No. 126956

IN THE SUPREME COURT OF ILLINOIS

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

CROSS-REPLY BRIEF OF RESPONDENT-APPELLEE/CROSS-APPELLANT ELLIZZETTE McDONALD

Steven J. Roeder (#6188428)
Ryan P. Weitendorf (#6336933)
ROEDER LAW OFFICES LLC
77 W. Washington Street, Suite 2100
Chicago, Illinois 60602
(312) 667-6000
sjr@roederlawoffices.com
rpw@roederlawoffices.com

Of Counsel on Appeal:
Robert G. Black (#6191552)
THE LAW OFFICES OF ROBERT G. BLACK, P.C.
101 N. Washington Street
Naperville, Illinois 60540
(630) 527-1440
rblack@rgb-law.com

E-FILED
9/30/2021 3:51 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

No. 126956

IN THE SUPREME COURT OF ILLINOIS

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

CROSS-REPLY BRIEF OF RESPONDENT-APPELLEE/CROSS-APPELLANT ELLIZZETTE McDONALD

Respondent/appellee/cross-appellant Ellizzette McDonald (Ellizzette) hereby submits her reply to the response of petitioner/appellant/cross-appellee Shawn McDonald, as Administrator of the Estate of John W. McDonald, III (Shawn).

Introduction

To divert attention from the unfairness of the proceedings below, Shawn's response to Ellizzete's request for cross-relief continues his inappropriate *ad hominem* attacks on her. This unfortunate form of advocacy does not alter the fact that Ellizzette was entitled to notice – indeed, no less than 30 days' notice – of the time and place Shawn would present his petition for appointment as administrator and his order declaring heirship.

Rather than comply with these most elemental due process and statutory standards, Shawn intentionally ignored them to disadvantage and disinherit Ellizzette. The irregular orders Shawn thereby obtained on an *ex parte* basis have greatly prejudiced her. They improperly relieved Shawn of his burden of proving his entitlement to serve as administrator of the estate of John W. McDonald, III (John) in preference to Ellizzette, a factual and legal burden Shawn could not meet. Shawn could not show that John, a highly educated doctor and scientist, did not understood the basic nature, effect, duties, and obligations of marriage on the day he and Ellizzette married. The orders Shawn improperly obtained gave him control over John's estate. They also disinherited Ellizzette. By failing to include her in the order declaring heirship, they declared she was not John's spouse and thus her marriage to John was invalid.

The *ex parte* orders appointing Shawn administrator and declaring heirship were entered in clear violation of Ellizzette's statutory and due process rights. They cannot be excused on the pretense that John somehow lost every vestige of his fundamental right to

marry when Shawn obtained his order of guardianship, especially since settled authority from this Court recognizes a ward's right to marry. Nor does the text of section 11a-17(a-10) of the Probate Act justify Shawn's actions; the statute nowhere states it eliminates a ward's right to marry. Indeed, it could not in conformity with controlling United States Supreme Court precedent.

I. Ellizzette and John had the fundamental right to marry each other.

Shawn does not contest he provided no notice to Ellizzette before obtaining his *ex parte* orders. Conceding his refusal to give notice was intentional, Shawn rationalizes his violation of the Probate Act on his unilateral determination Ellizzette had no constitutional or other interest in her marriage with John. While his Response admits John and Ellizzette celebrated their marriage, Shawn judges "[t]he marriage ceremony that occurred between Ellizzette and John was good for no legal purpose, void at its inception, and amounted to nothing more than an idle ceremony which conferred no legal rights." (Resp., p. 17) Shawn further concludes John was "totally without capacity" to marry and, absent a best interest hearing purportedly held in compliance with section 11a-17(a-10) of the Probate Act, "Ellizzette's marriage ceremony to John conferred no rights to her, she is not an heir, was not entitled to notice and therefore her argument that the trial court's orders are void due [to] lack of personal jurisdiction are without merit." (*Id.*)

Shawn's *ipse dixit* dismissal of his elemental responsibilities under the law, Ellizzette and John's fundamental rights to marry, and the rights Ellizzette continues to have in her marriage, are without merit and should be rejected.

A. Ellizzette had and continues to have fundamental rights to marry John, to the recognition and respect of her marriage, and to the liberty and property rights she is entitled as John's surviving spouse and sole heir.

