. (R 347) After discussing this with John and Ellizzette over a two-to-three-month period "about what it meant to be in a relationship in our 50s," Bement went "through a series of questions with John and [Ellizzette] to prepare for – to determine whether or not [Bement] would marry" them. (R 347, 348)

On July 10, 2017, Bement attended a Ketubah signing in John and Ellizzette's home in Paris, Illinois. He explained:

> The Ketubah is the – like what Christians would call a marriage license, meaning what one party's bringing to the relationship; and what the other party's bringing to the relationship, and its done on a very formal piece of parchment, usually a lambskin. It's very beautiful, actually. (R 354)

Bement performed the wedding ceremony between John and Ellizzette on July 11, 2017, in their home in Paris, Illinois. (R 351-52) It was Bement's idea to officiate the ceremony. (R 362)

Bement signed the wedding certificate for John and Ellizzette on their kitchen table. (R 352) After he performed the ceremony in Edgar County, Bement, John, and Ellizzette went to Allerton Park, where more secular activities were performed. (R 352-53)

After John and Ellizzette's marriage, Bement had the opportunity to interact with them, both personally and professionally. (R 354) The trial court sustained as irrelevant whether Bement was "involved in a project that included [John] and [Ellizzette] and the NFL, the NHL, and various other elite sports teams with the Human Connectome Project after [Bement] performed [the] marriage ceremony." (R 355) The trial court similarly sustained objections to whether Bement had the opinion that: John was disabled (R 355), was incapable of caring for himself (R 356), or whether, based on his professional licensure, he ever felt the need to report any concerns regarding John (R 356-57). The court further sustained as irrelevant whether Bement believed John and Ellizzette were happily married. (R 356)

Bement testified he knew Ellizzette by other names, such as Elle, Lisa, and Lizzy, but her formal name was something other than that. (R 371) Bement knew her last name as both Blaydes and Duvall. (R 373)

M. Shawn's Motion for Directed Finding.

After Ellizzette rested, Shawn brought an oral motion for directed finding on the validity of the marriage. (R 377 – 378). Shawn's counsel argued, "[t]he case law in Illinois

with respect to this couldn't be clearer. The law says you must have two witnesses to a marriage." (R 378)

Next, counsel argued the:

> Illinois Probate Act provides that before a marriage can be conducted where the -- where one participant is a ward of the court like John McDonald, III, that you or the probate court must conduct a best-interest hearing.
>
> We know, and you can take judicial notice of the fact, that there was a guardianship proceeding in this case. You can take notice of the fact that John McDonald, III, was made a ward of this court on a plenary basis without any capacity whatsoever. And we know based on the record before you that no one knew of the marriage until November of 2017.
>
> The Probate Act says under those circumstances, if a marriage is to occur and be valid, then a best interest hearing *must* be conducted by the Court to determine whether the marriage of two parties, one of which is Mr. McDonald *** is in his best interest. That was not done. The best-interest hearing, if you found it was a valid marriage, would then result in an order, and the order would be issued to a county clerk indicating that the marriage could take place.
>
> More importantly, Judge, this is not, as the statute says, a matter of just a simple preponderance of the evidence. It must be clear and convincing evidence that it's in the best interest of the ward. We have not heard any testimony in this case that would indicate that this marriage is valid based on that statute. That's number one.
>
> Number two, we also have the probate provision, which I cited in my motion in limine which you have a copy of, or the response to the motion in limine reply, which indicates that a ward cannot enter into a contract with any other person unless -- and in this particular case it says he can't enter into a contract, and a marriage is a civil contract. And if they do enter into a contract, the law says, in the statute that I quoted, that the contract is invalid and its void as to the ward.
>
> Those are the two bases for our argument that this is not a valid marriage. Plus there's no evidence that there was a valid marriage other than what Mr. Bement said, and Mr. Bement said he conducted a ceremony.
>
> There's no evidence of it other than what he said, and for those reasons I do not believe that she has shown in this case, Ms. McDonald, that she is an heir of the Decedent. (R 378-81)

Without referencing Shawn's motion that the Court take judicial notice at trial of the marriage documents or the Court's order taking judicial notice of these documents, counsel continued:

> It would have been a simple proposition for her to produce a marriage license, a marriage application, and a marriage certificate. More importantly, it would have been very simple for Mr. Bement to do that. They chose not to do that and they have not shown by a preponderance of the evidence, if that's the standard you are going to use.
>
> But if you look at the best interest of John and you look at the Probate Act, the clear and convincing standard would be the one that would be required for the best-interest hearing. I know you can't conduct the best-interest hearing now and the reason you can't is because my client, Shawn McDonald, was deprived of being able to invalidate the marriage because he didn't learn about it until November 2017. (R 381)

Apparently referring to the petition to invalidate Shawn, filed but purported to be withdrawn, counsel stated:

> Indeed you will see pleadings that were initiated by my co-counsel in the guardianship case where she attempted to do that, but because of Mr. McDonald's untimely death, that never occurred. (*Id.*)

Counsel concluded:

> I think it's pretty clear, Judge, based on the record * * * that they haven't proven their case and that you should dismiss their claim, the claim that Ms. McDonald is an heir of the Decedent, as a matter of fact and as a matter of law. (R 381-82)

When the trial court informed Ellizzette that Shawn's counsel had made a motion for directed finding, she asked, proceeding *pro se*, "[w]hat is a directed finding." (R 382) When informed "[t]that means that the case would be over because you haven't proven your case" (*id.*), Ellizzette responded:

> I would like to know what can be done about the fact that opposing counsel has blatantly lied about their knowledge of the wedding. It was known by Shawn even prior to July that John and I were getting married, and, in fact there was evidence ascertained to show that, in fact, Shawn was very aware

> that John and I were married. And now here he comes. He didn't petition to invalidate the marriage while John was alive. No, he instead waited until after he – until John wasn't here speak for himself because he knew what John had already stated in another court.
>
> They were well aware of the marriage and the guardianship was a fraud on the Court, and they were well aware of that as well. Documents used to bring the guardianship case were written by – allegedly written by a physician who's also now stated they did not write those documents. But unfortunately, we didn't have the opportunity to invalidate the guardianship. (R 382-83)

Ellizzette continued:

> I shouldn't be the one having to defend the validity of my marriage. And, in fact, if you want to challenge the validity of the marriage, your case should be brought against the Edgar County clerk's office.
>
> My husband and I followed the rules according to the Edgar County circuit clerk. We produced the documentation we were required to produce. We filled out the application. We waited for them to contact us and tell us that our marriage application for a license had been granted, at which time we picked that up; and we had an interfaith marriage ceremony in Edgar County, Illinois in Paris, in my home. Afterwards, we had a religious celebration in Monticello.
>
> And if we're here for the truth, let's speak to the truth of the matter. I had a legitimate marriage to my husband. He testified to that even in the other court. And, again, it shouldn't be me who suddenly has to sit here and defend the legitimacy of my marriage when I already have a government-issued marriage certificate from a government circuit clerk's office in Edgar County, ***. (R 383-84)

In reply, Shawn's counsel argued, again without referencing the order taking judicial notice of the Marriage Documents:

> If they wanted to prove it, all they had to do is prove the marriage certificate, and the reason they didn't is because they know they can't. They didn't bring the marriage certificate in here. They didn't bring the application. They didn't bring the license in here. You should ask yourself why they didn't do that. (R 386-87)

Ellizzette now responded:

> My counsel, in fact, produced a marriage license application and marriage certificate, which you continued to try and challenge. Ms. Ogle came to the Court to represent that she had issued the marriage certificate license in Edgar County, but Mr. Kinnally wasn't part of the case then. (R 387)

N. The Trial Court's Ruling on the Directed Finding Motion.

In granting the motion for directed finding, the trial court first ruled that "[n]either the longstanding relationship nor the alleged competence of the Decedent at the time of the purported marriage are relevant to whether the marriage was valid or void." (R 389) Instead, the court specifically expressed that Ellizzette had to present a valid application for a marriage license and a ceremony performed in Edgar County, witnessed by two witnesses, to present a *prima facie* case on the validity of the marriage. (R 389-90)

Again without reference to the order taking judicial notice of the marriage documents, the trial court ruled, "[i]t would have been simple to present the evidence of a marriage license and certificate of application and have some witness testify about that, but that was not done." (R 391)

The trial court then found: "Petitioner did not present a *prima facie* case of a valid marriage ceremony under the circumstances such as would be sufficient to meet her burden of proof on all of the elements." (R 390 – 391) The trial court additionally stated:

> And while it is not as clear as Mr. Kinnally [Shawn's counsel] presents as to the case law precedents -- and in that I'm referring to the arguments that Petitioner had when she was represented by counsel during motion practice on a motion for judgment on the pleadings -- it is clear that there was an order finding and adjudicating Decedent as a disabled person and in immediate need of plenary guardianship and that there was no best-interest hearing held; that the punitive [sic] marriage was not known to the Administrator until November 2017; and that the marriage was not properly witnessed or licensed or subject to a best-interest determination by the probate court. (R. 391-92)

Ellizzette timely filed her notice of appeal on December 18, 2019. (C 2243)

O. The Appellate Court's Opinion.

On December 23, 2020, the Second District Appellate Court affirmed in part and reversed in part in an unpublished order. Its opinion was later filed as published on February 2, 2021. *In re McDonald*, 2021 IL App (2d) 191113.

The appellate court in its opinion held the trial court abused its discretion and committed reversible error by its order *in limine* barring Ellizzette from testifying regarding her heirship, in the process holding section 8-201(d) of the Dead Man's Act explicitly authorized the testimony the trial court barred. *Id.* ¶¶82-83. The appellate court also rejected Shawn's position that *Laurence v. Laurence*, 164 Ill. 367 (1896), remains good law, even after the legislature's 1973 amendment to the Act. *Id.* ¶83. The appellate court additionally rejected Shawn's contention that Ellizzette forfeited review of this ruling by not making an offer of proof, as the trial court knew and understood that Ellizzette would testify to her marriage with John. *Id.* ¶85.

The appellate court additionally considered the four bases on which the trial court granted its directed finding – no evidence the marriage was licensed; no evidence of a valid marriage in Edgar County; no evidence of two witnesses to the marriage; and no best interest hearing – and rejected each one. *Id.* ¶¶92-105.

The appellate court, however, rejected Ellizzette's contentions that the trial court erred: in granting Shawn's petition for letters and entering its order of administration without notice to Ellizzette (*id*, ¶¶53-55); in declining to vacate or reconsider (*id.* ¶56); in failing to grant Ellizzette's motion for judgment on the pleadings (*id.* ¶¶70-73); and in refusing to grant Ellizzette a continuance so she could retain counsel at trial. (*Id.* ¶¶57-67)

ARGUMENT

I. The Standard of Review is *de novo*.

When ruling on a motion for directed finding, a trial court engages in a two-prong analysis. *People ex rel. Sherman v. Cryns*, 203 Ill.2d 264, 275 (2003). The court first determines whether the plaintiff presented a *prima facie* case as a matter of law by "proffering at least 'some evidence on every element essential to [the plaintiff's underlying] cause of action.'" *Id*., citing *Kokinis v. Kotrich*, 81 Ill.2d 151, 154 (1980). (Emphasis in original.) A trial court's determination that plaintiff failed to present a prima facie case is reviewed *de novo*. *Sherman*, 203 Ill.2d at 275. Even if a trial court makes some remarks indicating it proceeded to the second step of the analysis, the ruling must be read in its entirety to determine what standard of review is appropriate. See *Hatchett v. W2X, Inc*., 2013 IL App (1st) 121758, ¶37. Because the entirety of the trial court's ruling makes clear it ruled Ellizzette failed to present a *prima facie* case of a valid marriage, the ruling should be reviewed and reversed on a *de novo* basis.

Further, while a ruling on the motion *in limine* may be reviewed for an abuse of discretion (*Dep't of Transportation v. Dalzell*, 2018 IL App (2d) 160911, ¶ 66; *City of Quincy v. Diamond Construction Co*., 327 Ill. App. 3d 338, 342–43 (4th Dist. 2002)), where the issue presents a question of law, the review is *de novo*. (*Illinois State Toll Highway Authority v. South Barrington Office Center*, 2016 IL App (1st) 150960, ¶¶ 31–33). Since the issue presented here has only to do with the trial court's interpretation of the Dead Man's Act, the *de novo* standard of review applies.

II. Probate Act Section 11a-17(a-10) Does Not Require Court Approval Before a Ward Can Marry Of His Or Her Own Accord.

Shawn moved in the trial court for directed finding on four bases and the appellate court rejected each one. Now forfeiting any claim of error regarding three of these, Shawn raises only one before this Court: that there was no best-interest hearing held before John and Ellizzette married. (PLA, p. 10) The appellate court soundly rejected the contention that section 11a-17(a-10) of the Probate Act (755 ILCS 5/11a-17(a-10)) requires a best-interest hearing before a ward can marry of his or her own accord.

This ruling should be affirmed for several reasons:

First, long-standing and consistent authority from this Court, detailed below, establishes that the entry of a guardianship order does not conclusively establish a ward's incapacity to take legal acts such as consent to marriage, execute a will, or engage in real estate transactions. Requiring a ward to obtain a court order after proving by clear and convincing evidence that the marriage is in his or her best interests, as Shawn now urges that section 11a-17(a-10) of the Probate Act requires, would overrule this authority and impermissibly restrict a ward's constitutional right to marry.

Second, nothing in the text of section 11a-17(a-10) requires a ward to seek approval from the court before he or she marries. Since this provision simply does not impose the obligation on a ward that Shawn contends it does, Shawn either asks this Court to ignore the text of the statute or to exceed the Court's judicial role and act akin to the legislature to add terms to the statute that do not exist.

Third, requiring proof the ward obtained court approval to establish the existence of a marriage after the ward's death circumvents the legislature's clear prohibition against

invalidating marriages on alleged incapacity grounds after the death of one of the parties to the marriage.

A. John's Fundamental Right to Marry Ellizzette was not Eliminated by Shawn's *ex parte* Guardianship Order.

Contending that a "ward is entitled to heightened protection without exception," Shawn argues John was required to prove by clear and convincing evidence his proposed marriage was in his best interests and then obtain an order from the court before he could marry of his own accord. (Brf, p. 14, 25) This necessarily presumes the guardianship order Shawn obtained established John's incapacity to consent to marriage under Illinois law. This Court has specifically rejected this argument before and should do so again.

In *Pape v. Byrd*, 145 Ill.2d 13 (1991), a ward with an IQ of 38 and the mental age of 6, entered a marriage that a later-appointed guardian sued to invalidate, contending the existence of the guardianship conclusively established the ward's incapacity to provide the consent required to marry. *Pape,* 145 Ill.2d at 16-17. Squarely rejecting this argument, this Court held "the appointment of a guardian of a person is not sufficient, in and of itself, to show that the person was incompetent to have consented to a marriage." *Id.* at 21. This Court explained why: the test of incapacity under the Probate Act "is limited and does not speak to the incapacity required" for the Marriage Act. *Id.* at 22. Tellingly, Shawn's brief does not cite *Pape.*

Pape's is not only controlling, it is consistent with other long-standing precedent from this Court. See, e.g., *Flynn v. Troesch*, 373 Ill. 275, 292-93 (1940) ("the same mental strength necessary to the transaction of business is not necessary to enable the party to contract a marriage, though he must be capable of understanding the nature of the act and sustained the marriage"); *Hagenson v. Hagenson*, 258 Ill. 197, 199 (1913) (same). This

Court cited and followed "well established authority" holding wards may execute wills, notwithstanding the existence of their guardianships. *Pape*, 145 Ill.2d at 22, citing *Pendarvis v. Gibb*, 328 Ill. 282, 292 (1927) (appointment of conservator not conclusive on issue capacity of conservatee to execute will); *In re Estate of Basich*, 79 Ill.App.3d 997, 1001 (1st Dist. 1979) (same). *Pape* thus specifically confirmed the appointment of a guardian is not "conclusive on [the ward's] capacity to have understood the nature, effect, duties and obligations of a marriage." *Pape*, 145 Ill.2d at 22.[3]

No decision of this Court has questioned *Pape* or the long-standing authority it relied upon. Nor is there any reason to do so here. Unlike the ward in *Pape*, the record showed that John, a world-renowned physician and scientist who held M.D. and Ph.D. degrees, functioned at a high level before and during the guardianship. Dr. Visar Belagu, John's colleague, testified he and John talked two or three times a week during the guardianship and John "kept me sort of up to date on the things he was doing, and some of it related to work we had done before. A lot of imaging stuff was discussed, MRI imaging, human connectome imaging, because that was something we were working on before." (R 307) Dr. Belagu confirmed John worked professionally in 2017. (R 308)

Dr. Belagu further testified he and John travelled on business in the summer of 2017, after John asked him "to do some work on evaluating a company on technology and that was the matter we took trips together." (R 308) In the six-month period before John passed – which includes the date John and Ellizzette married – John and Dr. Belagu also worked on a scientific paper that was accepted for publication before but published after

[3] *Pape* also confirms why section 22(b) of the Probate Act, 755 ILCS 5/11a-22(b), referring to "Trade and contracts," has no relevance to marriages.