"[T]he right to marry is a fundamental right inherent in the liberty of the person" and is entitled to significant constitutional protection. *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015). "While the outer limits of [the right to privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage' ***." *Carey v. Population Services International,* 431 U.S. 678, 684-85 (1977). Ellizzette had the fundamental right, recognized by the federal constitution, the Illinois constitution, and Illinois law, to marry John. Ellizzette's right to marry, and have her marriage recognized and respected, continues to this day. *See Obergefell*, 576 U.S. at 681, 658 ("[a]s some of the petitioners in these cases demonstrate, marriage embodies a love that may endure past death" and petitioner James Obergefell "brought suit to be shown as the surviving spouse on Arthur's death certificate.")

In addition to her constitutional right to marry, Ellizzette has a right to be let alone in her marriage. Section 5/302(b) of the Marriage Act grants her rights as a surviving spouse to be free from legal proceedings that question the validity of her marriage. 750 ILCS 5/302(b).[1] Ellizzette thus has a legitimate claim of an entitlement under Illinois law to be free from any attempt from anyone, even in a probate proceeding initiated by an antagonistic and estranged brother of her late husband, to take any action to invalidate her marriage. *See e.g., Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property interests

[1] The Marriage Act only allows challenges to the validity of a marriage after one spouse dies "if the marriage is prohibited." 750 ILCS 5/302(b) and 5/301(4). A marriage is "prohibited" if one of the parties remains married to another at the time of the marriage or there is an improper blood relation. 750 ILCS 5/212(a).

are created by "existing rules and understandings that stem from an independent source such as state law.")

Indeed, Shawn's "Petition for Declaration of Invalidity of a Marriage pursuant to section 5/301 of the Illinois Marriage and Dissolution of Marriage Act," which he filed the day his letters of administration were issued, clearly violated section 302(b) of the Marriage Act. This pleading did something else: it recognized Ellizzette's claim to the estate by virtue of her marriage to John. This very claim required Shawn to provide 30 days' notice to her of his petition for letters, as the Probate Act requires. 755 ILCS 5/9-5(a).

Ellizzette also has property interests under Illinois law. As John's surviving spouse, she has the highest preference to serve as administrator of his estate or to appoint its administrator. See 755 ILCS 5/9-3(a) ("[t]he following persons are entitled to preference in the following order in obtaining the issuance of letters of administration ***(a) The surviving spouse or any person nominated by the surviving spouse."). Because John did not have children, Illinois law grants Ellizzette the right to inherit the entirety of John's modest estate. 755 ILCS 5/2-1(c) ("Rules of descent and distribution. The intestate real and personal estate of a resident decedent and the intestate real estate in this State of a nonresident decedent, after all just claims against his estate are fully paid, descends and shall be distributed as follows: *** (c) If there is a surviving spouse but no descendant of the decedent: the entire estate to the surviving spouse.")

Ellizzette's rights as John's surviving spouse and sole heir to administer John's estate, to appoint its administrator, and to inherit any of its assets are all constitutionally protected interests. *In re Estate of Jolliff*, 199 Ill.2d 510, 524 (2002) (an heir's expectancy in inheritance ripens into vested constitutionally protected property rights when decedent

passes.) It is clear no order should have been entered displacing and impacting these rights without prior notice to Ellizzette giving her an opportunity to be heard.

B. John's fundamental right to marry Ellizzette was not eliminated by the guardianship or section 11a-17(a-10).

Shawn's briefs do not say so directly, but it is now clear from his response to Ellizzette's request for cross-relief that Shawn contends, as guardian, he had the absolute, sole and unconditional right to determine whether John could exercise his fundamental, constitutional right to marry. Shawn's contention is apparently that section 11a-17(a-10) of the Probate Act, enacted in 2015, is a watershed piece of legislation withdrawing any ability of a ward to marry. Shawn's argument further presumes section 11a-17(a-10) completely transferred to the guardian in all instances the decision to seek prior approval for the ward to marry, without reference to the type of guardian, the type of guardianship, or the ward's individual circumstances. More startling still, Shawn presumes all this happened without the legislature actually saying so directly in the statute.