John's death. (R 309-310) Dr. Belagu also testified John accepted an international position, to start in 2018. (R 311)

John's mental strength and capacity during the pendency of the guardianship, allowing him to work on scientific papers, evaluate commercial technologies, and engage in business transactions, establishes his capacity to marry, even while excluding the evidence Ellizzette attempted to adduce on this topic but which the trial court excluded. See *Greathouse v. Vosburgh,* 19 Ill.2d 555, 567-68 (1960) (noting that "all of such authorities agree that a person who has sufficient mental capacity to transact ordinary business has mental capacity to perform all three of the aforesaid acts," *i.e.*, "entering into a marriage," "executing a will," and "conveying real estate by deed.")[4]

In addition to the evidence regarding John's business and professional activities, Ellizzette was able to present evidence that fully established John had sufficient mental capacity to meet the lower standard of consent required to marry. Raymond Bement, a licensed social worker and friend of John's and Ellizzette's since their days at the University of Illinois in the 1980s, testified that in the two or three months before he officiated their wedding, he, John, and Ellizzette discussed "what it meant to be in a

[4] Ellizzette asked if Dr. Belagu at any time felt he "had a fiduciary responsibility to contact the medical board, the IRB, or any institutional board in regard to my husband's ability to conduct his duties professionally," but the trial court sustained Shawn's relevance objection. (R 311) Ellizzette argued, to no avail, that "it's relevant considering they're trying to argue that my husband was incapable of managing his affairs when, in fact, my husband was not only capable of managing his affairs, he was functioning at an extraordinarily high capacity as one of the world's renowned and leading scientists and he was frequently travelling with Dr. Belagu." (R 311-12) Shawn argued such evidence was irrelevant because an "order was entered by this Court declaring John McDonald, III, to be totally without capacity and a ward of the court." (R 312)

relationship in our 50's." (R 347-48) Bement asked them "a series of questions * * * to prepare for – to determine whether or not [Bement] would marry" them. (R 348) The night before the marriage, Bement attended a Ketubah signing in John and Ellizzette's home in Paris, Illinois. (R 354) Bement testified a Ketubah "is like what Christians would call a marriage license, meaning what one party's bringing to the relationship, and what the other party's bringing to the relationship* * * ." (*Id*.) Signing a document that summarizes what John and Ellizzette understood and agreed they were each bringing to the marriage demonstrates John had the ability to understand the nature, effect, duties, and obligations of marriage, notwithstanding the *ex parte* guardianship order Shawn succeeded in obtaining.

This Court's decision in *Pape* confirms the existence of a guardianship order did not eliminate John's legal capacity to consent to marriage. Moreover, sufficient evidence was introduced on John's mental strength and acumen -- despite the trial court's exclusion of key evidence on this very topic -- showing John was capable of handling professional affairs and he understood the nature, effect, and duties of marriage. Under these circumstances, *Pape* stands as binding, controlling authority. As such, a judicially-created requirement that a ward must first show by clear and convincing evidence that a marriage is in his or her best interests, and then obtain an order from the court to that effect before he may marry of his own accord, should not stand.

B. Because Section 11a-17(a-10) Does Not Require a Best Interest Hearing Before a Ward May Marry, Implying One from *Karbin* is Unwarranted and Would Constitute Impermissible Judicial Lawmaking.

Shawn's argument that section 11a-17(a-10) requires prior court approval also should be rejected because there is nothing in this section that requires a ward to seek such

approval, let alone to require a ward to make a clear and convincing showing the proposed marriage is in his or her best interests. As the appellate court correctly held:

> The plain language of this provision simply does not require prior approval by the court before a ward can marry of his or her accord. Instead, it provides a procedure to allow a guardian to petition the court for authorization to consent, on behalf of the ward, to the ward's marriage. The fact that a guardian may seek an order allowing consent from the court, however, does not mean that the ward may not marry unless and until the guardian first obtains the court's consent. We read nothing in the language of section 11a-17(a-10) of the Probate Act which expressly declares that a marriage entered into by a ward is void in the absence of a best-interest hearing. *In re McDonald*, 2021 IL App (2d) 191113, ¶102.

Section 11a-17(a-10) applies to actions a guardian "may" take. Its language does not attempt to address steps a ward "must" take. See, *Andrews v. Foxworthy*, 71 Ill. 2d 13, 21 (1978) (use of the words "shall" or "must" in a statute regarded as mandatory, while the word "may" in a statute indicates permissive).

Shawn also argues this Court's decision in *Karbin v. Karbin*, 2012 IL 112815, compels the conclusion a best interest hearing must be held when a ward seeks to marry. *Karbin* is factually and legally distinguishable. *Karbin* involved the very different situation where a guardian determined the best interests of the ward required *dissolution* of a marriage, over the objections of the spouse who had abandoned the ward. *Karbin*, 2012 IL 112815, ¶¶5-8. *Karbin* does not involve a decision by a ward to marry.

There is a recognized fundamental constitutional right to marry. *Loving v. Virginia*, 388 U.S. 1 (1967). This Court also recognized a ward's right to marry in *Pape.* However, there is no corollary constitutional right for one spouse to remain in a marriage. To the contrary, the Supreme Court has specifically protected individuals' rights to dissolve a marriage. See *Boddie v. Connecticut*, 401 U.S. 371, 382–83 (1971).

This Court decided *Pape* in 1991. Its decision construed Section 11a-3 of the Probate Act (755 ILCS 5/11a-3), Section 301(1) of the Marriage Act (750 ILCS 5/301(1)), and how they related to each other. The legislature enacted section 11a-17(a-10) effective January 1, 2015, 24 years after this Court decided *Pape*. In the years following *Pape*, the legislature took no action to indicate its disapproval of this Court's broad construction of mental capacity under section 11a-3 of the Probate Act, how it related to capacity under the Marriage Act, and the differences between the two. As this Court noted in *Karbin*, where "the legislature has not taken any action to indicate its disapproval of the judiciary's broad construction" of a statute, "the legislature acquiesced in this broad interpretation." *Karbin*, 2012 IL 112815, ¶47. *See* 755 ILCS 5/11a-17(a-10). The legislature has thus acquiesced in this Court's ruling in *Pape*.

This of course is important as this Court has emphasized its business is not to function as a super legislature:

> It is the province of the legislature to enact laws; it is the province of the courts to construe them. Courts have no legislative powers; courts may not enact or amend statutes. A court cannot restrict or enlarge the meaning of an unambiguous statute. The responsibility for the justice or wisdom of legislation rests upon the legislature. *Heinrich v. Libertyville High School*, 186 Ill.2d 381, 394 (1998).

Shawn asks this Court to engage in impermissible judicial lawmaking. Construing section 11a-17(a-10) to require John to undergo a best interest hearing before he could marry, in which he would be required to prove by clear and convincing evidence the proposed marriage was in his best interests, when no such statutory requirement exists, would exceed this Court's function. Indulging the false presumption that only a trial court could make this determination would violate the rule that "a court must interpret and apply

statutes in the manner in which they are written," and cannot "rewrite them to make them consistent with the court's idea of orderliness and public policy." *Id* at 395-95.

Section 11a-17(a-10) of the Probate Act does not require a ward to engage in a best interest hearing in which he or she must prove by clear and convincing evidence the marriage is in the ward's best interests, and then obtain an order from court before marrying. Shawn's argument that this Court should so construe this section would require this Court to engage in impermissible judicial legislating. It should be rejected.

C. Imposing a Best Interest Hearing Requirement After the Death of One of the Parties Violates Section 302(b) of the Marriage Act.

The Marriage Act reflects the strong legislative public policy that no marriage may be invalidated based on alleged incapacity of either party after one of the parties to the marriage dies. See 750 ILCS 5/301(1) ("[a] court shall enter its judgment declaring the invalidity of a marriage (formerly known as annulment) entered into under the following circumstances: (1) a party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity"); and 750 ILCS 5/302(b) ("[i]n no event may a declaration of invalidity of marriage be sought after the death of either party to the marriage under subsection (1) * * * of Section 301").

The drafters of this provision understood it would bar proceedings to declare a marriage invalid after the death of one of the parties, even before the probate courts. The comments to section 208(b) of the Uniform Marriage and Divorce Act, the basis for Section 302(b) of the Marriage Act, state:

> The provisions of subsection (b), stating that no declaration of invalidity may be "sought" after the death of either party, is intended to prohibit such a collateral attack upon the marriage, in lieu of a declaration, in all proceedings, including probate proceedings. Moreover, the use of the word "sought" rather than "commenced" implies that the death of a party to the

> marriage at any time before final entry of judgment would terminate a proceeding attacking the marriage. 9A Uniform Laws Annotated, §208, Comment, at 171 (1970).

Shawn's argument that Ellizzette had to prove a best interest hearing was conducted or else the marriage is void *ab initio,* both collaterally attacks the marriage and circumvents section 302(b) of the Marriage Act. The appellate court correctly ruled Ellizzette was not required to show a best interest hearing was held before she and John married. It properly reversed the court's directed finding, entered on the basis that no such hearing was held, and its determination in this regard should therefore be affirmed.

III. The Appellate Court Correctly Ruled Ellizzette Presented a *Prima Facie* Case of Her Marriage with John.

Shawn contends "it cannot be said that a *prima facie* case was made, and therefore, this Court should reverse the appellate court's judgment," solely because Ellizzette "failed to prove her actual identity." (Brf., pp. 22, 19) This argument is specious and without merit.

Shawn obviously knew then and knows now Ellizzette's identity; he filed affidavits and pleadings that identified her based on his personal knowledge. (C 21, 29) Shawn repeatedly judicially admitted under oath that Ellizzette and John participated in a marriage ceremony. (*Id*.) Shawn's brief admits he knows Ellizzette's place and hospital of birth; her date of birth; prior names she has used, including her last name at birth; her parents; her occupation; and even a misdemeanor conviction from 2003 for which Ellizzette was given probation. (Brf., pp. 20-21)

Despite this, and despite the questions he now attempts to raise concerning her "actual identity," Shawn did not move for a directed finding based on this purported deficiency. He moved for judgment based on Ellizzette's purported failure to: (1) prove compliance with a two-witness "rule" that does not exist under Illinois law; (2) introduce

into evidence a marriage license Shawn placed in evidence a year before trial; (3) show a marriage ceremony Shawn admitted was performed; and (4) submit to a best interest hearing under a statute that contains no such requirement. (R 377-81) Indeed, Shawn did not once raise Ellizzette's alleged failure to prove her "actual identity" once at trial.

Although aware of the results of his exhaustive searches into Ellizzette's background that his brief purports to highlight, Shawn did not argue in the appellate court the trial court's directed finding should be affirmed because she did not prove who she was. Shawn now seeks to sully her reputation before this Court and in the record by referring to wholly irrelevant and unfairly prejudicial matters that would not be admissible at trial, had Ellizzette been allowed to testify.

Ellizzette was able to establish a *prima facie* case that she and John were married, despite Shawn's relentless objections at trial and his *ad hominem* attacks on her there and before this Court. Shawn's contention that the appellate court failed to acknowledge and appreciate what he did not argue before that court provides no reason to reverse the holding that Ellizzette established a *prima facie* case.

A. This Court's Precedents Establish That Evidence of a Celebration Presents a *prima facie* case of Everything Necessary to the Validity of the Marriage.

A consistent line of cases from this Court holds evidence a marriage was celebrated is all that is needed to establish a *prima facie* case that the marriage is legal and valid. See *Greathouse v. Vosburgh*, 19 Ill.2d 555, 568 (1960) ("where a marriage is shown the law raises a presumption of its validity, and the burden is on the objecting party to prove its invalidity"); *Flynn v. Troesch*, 373 Ill. 275, 293 (1940) ("When the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and in fact

everything necessary to the validity of the marriage, in the absence of proof to the contrary, will be presumed."); *Potter v. Clapp*, 203 Ill. 592, 599 (1903) (same); *Cartwright v. McGown*, 121 Ill. 388, 396-97 (1887) (same); *Johnson v. Johnson*, 114 Ill. 611, 617 (1885) ("When a marriage is shown in fact, the law raises a strong presumption in favor of its legality, and the burden is with the party objecting to its validity to prove it is not valid. *** Presumptions of this class are not conclusive, but are sufficient in general to shift the burden of proof."); *Crysler v. Crysler*, 330 Ill. 74, 76-77 (1928) ("When a marriage is shown, the law raises a strong presumption in favor of its legality, and the burden is on the party objecting to its validity to prove such facts and circumstances as establish its invalidity"); *Jones v. Gilbert*, 135 Ill. 27, 32 (1890) (same); See also *Larson v. Larson*, 42 Ill.App.2d 467, 472 (2d Dist. 1963) (citing *Flynn* and holding evidence sufficient to overcome the presumption of validity must be clear, definite and compelling). Under this unbroken line of authority, all Ellizzette had to do to establish a *prima facie* case of her marriage to John – and of everything necessary to the validity of her marriage – was to introduce evidence the marriage was celebrated. Which she did.

Ellizzette established her marriage was celebrated through the testimony of Raymond Bement, who stated he performed a wedding ceremony between Ellizzette and John on July 11, 2017. (R 351-53) Bement also signed a wedding certificate for John and Ellizzette on the kitchen table of their home in Paris, Illinois. (*Id*.)

There is no question that Bement was referring to Ellizzette and John in his testimony. Nor, since Shawn did not deny Ellizzette's verified allegation that she was John's surviving spouse, was her identity ever a question or an issue at trial. (C 297-300) Indeed, Shawn's attorney admitted in argument "there's no evidence that there is a valid

marriage other than what Mr. Bement said *and Mr. Bement said he conducted a ceremony*." (R 380) (Emphasis added.)

Even before consideration of Ellizzette and John's marriage documents, the unrebutted evidence John and Ellizzette celebrated their marriage established "the contract of marriage, the capacity of the parties, and in fact everything necessary to the validity of the marriage." *Flynn*, 373 Ill. at 293. In other words, this testimony established Ellizzette's *prima facie* case. This should have required Shawn to prove by definite, clear, and convincing evidence that no marriage existed – assuming Shawn could even collaterally attack the marriage after John's death within section 302(b) of the Marriage Act, which he cannot. Even if Shawn could attack the marriage in this fashion, he still would have to show that John lacked the lower-than-business-level-capacity required to consent to a marriage on July 11, 2017. *Larson*, 42 Ill.App.2d at 472 (with no proof that the spouse was incapacitated at the specific time of marriage, claim to annul the marriage dismissed). Shawn cannot and did not make that showing.

Shawn nonetheless argues "[w]hen Ellizzette failed to prove her identity, the trial court correctly determined the litigation could not proceed to a subsequent stage which consequently entitled Shawn to judgment in his favor as a matter of law." (Brf., p. 19.) This misrepresents the record. The trial court never ruled it granted a directed finding because Ellizzette failed to prove her actual identity. This Court need not consider an argument without support in the trial record and only first raised before this Court.

Shawn's unsupported and reimagined account of the trial court's ruling does not alter the correct reasoning of the appellate court that Ellizzette established a *prima facie* case of her marriage. The appellate court's decision should be affirmed.

B. Any Supposed Discrepancies in the Marriage Documents Do Not Invalidate Ellizzette's and John's Marriage.

Shawn argues that the appellate court should be reversed because it did not consider discrepancies in the marriage license, certificate, and application. Shawn complains Ellizzette's last name on her license does not match the name on her birth certificate, her birthday was off by a year, and her birthplace and profession were not correctly stated. While Shawn complains the appellate court "failed to consider the identity issue" (brf, p. 21), he did not request that it do so.

Had Shawn requested the appellate court affirm the directed finding based on the discrepancies in the marriage documents he now seeks to highlight, any such affirmance would have been error. The law engages in every presumption to uphold marriages, including those entered with incorrect or false statements in the marriage documents. As this Court has made clear, "[f]raud sufficient to vitiate a marriage must go to the essence of the marriage relation. * * * The fraudulent representations for which a marriage may be annulled must be of something essential to the marriage relation — of something making impossible the performance of the duties and obligations of that relation." *Wofle v. Wolfe*, 76 Ill.2d 92, 97 (1979), citing *Bielby v. Bielby*, 333 Ill. 478, 484 (1929), and *Lyon* v. *Lyon*, 230 Ill. 366 (1907). None of the statements Shawn now complains of were essential to the marriage or would have made impossible John and Ellizzette's performance of their marital obligations.

Case law confirms this. Incorrect names on marriage certificates are not cause to invalidate marriages, especially when it is clear who the names refer to. *Cartwright*, 121 Ill. at 396 ("No importance is attached" to incorrect name on marriage certificate where "[t]he evidence shows beyond dispute that *** the person named in the certificate of

marriage and license" was the wife of the deceased.) A false date of birth in a marriage license does not support invalidation. *Long v. Long*, 15 Ill.App.2d 276 (2d Dist. 1957) (court refused to annul marriage when husband falsely represented he was one year older than actual age.) Incorrect statements of profession likewise are insufficient to support the invalidation of a marriage, as "[f]alse representations as to fortune, character, and social standing are not essential elements of the marriage, and it is contrary to public policy to annul a marriage for fraud or misrepresentations as to personal qualities." *Wolfe*, 76 Ill.2d at 97, *quoting Bielby*¸ 333 Ill. at 484. One court has held even concealment of three prior marriages does not support invalidation because it does not amount to fraud going to the essentials of the parties' marriage contract. *In re Marriage of Igene*, 2015 IL App (1st) 140344, ¶16.

The Marriage Act does not alter this rule; on the contrary, it recognizes it. While section 201 of the Marriage Act provides "[a] marriage between 2 persons licensed, solemnized and registered as provided in this Act is valid in this State" (750 ILCS 5/201), this language does not require strict compliance. The Comment to section 201 of the Uniform Marriage and Divorce Act, the basis for section 201 of the Marriage Act, states:

> The provision does not necessarily invalidate marriages performed in the state which are not "licensed, solemnized, and registered" in accordance with this Act. For example, although an applicant for a marriage license may have given a false name to the clerk [see section 202(a)], the general policy favoring the validity of marriages would require that the marriage be held valid. This position is in accord with the case law. See Clark, Domestic Relations 41 (1969). Unif. Marriage & Divorce Act §201, Comment.

None of the alleged misstatements in the marriage documents Shawn complains of – last name on birth certificate, birth year, place of birth, occupation – come close to involving the essentials of the marriage, to be cause to invalidate the marriage.