Shawn's argument the legislature surreptitiously eliminated a ward's fundamental right to marry is without merit. It ignores this Court's controlling precedent, the provisions of the Probate Act as a whole, and the language of section 11a-17(a-10) itself. The reading of the section Shawn demands would violate the fundamental constitutional rights of John and all Illinois wards to marry, contrary to existing United States Supreme Court precedent.

1. *Pape* confirmed a ward could marry notwithstanding the existence of a guardianship order.

In *Pape v. Byrd*, 145 Ill.2d 13 (1991), this Court recognized that an order of guardianship "is not sufficient, in and of itself, to show that the person was not competent to have consented to a marriage." *Id*. at 21. Under the rule in *Pape*, the guardianship order

Shawn obtained could not have established, as a matter of law, John was "unable to understand the nature, effect, duties and obligations of marriage." *Id.* at 22. As *Pape* recognized, the standard for consenting to marriage is *lower* than that which applies to transact business or applies to whether the ward can "make decisions concerning the care of his person" under section 11a–3 of the Probate Act. *Id.*

Pape is directly on point and controlling, despite Shawn's futile attempts to distinguish it. While Shawn contends "the individual in *Pape* was subject to a guardianship after the marriage in question took place, unlike the marriage here where the John had been declared totally without capacity and was subject to a plenary guardianship at the time he participated in a marriage ceremony with Ellizzette" (Resp. p. 10), this misstates *Pape's* facts. On the contrary, the ward in *Pape* was subject to a guardianship for 46 years *before* entering into the marriage. *Pape*, 145 Ill.2d at 16-17 (order of conservatorship entered in 1939 and ward married in 1985.) In addition, there was no substantive difference between the guardianship order in *Pape* and the order entered against John; the appointment of the guardian in *Pape* was "on the basis of his incapacity to make or communicate decisions regarding his care." *Id.* at 22. The only difference of significance of record between these cases cuts *against* Shawn: the ward in *Pape* had an IQ of 38 and was found to be "feeble minded." *Id.* at 16. In contrast, John was a brilliant doctor and scientist.

Nor was the marriage in *Pape* void. It was instead deemed *voidable*. While the guardian there filed an action to declare the marriage invalid, she commenced it after the limitations period in the Marriage Act had run. *Id.* at 25 (holding "trial and appellate courts did not err in finding that section 302(a)(1) of the Marriage Act barred Pape's action for a declaration of invalidity of Simpson's marriage to defendant.") Since "a voidable marriage

is valid, for all civil purposes, until a competent tribunal has pronounced the sentence of nullity on direct proceedings instituted for the purpose of setting the marriage aside," *Barber v. People*, 203 Ill. 543, 546-47 (1903), at best John and Ellizzette's marriage could have been voidable, subject to a claim commenced within the limitations period and before John died to declare it invalid. Indeed, all marriages could be so "voidable." Nonetheless, since Shawn failed to timely file such a claim, section 302(b) of the Marriage Act bars any claim now.

The guardianship order Shawn obtained against John did not conclusively establish John's inability to understand the nature, effect, duties, and obligations of marriage. The guardianship order simply stated "[r]espondent suffers from bi-polar disorder and drugs/alcohol addiction." (C 2119) It made no finding regarding John's inability to marry. Under these circumstances, no reasonable argument can be made that John lacked the capacity to consent to marriage, including under this Court's controlling caselaw.

C. Because the Probate Act recognizes wards with plenary guardians can enter into transactions that bind the ward, it necessarily recognizes such wards may consent to marriages.

This Court has long recognized the standard governing a ward's ability to transact ordinary business is higher than the standard governing a ward's ability to marry. *Greathouse v. Vosburgh*, 19 Ill.2d 555, 567-68 (1960). While Shawn argues John "was totally without capacity to marry" (Resp., p. 17), the Probate Act recognizes that a ward, for whom a plenary guardian is appointed, may nonetheless transact business and enter into binding contracts. *A fortiori*, a ward may consent to marriage, which relies on a lower standard, subject to the guardian's ability to seek to declare such a marriage invalid pursuant to the provisions and limitations of the Marriage Act.