Equally important is the absence of evidence that any of this mattered to John, let alone that he could have been misled. The inability to obtain his testimony – the only testimony on this issue that matters – confirms the wisdom of the Marriage Act's prohibition on seeking to invalidate a marriage on the basis that one was "induced to enter into a marriage by * * * fraud involving the essentials of marriage," after the death of one of the parties. 750 ILCS 5/301(1), 302(b). Indeed, the public policy against vitiating marriages on such grounds applies with greater force here. While Shawn improperly uses his "actual identity" argument to impugn Ellizzette before this Court, none of this could ever be remotely relevant to whether the marriage existed. None of the alleged "actual identity" evidence Shawn complains of comes close to establishing a basis for invalidating Ellizzette's marriage to John, especially after John's death.

The Marriage Act and Illinois case law thus wisely prevent the invalidation of marriages based on after-the-fact complaints of misrepresentations that do not go to the essentials of the marriage. In barring attacks filed against a marriage after one of the parties dies, section 302(b) of the Marriage Act renders irrelevant Shawn's attempts at mudslinging and character assassination in his brief.

C. The Appellate Court's Ruling on Judicial Notice Prevents the Introduction of Evidence to Contravene the Marriage Documents.

The appellate court ruled that the trial court's judicial notice of the marriage license, application, and certificate "precludes the introduction of evidence of a contrary tenor." *In re McDonald*, 2021 IL App. (2d) 191113, ¶92. This is consistent with settled principles of judicial notice. See, Ill. R. Evid. 201(g) ("[i]n a civil action or proceeding, the court shall inform the jury to accept as conclusive any fact judicially noticed.") In contrast to another

motion for judicial notice Shawn filed "so it would be admitted in evidence now" (R 209), the trial court's order taking judicial notice of the marriage documents contained no limitation or condition on the notice or the admission of the documents in evidence. (C 1058)

While Shawn purports to reveal now why he filed his one-page motion to take judicial notice of the marriage documents – even though Ellizzette's former counsel objected that the motion did not reveal this – Shawn knew his motion admitted these documents in evidence before trial.[5] The appellate court ruled the trial court's order taking judicial notice did not contain any limitations and therefore rejected Shawn's argument that these documents were only intended "to highlight every falsehood" regarding Ellizzette's identity. *In re McDonald*, 2021 IL App (2d) 191113, ¶94.

Shawn's Petition for Leave to Appeal did not assign error to the appellate court's ruling that "since there was no limitation on the purpose for the exhibits were admitted at

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[5] Shawn requested in that other motion that the trial court take judicial notice that Ellizzette had a conviction in New York. (C 1954) Shawn's counsel specifically asked that his motion be granted because "I want it to come into evidence now," a month before trial. (R 209) The trial court granted the motion to the extent it sought to show that the documents were authentic, but reserved for trial the issue of whether the documents were admitted at trial. (R 215, C 2042)

The handwriting on the document, the only record that exists (R 212), shows that its original charge was changed to "misd" under PL §175.05, a misdemeanor. (C 1955) While Ellizzette argued the document was "not an accurate reflection of that case and what took place" and had no bearing on her heirship or her marriage (R 211), the document shows no confinement and only probation was ordered in January 2003, almost 17 years before the trial. (C 1957) *See* Ill.R.Evid. 609(b). Nor is this misdemeanor record otherwise admissible. Shawn's attempt to sully Ellizzette's reputation by referring to matters that are inadmissible should be disregarded and references to these proceedings in Shawn's brief should be stricken or disregarded.

trial *** Shawn's position lacks merit." *Id.* Accordingly, he is bound by that ruling. See *City of Naperville v. Watson*, 175 Ill. 2d 399, 406 (1997) ("party's failure to raise an argument in the petition for leave to appeal may be deemed a waiver of that argument.") Because Shawn was and is barred from introducing his supposed "actual identity" evidence, and because he judicially admitted John and Ellizzette participated in a wedding ceremony, Ellizzette was not required to prove her identity to whatever higher standard might theoretically satisfy Shawn.

Nor can Shawn complain of the effect of the judicial notice order, since he invited the supposed error. A party cannot complain of error which that party induced the court to make or to which that party consented. The reason for this rule is well established: it would be manifestly unfair to allow a party to prevail upon the basis of a supposed error that the party injected into the proceedings. *McMath v. Katholi*, 191 Ill.2d 251, 255 (2000) (and cases cited therein); *accord, People v. Segoviano*, 189 Ill.2d 228, 240–41 (2000), and *In re Det. of Swope*, 213 Ill. 2d 210, 217 (2004).

In sum, the appellate court did not err by refusing to acknowledge the identity arguments Shawn now makes on appeal. The court's decision should be affirmed.

IV. The Trial Court Erred in Barring Ellizzette's Testimony Under The Dead Man's Act.

The trial court incorrectly entered an order *in limine* barring Ellizzette from testifying as to her and John's marriage, even though the Dead Man's Act expressly bars a trial court from excluding the very testimony the trial court excluded. The appellate court correctly applied the Dead Man's Act as it now reads and reversed the trial court. *In re McDonald*, 2021 IL App (2d) 191113, ¶86. Shawn contends the appellate court erred in allowing a statutory rule of evidence to control over this Court's decision from 1896 in

Laurence v. Laurence, 164 Ill. 367 (1896), notwithstanding the legislature's 1973 changes to the Act. (Brf., p. 22.)

Shawn's argument should be rejected. It ignores: (1) the legislature's general authority to enact legislation to overrule judicial constructions of statutes the legislature disagrees with, and (2) the legislature's specific authority to make changes to the Dead Man's Act. Because the legislature can and did repudiate the rule in *Laurence* when it changed the Act in 1973, because the purposes of the Dead Man's Act are no longer served by preventing Ellizzette's or any heir's testimony concerning heirship, and because it is clear from the record that Ellizzette would testify that she was married to John, this Court should affirm the appellate court's ruling adhering to the language of the current version of the Dead Man's Act.

A. The Legislature Has the Power to Make Changes to the Dead Man's Act and Overrule *Laurence* and Its Progeny.

Shawn's entire argument presupposes as a basic tenet that a Supreme Court decision will always control over subsequent legislative enactment. Shawn is in error. "The legislature has the power to proscribe new rules of evidence and alter existing ones, and to prescribe methods of proof. Such action does not offend the separation-of- powers clause of our constitution." *First National Bank of Chicago v. King*, 165 Ill.2d 533, 542 (1995). *See also People v. Peterson*, 2017 IL 120331, ¶30 ("[t]he law of evidence is one area in which an overlap between the spheres of authority exercised by the judicial and legislative branches exists.")

This Court has further specifically recognized the legislature's power to make changes to the Dead Man's Act itself:

> The Dead Man's Act in Illinois and elsewhere has been vigorously criticized, and many feel it should be eliminated. We consider that criticisms

> of the statute should properly be addressed to the legislature. The Act was last amended in 1973, and it is for the legislature to determine if further change is desirable.

In re Estate of Babcock, 105 Ill.2d 267, 275 (1985).

B. The 1973 Changes to the Dead Man's Act Overruled *Laurence* and Its Progeny.

The 1973 changes to the Dead Man's Act overruled this Court's 1896 decision in *Laurence.* In that case, this Court construed the Act as it then existed to bar a wife from testifying concerning her marriage, so as to establish heirship. In so deciding, this Court relied on the specific wording of Section 2 of the Act as it existed in 1896. Section 2 at that time provided:

> no party to any civil action, suit or proceeding, or *person directly interested in the event thereof,* should be allowed to testify therein on his own motion or in his own behalf, *** when any adverse party sues or defends as the heir of any deceased person, except when called as a witness by such adverse party so suing or defending. *Laurence*, 164 Ill. at 372. (Emphasis added.)

Ruling the wife was "directly interested in the event thereof," *Laurence* held she was "incompetent to testify" regarding her marriage in opposition to her deceased husband's other heirs at law and the trial court erred in permitting her testimony. *Id.* at 373. The unfairness of this ruling has long been recognized. See *In re Estate of Bailey*, 97 Ill. App. 3d 781, 783 (5th Dist. 1981) ("The *Laurence* case is an example of the harsh result obtaining from a strict application of the Dead Man's Act").

In 1973, some 77 years later, the legislature repealed and replaced this portion of the Dead Man's Act. Thus, it is no longer the law. As this Court noted in *Estate of Babcock*:

> The successor act thus no longer bars all testimony by interested persons. Unlike the predecessor statute, the Act now disqualifies the testimony by interested persons only to the extent that the testimony would be to a "conversation with the deceased" or an "event which took place in the presence of the deceased." [735 ILCS 5/8-201] See generally, Comment, *Illinois Amended Dead Man's Act: A Partial Reform*, 1973 U.Ill.L.F. 700.

Babcock, 105 Ill.2d at 274.

Once the legislature chose to eliminate this general incompetency provision, it undermined *Laurence*'s holding, which depended on this provision. See, *Roth v. Yackley*, 77 Ill.2d 423, 429 (1979) (when legislature changes the law in response to a ruling by this Court, that precedent is overruled when the statute is enacted.) By virtue of the changes the legislature made to the Act, *Laurence* was no longer good law as of the effective date of these changes.

In addition to removing the basis for *Laurence*'s holding, the 1973 Act added a new section, now codified at 735 ILCS 5/8-201(d), to expressly overrule the former rule barring a wife from testifying regarding her marriage to the decedent, to establish her heirship. Section 8-201(d) unambiguously provides: "[n]o person shall be barred from testifying as to any fact relating to the heirship of a decedent." 735 ILCS 5/8-201(d). The effect of this change was clear when it was made; indeed, the student comment the *Babcock* court endorsed, noted, "[t]his new provision overturns a line of cases beginning with *Laurence v Laurence,* progressing through *In re Diak's Estate*, and culminating in *In re Priebe's Estate.*" Comment, 1973 U.Ill.L.F. at 713. Shawn's motion *in limine* cited *Laurence* and *In re Diak's Estate* (C 2005-2006) – two decisions overturned by operation of the 1973 amendment – and the trial court bought into this legal fiction when it relied on these cases to bar Ellizzette from testifying. (C 2224) (noting "there's cases cited, and they weren't responded to.")

Despite the 1973 amendments to the Act, and the universal understanding that section 8-201(d) overruled *Laurence*, Shawn nonetheless incredibly contends *Laurence* "has remained undisturbed since it was originally decided." (Brf., p. 22) Other than the

trial court, which presumably relied on Shawn to accurately represent the law, apparently no other court examining the issue agrees. As the Fifth District noted in *In re Estate of Bailey*, 97 Ill.App.3d 781 (5th Dist. 1981),

> we believe that by enacting section [8-201(d)] the legislature intended to change the rule of *Laurence* which applied the Act to proceedings to establish heirship. The language of the amendment is *reasonably clear and no other purpose can be discerned in enacting the amendment*.

97 Ill.App.3d at 784 (Emphasis added.)

Three years later, the Fourth District agreed "with the reasoning of the court in *Bailey,*" that this change to the Dead Man's Act was intended to overrule the "harsh" results of *Laurence* and to allow a spouse to testify concerning heirship. *In re Estate of Hutchins*, 120 Ill.App.2d 1084, 1087 (4th Dist. 1984).

Even while proceeding *pro se,* Ellizzette cited section 8-201(d) in opposition to Shawn's motion *in limine*. (C 2047) Section 8-201(d) plainly prevented the trial court from entering its order *in limine* barring her from testifying concerning her heirship. The trial court compounded its error by ruling it would not consider Ellizzette's arguments, as violating its order *in limine*. (C 2229-30)

The appellate court's reversal of the trial court's order *in limine* is correct and should be affirmed.

C. There is No Conflict Between the Dead Man's Act and a Current Rule or Decision of This Court Regarding Heirship Testimony.

Since the terms of current section 8-201(d) plainly prevented the trial court from barring Ellizzette's testimony, Shawn now argues that this section is not effective because the Dead Man's Act is "[a] statutory rule of evidence * * * in conflict with a rule or decision of the Illinois Supreme Court," citing Illinois Rule of Evidence 101. (Br., p. 22) Shawn

misunderstands what constitutes (1) a conflict between a statutory rule of evidence and a rule or decision of this Court, and (2) the true effect of legislation *overruling* a decision of this Court. Because there is no conflict between section 8-201(d) and a rule or decision of this Court under Rule 101, and because the Illinois Rules of Evidence, effective January 1, 2011, could not have resurrected *Laurence* after the legislature overturned it, Shawn's argument is without merit and can only be rejected.

A statutory rule of evidence *conflicts* with a rule or decision of this Court when the statute, on the one hand, and the rule or decision, on the other hand, apply differing standards to the same evidence. *People v. Peterson*, 2017 IL 120331, illustrates this. *Peterson* involved a legislative "hearsay exception for intentional murder of a witness" that required the proponent to show the declarant's hearsay statements were reliable before they could be admitted. *Id.* ¶33.

In *People v. Stechly*, 225 Ill.2d 246, 272-73 (2007), however, this Court adopted the common law doctrine of forfeiture by wrongdoing to allow a hearsay exception for statements of a witness the defendant intentionally made unavailable to prevent from testifying. *Id*. at 272. In contrast to the statutory rule of evidence, the common law forfeiture by wrongdoing hearsay exception *Stechly* adopted does not impose a reliability requirement. *Id*. at 278. Instead, under the common law rule, the defendant forfeits his ability to challenge the reliability of the hearsay statements by the very act of preventing the declarant from testifying. *Peterson*, 2017 IL 120331, ¶33.

The differing requirements for admission of the same evidence established a conflict under Illinois Rule of Evidence 101. Specifically, "[t]he statute's imposition of a reliability requirement creates an irreconcilable conflict with a rule of this court on a matter

within the court's authority" that does not impose a reliability requirement. *Peterson*, 2017 IL 120331, ¶34. "Under such circumstances, separation of powers principles dictate that the rule will prevail." *Id.* As a result, this Court held the trial court properly applied the common law forfeiture by wrongdoing hearsay exception, codified in Illinois Rule of Evidence 804(b)(5), and not the statutory version. *Id.*

Unlike in *Peterson*, there is no conflict between an Illinois Rule of Evidence and the Dead Man's Act, as it now reads. Nor is there any conflict between a decision by this Court adopting a common law Dead Man's rule of law and the current Dead Man's Act. *Laurence* did not base its decision on a common law evidentiary rule or any court rule of evidence that codified such a common law rule. *Laurence* based its decision on a statutory incompetency prohibition the legislature imposed in the Dead Man's Act itself, which the legislature was free to change.

When it enacted the Illinois Rules of Evidence – effective in 2011, some 38 years after the legislature changed the Dead Man's Act – this Court did not resurrect and reinstate *Laurence* and its progeny. Shawn's Illinois Rule of Evidence 101 argument is without merit.

D. The Purposes for the Dead Man's Act Do Not Support Barring Ellizzette's Testimony.

Shawn also argues the "theory behind the Act" supports its application against Ellizzette. (Brf., p. 22.) This argument is without merit. The theory behind the Dead Man's Act, to the extent it ever had any validity, should not bar Ellizzette's testimony. What motivates Shawn is not any testimony by Ellizzette in contradiction to the estate's interest, but testimony she would give that would contradict *Shawn's* interests in John's estate.

The Dead Man's Act deals primarily with the *competency* of a witness to testify, not with the actual *admissibility* of such evidence. *Cleary & Graham*, Handbook of Illinois Evidence §606.2. The Act seemingly relies on the cynical view that a party who cannot be directly contradicted will lie. Despite this, many commentators believe the Act leads to more miscarriages of justice as it prevents. *See e.g., Smith v. Haran*, 273 Ill.App.3d 866, 878 (1st Dist. 1995) ("because the Act generates so much controversy and litigation, many commentators have suggested that the time has come for the legislature to repeal or modify the Dead Man's Act, as have more than half the states"), *overruled on other grounds, Gunn v. Sobucki*, 216 Ill.2d 602, 609 (2005); *Matter of Estate of Rollins,* 269 Ill.App.3d 261, 270 (1st Dist. 1995) ("the modern trend is to remove Dead Man's Act disqualification because its unjust results outweigh its protections").

The Act, however, should not apply to proceedings to determine heirship, notwithstanding section 8-201(d). As the Fifth District Appellate Court noted, in *In re Estate of Bailey*:

> We question whether a proceeding to establish the proper administrator of an estate is within the scope of the Act. Such a proceeding does not directly reduce or impair the decedent's estate. Application of the testimonial bar of the Act to situations such as this leads to a race to the courthouse to be appointed or nominate an administrator. Once the appointment is made, any party wrongfully omitted from the selection must shoulder the onerous burden of proving heirship without the benefit of his own testimony. 97 Ill.App.3d at 784.

If there ever were a race to the courthouse, this is it. Shawn filed his petition for letters four days after John passed, presented it the following court day, with no notice whatsoever, let alone the 30 days' notice required by the Probate Act. 755 ILCS 5/9-5(a). By violating these clear statutory notice requirements, Shawn obtained his appointment as administrator – and what he contends is his statutory right to prevent Ellizzette from

testifying regarding her heirship – even though she was wrongfully omitted from the selection for administrator. Shawn further concedes he cannot prove that Ellizzette was not married to John. (PLA, p. 16.) Yet this is precisely what Shawn needed to prove to show his superior right to serve as administrator of John's estate, in preference to Ellizzette. 755 ILCS 5/9-4. Shawn's race to the courthouse allowed him to obtain an *ex parte* order he could not have otherwise obtained, had he complied with the statute's proper notice provisions. He now seeks to use his violations of the Probate Act to violate the Dead Man's Act.

Although the purpose of the Dead Man's Act is to put the parties upon a level of perfect equality, the erroneous application of the Act allowed Shawn to do precisely the opposite. His policy arguments should therefore be rejected.