Section 11a-22(b) of the Probate Act applies to business transactions, not marriages. That section 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*." (Emphasis added.) 755 ILCS 5/11a-22(b). While section 11a-22(b) uses the word "void" concerning the ward's obligations, it simultaneously confirms the counterparty doing business with the ward "is bound thereby."

Ellizzette has found only one reported appellate decision which addresses the meaning of both phrases of section 11a-22(b) when read together. In *Citicorp Savings of Illinois v. Stewart Title Guaranty Co.*, 840 F.2d 526 (7th Cir. 1988), the Seventh Circuit quoted this language and held "[i]in lawyer's parlance, the contract is 'voidable.'" *Id.*, 840 F.2d at 529, citing *Brandt v. Phipps*, 398 Ill. 296, 315 (1947) (quitclaim deed executed while plaintiff was incompetent was not void but voidable) and *Jordan v. Kirkpatrick*, 251 Ill. 116, 120 (1911) (same). As that court noted, "[t]he guardian of the incompetent person is free to enforce or reject the contract." *Id.* When a guardian enforces such a contract, the ward and the estate cannot avoid their contractual responsibilities. Similarly, if a contract resulting from a ward's transaction of business were truly void and of no legal effect, nothing under the law could save it. See *1550 MP Rd. LLC v. Teamsters Loc. Union No. 700*, 2019 IL 123046, ¶ 28, citing *Illinois State Bar Ass'n Mut. Ins. Co. v. Coregis Ins. Co*., 355 Ill. App. 3d 156, 164 (1st Dist. 2004) ("[A] contract that is void *ab initio* is treated as though it never existed; neither party can choose to ratify the contract by simply waiving its right to assert the defect.") As a result, contracts under Section 11a-22 are voidable.

Section 11a-22(b) of the Probate Act recognizes a ward with a plenary guardian may enter into contracts that can be ratified, enforced, and thus have legal effect. Since the Probate Act applies a stricter standard to ordinary business contracts than Illinois law does to marriages, the Act recognizes a ward with a plenary guardian also can enter into marriages, subject to a guardian's ability to file an action to invalidate per the Marriage Act.

D. Section 11a-17(a-10) does not require a ***ward*** to prove by clear and convincing evidence a proposed marriage was in his best interest and to obtain a court order before marrying.

Shawn contends Ellizzette and John's wedding ceremony had no legitimacy unless a best interest hearing was first held under section 11a-17(a-10) of the Probate Act. As the appellate court ruled, "the plain language of this provision *simply does not require prior approval by the court* before the ward can marry of his or her own accord." (Emphasis added.) *In re McDonald*, 2021 IL App (2d) 191113, ¶102. This holding, based on the unambiguous text of the statute, can only be affirmed.

Section 11a-17(a-10) states in pertinent part:

> Upon petition by the guardian of the ward's person or estate, the court may authorize and direct a guardian of the ward's person or estate, to consent, on behalf of the ward, to the ward's marriage pursuant to part II of the Illinois Marriage and Dissolution of Marriage Act if the court finds by clear and convincing evidence that the marriage is in the ward's best interests. 755 ILCS 11a-17(a-10).

The most reliable indicator of legislative intent is the language of a statute, given its plain and ordinary meaning. *People v. Botruff*, 212 Ill.2d 166, 174 (2004). When the statutory language is clear and unambiguous, it must be applied as written, without resorting to further aids of statutory construction. *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶56.

The plain and ordinary meaning of section 11a-17(a-10)'s language contains nothing to indicate an order of guardianship removes a ward's fundamental ability to marry. Nothing in the statute states a marriage celebrated without a best interest hearing is void. Nor does section 11a-17(a-10) require, let alone authorize, a *ward* to file a petition to seek court approval before marrying. It only allows a *guardian* to seek court approval.