E. The Appellate Court Correctly Ruled That No Offer of Proof was Necessary When the Trial Court Knew the Exact Testimony it was Excluding.

The appellate court rejected Shawn's argument that, because Ellizzette did not make a specific offer of proof, she forfeited review of the trial court's order *in limine*. The appellate court ruled "an offer of proof was not required because the trial court understood that Ellizzette would testify as to her purported marriage to decedent." *In re McDonald*, 2021 IL (2d) 191113, ¶85. The appellate court's ruling is correct and should be affirmed.

In *Dillon v. Evanston Hospital*, 199 Ill.2d 483, 495 (2002), this Court held "an offer of proof is not required where it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced." That test is more than met here. Shawn's motion *in limine* averred he "expected that * * * Ellizzette *** will attempt to testify she is the surviving spouse of John." (C 2005) In granting the motion *in limine*, the trial court stated, "to the extent that the spouse is going to testify as to the purported

marriage * * * I would have to grant the motion *in limine* based on the law that [she] can't testify." (C 2224-2225) This basis, though clearly wrong, admits the trial court clearly understood the precise testimony it excluded.

At the same hearing, the trial court further recognized the importance of its *in limine* order, telling Ellizzette:

> Well having ruled as to your [in]ability to testify, that makes it difficult for you to prove the validity of the marriage. The marriage may have happened. It may have been valid in your eyes, but *we're proceeding under statutes, law, cases, precedent and rulings on those laws* as applied to the facts. So I'm not saying you didn't have a ceremony, but I may – that may be the effect as it pertains to heirship. It depends on what you are able to prove without testifying. (C 2229-30) (Emphasis added.)

The trial court supplied further confirmation of this when it advised Ellizzette it would not even consider her arguments because they were violations of its order *in limine*. (R 391)

The order *in limine* was clear error. The appellate court properly ruled it substantially prejudiced Ellizzette, constituted an abuse of discretion, and warranted reversal. This ruling is correct and should be affirmed.

ARGUMENT FOR CROSS - RELIEF

I. The Trial Court Erred When It Granted Shawn's Petition for Letters, Declared Ellizzette was Not John's Heir, and Declared Their Marriage Invalid for Purposes of Heirship. The Appellate Court in Turn Erred When It Declined to Review These Orders Even Though the Record Contained All Relevant Facts.

A. This Court Should Review the Orders Granting Shawn's Petition for Letters, Order Appointing Administration, and Order Declaring Heirship *de novo.*

When the trial court granted Shawn's petition for letters and entered its order appointing administration (C 24), no notice was provided to anyone, let alone Ellizzette, John's surviving spouse. (*See* C 19-28) When the court entered its order on heirship declaring Ellizzette was not John's heir, again without notice to her, it necessarily deemed

John and Ellizzette's marriage invalid and disinherited her. (C 26) Both these orders, entered in violation of the Probate Act, the Marriage Act, Ellizzette's due process rights, and controlling precedent from this Court, were void, unlawful, and should be reversed.

The applicable standard of review here, concerning the interpretation of a statute and its application to undisputed facts, is a question of law reviewed *de novo*. *Price v. Philip Morris, Inc*., 219 Ill.2d 182, 236 (2005). Similarly, whether a statute has been violated is a question of law subject to *de novo* review. *Vine Street Clinic v. Healthlink*, 222 Ill. 2d 276, 278 (2006).

The order appointing administration (C 24) and the order declaring heirship (C 26) should be reviewed and reversed, upon that *de novo* review. This Court should remand with instructions that the trial court appoint Ellizzette administrator of John's estate, enter an order declaring heirship confirming Ellizzette is John's sole heir, and direct the trial court to provide such other relief that flows from the void, erroneous, and unconstitutional orders the trial court entered.

B. The *ex parte* Orders Appointing Administration and Declaring Heirship Entered on Shawn's Race to the Courthouse Violated the Probate Act, Were Void and Unlawful as to Ellizzette, and Should be Reversed.

Section 9-4 of the Probate Act requires a petition for letters to list "the names and post office addresses of all heirs of the decedent * * * and whether any of them is entitled either to administer or to nominate a person to administer equally with or in preference to the petitioner." 755 ILCS 5/9-4. Section 9-5(a) of the Probate Act requires that sufficient notice be provided so heirs can respond, appear, and be heard with regard to a properly filed and served petition. It mandates

> *[n]ot less than 30 days* before the hearing on the petition to issue letters, the petitioner shall mail a copy of the petition, endorsed with the time and place of the hearing, to each person named in the petition whose post office address is stated and who is entitled either to administer or to nominate a person to administer equally with or in preference to the petitioner." 755 ILCS 5/9-5(a) (Emphasis added.)

While section 9-5(c) provides that no notice of the petition need be served on an heir who has filed a written waiver of notice or who appears at the hearing, this provision does not allow a petitioner to shorten the mandatory 30-day notice period unilaterally.

John had no children. As John's surviving spouse, Ellizzette is John's sole heir. 755 ILCS 5/2-1(c). Additionally, as surviving spouse and sole heir, Ellizzette has the highest possible preference under the Probate Act to obtain letters of administration or nominate an estate representative. 755 ILCS 5/9-3(a). Her rights as surviving spouse and sole heir – to obtain letters of administration; to nominate a representative; to inherit the assets of John's estate; and to obtain any benefits that come with these – are significant recognized property rights under Illinois law. *In re Estate of Joliff*, 199 Ill.2d 510, 524 (2002) (an heir's expectancy in inheritance ripens into vested and constitutionally protected property rights when decedent passes).

Shawn's petition for letters, granted on an *ex parte* basis seven days after John passed, made no pretense of complying with the 30-day notice Probate Act section 9-5(a) mandates. Because no notice was provided, the trial court did not then acquire jurisdiction over Ellizzette when it entered its orders of administration and declaring heirship. These orders were and are therefore void. As the Fifth District held regarding similar statutory notice violations in *In re Estate of Stanford*, 221 Ill.App.3d 154, 161 (5th Dist. 1991):

> since the circuit court in the instant case lacked personal jurisdiction over the heirs who had not appeared generally before the court *** due to lack of compliance with the statutory notice requirements, any subsequent orders

> entered by the court after the admission of the will to probate without jurisdiction were void, regardless of the notice issued for each of the proceedings.

In re Stanford further held "[t]he law is clear that if the court lacks jurisdiction over the parties, any judgment entered without jurisdiction is void." *Id.*, citing *In re Marriage of Verdung*, 126 Ill.2d 542, 547 (1989). The order of administration appointing Shawn as administrator of John's estate, and the order declaring heirship, are therefore void and unlawful.

C. The Orders Appointing Administration and Declaring Heirship, Entered Without Notice to Ellizzette, Also Violated Her Constitutional Due Process Rights.

Fundamentally, a court may not deprive a person of property without due notice and an opportunity to be heard. U.S. Constitution, Amend. XIV, § 1 ("[n]o person shall be deprived of life, liberty or property, without due process of law."); Ill.Const. 1970, Art. 1, § 2 ("[n]o person shall be deprived of life, liberty or property, without due process of law"); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982) (interest in statutory scheme was property right that could not be deprived arbitrarily); *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶28, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("[t]he fundamental requirement of due process is the opportunity to be heard, and that right 'has little reality or worth unless one is informed that the matter is pending.'")

Shawn's deliberate failure to provide Ellizzette due notice and an opportunity to be heard *before* the trial court granted him letters of administration and entered its order declaring heirship violated Ellizzette's rights to due process under the United States and Illinois constitutions. These orders should be reversed for that reason as well.

D. The Appellate Court Erred When It Failed to Address Ellizzette's Constitutional and Statutory Objections to Shawn's Appointment as Administrator and the Order Declaring Heirship, Even Though the Record Contains all Relevant Facts, and the Orders Severely Prejudiced Her.

The appellate court conflated Ellizzette's objections to the *ex parte* orders of administration and declaring heirship with the order denying her motions to reconsider and vacate. *In re McDonald*, 2021 IL App (2d) 191113, ¶55. Relying on *Foutch v. O'Bryant*, 99 Ill.2d 389, 91-92 (1984), the court then "presume[d] the trial court's ruling on the motion to vacate conformed to the law" because there was no transcript of the hearing on that motion. *In re McDonald*, 2021 IL App (2d) 191113, ¶54. Since Ellizzette was given leave to file her petition for letters, the court additionally saw no prejudice to Ellizzette from these orders. *Id.* ¶55.

The appellate court should have reviewed the orders of administration and declaring heirship separately from the orders denying Ellizzette's motions to vacate and reconsider, and reversed these orders. The presumption that the trial court properly granted Shawn's petition for letters, entered his order of administration and properly declared heirship because there was no record of Shawn's *ex parte* petition and the hearing on Ellizzette's motions to vacate and reconsider is not warranted here. No such presumption should attach where the statutory and constitutional violations are undeniable. In addition, review should have been made because the record contains all relevant facts on these orders, without the need to resort to specific arguments of counsel. Similarly, the conclusion Ellizzette was not prejudiced because she was given leave to file her own petition for letters ignores the legal and economic prejudice she suffered.