Section 11a-17(a-10) contrasts significantly with the approach of other legislative schemes in existence in 2015, when it was enacted. Unlike Illinois, Wisconsin provides a ward's right to marry can be specially withdrawn if clear and convincing evidence supporting its removal exists, while insuring this right is *not* delegated to the guardian. Wis. Stat. 54.25(2)(a) ("A guardian of the person has only those rights and powers that the guardian is specifically authorized to exercise by statute, rule, or court order. Any other right or power is retained by the ward, unless the ward has been declared incompetent to exercise the right under par. (c) ***") and (c)(1)(a) ("[t]he right to consent to marriage.") (enacted 2006.) Iowa allows the court to enter a special order withdrawing the right to marry, this right remains with the ward unless and until withdrawn. Iowa Code Ann. § 633.635(4) ("[T]he court shall state those areas of responsibility which shall be supervised by the guardian and all others shall be retained by the protected person. The court may make a finding that the protected person lacks the capacity to contract a valid marriage.") While constitutionally infirm, for reasons stated later, Indiana nonetheless still explicitly withdraws a ward's right to marry and specifically allows the guardian the right to consent. Ind. Code §§ 29-3-8-2(a)(5), (b) (guardian has "[t]he power to consent to marriage ***.") (enacted 1991.)

If the Illinois legislature intended section 11a-17(a-10) to eliminate a ward's fundamental constitutional right to marry, and thus render void any marriage celebrated without such a hearing, it would have said so. That section 11a-17(a-10) does not even address this issue, yet somehow did so *ab silentio*, reveals the lack of merit in Shawn's tortured interpretation.

While Shawn argues his reading of section 11a-17(a-10) is necessary to protect the ward, this is simply not correct. A guardian may always, as in *Pape*, file an action to invalidate a marriage if the ward truly lacked the ability to understand the nature, effect, duties, and obligations of marriage. Shawn certainly knew how to file such an action; indeed, he did so, even though his action was untimely and barred by statute. (C 29-31) John and Ellizzette's marriage, like other marriages, was only subject to a claim for invalidation on incapacity grounds if such a proper action were commenced pursuant to the Marriage Act.

Since no such filing was timely commenced, the only proper conclusion is that John and Ellizzette's marriage stands as firm and valid under the Marriage Act and Illinois law.[2]

E. The reading of section 11a-17(a-10) Shawn advances would impermissibly restrict the fundamental right to marry.

It is settled that "cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort." *In re E.H.*, 224 Ill.2d 172, 178 (2006). If this Court were inclined to accept the argument that section 11a-17(a-10) applies

[2] However, if contrary to the statute's text this Court were to so interpret section 11a-17(a-10) as Shawn demands, it is clear any such ruling should be prospective only and not apply to Ellizzette. *See Exelon Corp. v. Dept. of Rev.*, 234 Ill.2d 266, 285-86 (2009).

to John and Ellizzette's marriage, it also must address the constitutional issues surrounding the statute's purported restrictions on the fundamental right to marry.

Shawn's argument requires this Court to determine that the fundamental right to marry is not impermissibly impeded when: the decision to seek approval of a ward's marriage is delegated solely to the guardian under all circumstances, no matter the type of guardian, the type of guardianship, and the individual capacities of the ward; the guardian must initiate and participate in a hearing in which evidence, presumably expert testimony, must be presented; the guardian must show by clear and convincing proof the proposed marriage is in the best interests of the ward; and, the court must then enter an order allowing the marriage only upon being satisfied the guardian has met this high burden of proof.

1. Supreme Court jurisprudence on the fundamental constitutional right to marry.

The Supreme Court has recognized states may impose some restrictions on the right to marry. Such restrictions, however, must not unduly interfere with this fundamental right.

In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court struck down a statute that removed the ability of fathers, delinquent on child support payments, to marry unless they obtained a court order allowing the marriage. In holding the restriction impermissibly impeded the constitutional right to marry, the Court held, "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388.

Similarly, in *Turner v. Safley*, 482 U.S. 78, 97-98 (1987), the Court reviewed prison regulations that refused permission to marry "absent a finding of a compelling reason to allow the marriage." 482 U.S. at 98. The Court struck that regulation as well. Holding it

was an "exaggerated response" that "sweeps more broadly than can be explained by [the state's] penological objectives," the Court held it impermissibly restricted the constitutional right to marry because there were "obvious, easy alternatives *** that accommodate the right to marry" while still implementing these objectives. *Id*. at 98-99.

Under *Zablocki* and *Turner*, state restrictions on the right to marry therefore must (1) be justified by a compelling state interest, (2) be narrowly tailored to achieve the goal or interest, and (3) be the least restrictive means for achieving the state interest. See Quasius, *The Next Step in Marriage Equality: Indiana Restrictions on Marriage for Individuals under Adult Guardianship*, 31 Geo. Mason U. Civ. Rts. L. J. 135, 145 (2021).

2. Section 11a-17(a-10), as interpreted by Shawn, is not narrowly tailored to protect the state's interest in safeguarding the ward.

While Ellizzette assumes Illinois has a sufficient *parens patrie* interest in regulating marriages for the protection of certain wards, Shawn's construction of section 11a-17(a-10) is not narrowly tailored to protect that interest. His reading would completely remove the ward's right to marry in all circumstances, no matter the type of guardian, the type of guardianship, and individual circumstances of the ward. It would do so without any specific finding or consideration of the ward's ability to understand the nature, effect, duties, and obligations of marriage.

In addition, section 11a-17(a-10), like the restrictions on the right to marry in *Zablocki*, is subject to court permission. It authorizes only the guardian to file such a petition. The statute, as Shawn construes it, thus delegates the ward's right to marry in all circumstances first to the guardian, thus affording the guardian the unilateral power to decide whether to allow the marriage, by deciding whether to file a petition for its approval. *Compare* Fla. Stat. §744.3215(2)(a) (if right to marry is restricted, decisions are placed

with court, not guardian); Wis. Stat. 54.25(2)(c) (the right to consent to marriage, if removed by order of court, cannot be transferred to guardian and can only be exercised by the court). Moreover, section 11a-17(a-10) would apply even though a guardian would have a conflict of interest when, as here, the guardian is a potential heir who would be disinherited if a childless ward were to marry.

Additionally, the high evidentiary burden imposed by section 11a-17(a-10) is not reasonably related to the state's interest. *See Turner*, 482 U.S. at 96-97 (regulation that required proof of a "compelling reason" to allow the marriage particularly problematic and impermissibly restricted right to marry). Requiring the court to first hold an evidentiary hearing and then "find by clear and convincing evidence that the marriage is in the ward's best interests," creates the need for the guardian to marshal and present expert evidence. Nor can one presume that all wards and their estates have the resources to present such evidence. *Cf. Zablocki*, 434 U.S. at 387 (noting that "many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry.") Moreover, the best interest finding the statute requires goes beyond the test of capacity this Court has held is required to consent to marriage, *i.e.*, whether the ward understands the nature, effect, duties, and obligations of marriage. *Pape,* 145 Ill.2d at 22.

Ellizzette notes that the clear and convincing best interest standard makes sense when the question is whether a guardian may commence an action to *dissolve* a marriage and override the ward's exercise of his or her fundamental right to marry in the first instance. This Court's decision in *Karbin v. Karbin*, 2012 IL 112815, made that clear when it held general equitable principles allowed a guardian to file a dissolution action, thus

addressing a very different situation. Nonetheless, even when a guardian has been appointed, the ward retains the right, notwithstanding the existence of the guardianship, to file for divorce. *See In re Marriage of Kutchins*, 136 Ill.App.3d 45, 48 (2d Dist. 1985) (when a guardian for the estate has been appointed because the ward is unable to manage his estate or financial affairs, "a different and more demanding test of mental competency than is applicable in determining whether the petitioner is competent to enter into or dissolve a marriage," the ward nonetheless "has legal capacity to sue for dissolution of marriage.")

Section 11a-17(a-10), as Shawn would prefer it construed, cannot stand in light of controlling Supreme Court jurisprudence upholding the right to marry. Under *Zablocki* and *Turner*, section 11a-17(a-10), as Shawn reads it, is broader than necessary to achieve legitimate state interests and unnecessarily interferes with the fundamental right to marry.

3. Section 11a-17(a-10), as interpreted by Shawn, is not the least restrictive means for protecting the state's interest.

An analysis of other state's approaches to a ward's fundamental constitutional right to marry demonstrates that section 11a-17(a-10), as Shawn interprets the statute, is not the least restrictive means for protecting the state's interest in regulating marriages of its wards.