1. The Record Contains All Relevant Facts Regarding the Void and Illegal Orders Appointing Administration and Declaring Heirship.

While the order appointing Shawn as administrator and declaring heirship states "due notice has been given to all parties according to law" (C 24), this statement does not comport with reality. The petition for letters was filed on Friday December 15, 2017, four days after John died. (C 16) It was granted on an *ex parte* basis the following Monday, December 18, 2017, seven days following John's passing. (C 24) Due notice under the Probate Act requires 30 days' notice of John's petition for letters. 755 ILCS 5/9-5(a). No notice at all was given, let alone the 30 days' notice the Act required.

The mandatory 30-day notice period allows sufficient time for all interested parties to appear and be heard regarding a petition for letters and an order declaring heirship. Shawn and his counsel knew that. Their *ex parte* motion and the order they obtained was specifically intended to prevent Ellizzette from appearing and objecting. As the appellate court recognized, Shawn does not dispute that he gave no notice to Ellizzette. *In re McDonald*, 2021 IL App (2d) 191113, ¶54. It was not for Shawn to determine that Ellizzette's and John's marriage was void *ab initio*, as his affidavit of heirship contended. Nor could the trial court have made that determination in accordance with Probate Act, the Marriage Act, or due process considerations on December 18, 2021.

The record reveals all facts relevant to determine whether there was "lack of compliance with the statutory notice requirements." *In re Estate of Stanford*, 221 Ill.App.3d at 161. Nor is it fair to deny review of these orders, premised solely upon the lack of a full record of a hearing for which Ellizzette never received notice. The order appointing Shawn administrator and the order declaring heirship should therefore be reversed.

Additionally, there is no need for a transcript of the hearing on the motions to vacate and reconsider, since the issues were clearly framed by the papers and no evidence was taken. *See Whitmer v Munson*¸ 335 Ill.App.3d 501, 511 (1st Dist. 2002) (appellants' failure to provide a report of proceedings did not prevent review where there were sufficient documents included in the record to apprise appellate court of trial court's decision); *Walker v. Iowa Marine Repair Corp*., 132 Ill. App. 3d 621, 625–26 (1st Dist. 1985) ("the fact that the trial court may have espoused certain reasons for its order not appearing on the face of the document does not support the necessity of a transcript on appeal where, as here, the record contains everything that was presented to the judge in support of or in opposition to the motion"); *DeVries v. Bankers Life Co.*, 128 Ill.App.3d 647 (1st Dist. 1984) (where record disclosed the "relevant facts," court determined "it was not necessary to resort to the specific arguments presented by counsel and the hearing on the motion").

The exhaustive briefing on the motion to vacate allows appellate review of the trial court's order denying the motions to vacate and reconsider. The appellate court erred in not reviewing these orders, merely because there was no transcript of the arguments of counsel, where the transcript had no relevant facts bearing on the issue, and the appellate court had before it more than sufficient means in the record to review the issue.

2. Ellizzette Suffered Substantial Prejudice by the Order of Administration, the Order Declaring Heirship, and the Order Denying Her Motions to Vacate and Reconsider.

The appellate court summarily concluded Ellizzette was not prejudiced by the orders appointing administration, declaring heirship, and denying her motions to vacate and reconsider, because she was granted leave to file her petition for letters. Ellizzette in fact suffered substantial prejudice. Most importantly, Ellizzette was deprived of the

presumption she was entitled under the law regarding the validity of her marriage, a presumption that Shawn could not and cannot overcome. Ellizzette also incurred substantial attorneys' fees and expenses, through the trial court, the appellate court and in this Court, to prove what Shawn was required to, but could not and cannot disprove.

When Shawn petitioned the trial court for appointment as administrator of John's estate, Shawn bore the burden of showing his entitlement to nominate himself. *See In re Viehman's Estate,* 47 Ill.App.3d 138, 148 (5th Dist. 1964) (when administrator failed to give notice to others with equal right to administer estate, order of appointment vacated). Proper application of the Probate Act required Shawn to show that his entitlement to serve was superior to Ellizzette's. This required Shawn to show at a hearing, not less than 30 days after he served his petition on Ellizzette, that John's marriage to Ellizzette was invalid and thus Shawn was an heir and Ellizzette was not.

Proper application of the Marriage Act prevented the entry of any order appointing administration and any order declaring heirship that omitted Ellizzette. The language of section 302(b) of the Marriage Act could not be clearer: *any* attempt to declare a marriage invalid based on an alleged incapacity to consent, after the death of one party to the marriage, is forbidden. *See* 750 ILCS 5/302(b), 301(1) ("in no event may a declaration of invalidity of marriage be sought after the death of either party to the marriage" on the basis that "a party lacked capacity to consent to the marriage at the time the marriage was solemnized.") Shawn nonetheless sought and obtained an *ex parte* order declaring that Ellizzette was not John's heir which necessarily declared John's and Ellizzette's marriage invalid based on incapacity. This order, even if notice had been given, violated the Marriage Act.

The affidavit of heirship Shawn submitted with his petition for letters affirmed "on July 11, 2017[,] the decedent participated in a wedding ceremony with Ellizzette Duvall Minnicelli." (C 21) Shawn's judicial admission that Ellizzette and John celebrated their marriage gave her the legal presumption that her marriage to John was and is valid. As this Court has previously held, "[w]hen the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and in fact everything necessary to the validity of the marriage, in the absence of proof to the contrary, will be presumed." *Flynn v. Troesch*, 373 Ill. 275, 293 (1940); *Larson v. Larson*, 42 Ill.App.2d 467, 472 (2d Dist. 1963) (same). To overcome this presumption – assuming that Shawn could overcome the prohibition of section 302(b) of the Marriage Act – Shawn would have had to present clear, definite, and compelling evidence that on July 11, 2017, John did not have the mental capacity to meet the lower-than-business capacity required to marry. *Larson* 42 Ill.App.2d at 472. Shawn was and is unable to meet that burden. Indeed, he has admitted he cannot prove that the marriage was invalid. (PLA, p. 16.)

All these issues could have and should have been addressed in a hearing held pursuant to the Probate Act's clear terms. All such issues could have and should have been addressed in a hearing held not less than 30 days after Shawn served Ellizzette and all other potential heirs with notice of when and where he would present his petition for letters. Had Shawn and the trial court followed the Probate Act's mandatory notice provision and Illinois law, the legal and economic prejudice Ellizzette suffered could have been avoided. Instead, Ellizzette sustained substantial prejudice from Shawn's decision and the trial court's void and unlawful orders. The economic prejudice is also substantial, to say nothing

of the emotional cost visited on a grieving widow who is told her marriage was void *ab initio*.

Shawn's deliberate failures to comply with clear statutory mandates and the most elemental principles of due process, and the orders the trial court entered in full knowledge of these deficiencies, should be reversed.

CONCLUSION

For all these reasons, appellee Ellizzette McDonald respectfully requests that this Court:

1. Affirm the decision of the Appellate Court reversing the directed finding against Ellizzette on the trial of her petition for letters;

2. Affirm the decision of the Appellate Court holding that the trial court abused its discretion in barring Ellizzette from testifying at trial concerning her heirship under the Dead Man's Act;

3. Reverse the decision of the Appellate Court declining to review the trial court's Order Appointing Administration, Order Declaring Heirship, and order denying Ellizzette's motion to vacate and motion to reconsider these orders;

4. Reverse the trial court's Order Appointing Administration;

5. Reverse the trial court's Order Declaring Heirship;

6. Remand this matter with instructions that the trial court appoint Ellizzette administrator of her husband's estate and enter an order declaring Ellizzette John's sole heir; and

7. Remand this matter for further proceedings consistent with this Court's opinion.

Respectfully Submitted,

ELLIZZETTE MCDONALD

By: /s/ Steven J. Roeder
One of her attorneys

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 57 pages.

/s/ Robert G. Black
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Dated: August 4, 2021August 4, 2021

No. 126956

IN THE SUPREME COURT OF ILLINOIS

In re ESTATE OF JOHN W. McDONALD, III, Deceased.	On Appeal from the Appellate Court of Illinois, Second Judicial District, Gen. No. 2-19-1113
SHAWN McDONALD, *Petitioner-Appellant/Cross-Appellee,* v. ELLIZZETTE McDONALD, *Respondent-Appellee/Cross-Appellant*.	There Heard on Appeal from the Circuit Court of the 16th Judicial Circuit, Kane County, Illinois Case No. 17-P-744 The Honorable **James R. Murphy**, Judge Presiding.

NOTICE OF FILING/CERTIFICATE OF SERVICE

The undersigned certifies and states that on August 4, 2021, there was electronically filed with the Clerk of the Supreme Court of Illinois, the attached **Brief on behalf of Appellee/Cross-Appellant** in this matter**,** and that this **Brief** has been served via email to the parties and attorneys of record indicated below:

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Under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Notice of Filing and Certificate of Service are true and correct, except for those matters therein stated to be upon information and belief, and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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