Wisconsin, for instance, requires an individualized assessment and a specific finding, based on clear and convincing evidence, before the right to consent to marriage can be removed. Wis. Stat.§54.25(c)(1); §54.44. Otherwise, Wisconsin presumes the ward retains that right. *Id.* Wisconsin also does not transfer the right to consent to marriage to the guardian; instead, the right to consent, if removed from the ward, remains with the court. Iowa is similar. Iowa Code Ann. § 633.635(4) ("[T]he court shall state those areas of responsibility which shall be supervised by the guardian and all others shall be retained

by the protected person. The court may make a finding that the protected person lacks the capacity to contract a valid marriage.")

Shawn's argument that section 11a-17(a-10) eliminated John's right to marry cannot be the least restrictive means to protect the ward's fundamental right to marry, as Illinois' neighboring states show. Since Shawn's reading of the statute cannot withstand constitutional muster, this Court should reject his argument that any failure to comply with the statute rendered John and Ellizzette's marriage void.

II. No record is necessary to show Shawn violated the Probate Act's mandatory 30 day notice period.

Shawn cites Supreme Court Rule 323 and *Foutch v. O'Bryant*, 99 Ill.2d 389, 392 (1984), to argue Ellizzette failed to supply a complete record of the hearing for which she received no notice and Shawn did not supply a court reporter. Under these facts, Shawn contends *Foutch* requires the presumption the trial court must have acted appropriately. Shawn's Catch-22 argument should be rejected. Shawn wrongfully failed to give Ellizzette notice of his motion, so he cannot and should not be heard to complain she failed to provide a record of this proceeding. *Compare Foutch*, 99 Ill.2d at 392 (noting that "plaintiff and defendant were represented by counsel" at hearing). Nor is any record required to know that an *ex parte* motion for letters of administration presented seven days after John's death was less than the 30 days' notice the Probate Act requires.

Similarly, no transcript of the hearing on the separate motions to vacate and reconsider is required where, as here, 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) (failure to provide report of proceedings did not prevent review where sufficient documents in record apprised appellate court of trial court's decision); *Walker v. Iowa Marine Repair*

Corp., 132 Ill. App. 3d 621, 625–26 (1st Dist. 1985) ("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," "it was not necessary to resort to the specific arguments presented by counsel and the hearing on the motion").

The appellate court erred in declining to review these orders because no transcript of the *arguments* of counsel at the hearing on the motions for vacate and reconsider was provided. Shawn should not be able to violate the Probate Act with impunity and avoid review of the *ex parte* orders he obtained because of these same violations.

III. Ellizzette timely filed her appeal once her status and rights as a party were *finally* determined.

In an attempt to avoid this Court's review of the trial court's orders of administration and declaring heirship, Shawn claims Ellizzette's appeal was not timely. (Resp. p.17.) This is patently without merit. Ellizzette timely filed her notice of appeal upon a final determination and order of her status and rights as a party.

"[N]ot every order entered in an estate proceeding may be immediately appealed." *In re Estate of Vogt*, 249 Ill.App.3d 282, 285 (1st Dist. 1993). The order must *finally* determine the right or status of a party for the appellate court to obtain jurisdiction. *In re Estate of York*, 2015 IL App (1st) 132830, ¶ 22. *See also Estate of Semeniw*, 78 Ill. App. 3d 570, 574 (1st Dist. 1979) (trial court's order dismissing with prejudice one of two putative spouse's petitions to declare heirship was final when it terminated her claim to heirship and to share in estate.) A trial court also may reserve issues and thereby make an apparently final order non-final; indeed, "[g]enerally, an order explicitly reserving an issue for further consideration or otherwise manifesting the trial court's intention to retain

jurisdiction for the entry of a further order is neither final nor immediately appealable." *In re Marriage of Bothe*, 309 Ill.App.3d 352, 355 (2d Dist. 1999) citing *In re Guzik*, 249 Ill.App.3d 95, 98 (2d Dist. 1993).

Despite Shawn's contention, the trial court's April 18, 2018 order denying Ellizzette's motion to vacate did not finally determine her rights or status as a party consistent with Rule 304(b)(1). That very order acknowledged Ellizzette's status remained at issue, stating Ellizzette "shall file her petition for appointment of administrator and affidavit of heirship on or before May 2, 2018 pursuant to Section 9-7 of the Probate Act." (C 240) This language manifested the trial court's intention to retain jurisdiction over the unresolved issues of whether Ellizzette had the preferential right to serve as or nominate the administrator and whether she was John's sole heir. There is no other reasonable interpretation of the April 18, 2018 order. Accordingly, *In re Estate of Thorp*, 282 Ill.App.3d 612 (4th Dist. 1996), and *Estate of Kime*, 95 Ill.App.3d 262, 269 (3rd Dist. 1981), are both completely distinguishable. In neither did the trial court manifest its intention to retain jurisdiction and neither involved a final order under the Rule.

Additionally, the trial court reaffirmed these issues it reserved were not final on the day Ellizzette's petition came before it for trial. The court then stated one of the issues for trial was Ellizzette "wanted to be able to designate who would be the Administrator as a preference." (R 246) Similarly, the trial court's decision to enter a finding of no just reason to appeal on November 18, 2019 under Rule 304(a) recognized it had then entered a final order finally determining Ellizzette's status as a party. (C 2167)

The lack of finality on Ellizzette's claims for heirship and administration in the April 18, 2018 order, and the trial court's reservation of these issues until it ruled on

November 18, 2019 and entered its Rule 304(a) finding, confirm Ellizzette's appeal is timely and she was not required to appeal the April 18, 2018 order under Rule 304(b)(1) or lose her right for review of these issues.

IV. Ellizzette was fundamentally prejudiced by *ex parte* orders of administration and declaring heirship.

Shawn finally contends the prejudice Ellizzette suffered from the *ex parte* orders he obtained was remedied because the trial court allowed her to file a petition for letters, after Shawn obtained an unlevel playing field. Shawn overlooks much here. He ignores the benefits he obtained to use the assets of John's estate against his sole heir and surviving spouse, leaving Ellizzette to bear the considerable burden and expense of litigating her rights. Shawn further ignores that while Ellizzette has had to deplete her savings to vindicate these rights, Shawn depleted John's estate to deny them.

More importantly, Ellizzette was prejudiced because Shawn could not have proven Ellizzette and John's marriage was invalid when it mattered, when he was required to (but did not) give notice and before he was appointed administrator. Shawn would have had to prove John did not understand the nature, effect, duties, and obligations of the marriage John and Ellizzette celebrated on July 11, 2017. Shawn could never have done that.

Further, Shawn would not have been able to assert legal positions as administrator that have no merit, but which he nonetheless forced Ellizzette to respond to, such as his false contentions that Illinois law required two witnesses to the marriage and the Illinois legislature could not amend the Dead Man's Act. Indeed, Shawn would have been unable to make his Dead Man's Act objection in the first place, had he not been appointed administrator by violating the Probate Act. Finally, Shawn would not have been able to pursue the offensive and intrusive hardball litigation tactics he has employed in this case,

including his motion practice regarding demands to fingerprint Ellizzette, and the personal attacks he has repeated before this Court. Such personal attacks should have no place in briefs filed in this Court. They can only have added to the pain Ellizzette suffered from the tragic loss of her husband.

The argument that Ellizzette did not suffer prejudice from Shawn's violation of her statutory and due process rights ignores reality. It should be summarily rejected.

CONCLUSION

For all these reasons, respondent/appellee/cross-appellant Ellizzette McDonald respectfully requests that this Court enter the relief she previously requested and further:

(a) reverse the trial court's orders granting Shawn's petition for letters of administration and declaring heirship;

(b) reject Shawn's contention that section 11a-17(a-10) of the Probate Act barred John from marrying Ellizzette and that their marriage was void;

(c) affirm that John and Ellizzette entered into a valid marriage that Shawn cannot attempt, after John's death, to invalidate on the alleged basis of incapacity; and

(d) remand this matter with directions that the trial court appoint Ellizzette administrator of John's estate and enter an order declaring Ellizzette John's sole heir.

Respectfully Submitted,

ELLIZZETTE MCDONALD

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

CERTIFICATE OF COMPLIANCE

I certify that this cross-reply brief conforms to the requirements of Rules 341(a) and (b). The length of this cross-reply brief, excluding the pages contained in the Rule 341(d) cover, this Rule 341(c) certificate of compliance, the certificate of service, and the matters appended to the cross-reply brief, is 20 pages.

Dated: September 22, 2021

Respectfully submitted,
ELLIZZETTE McDONALD

By: /s/ Ryan P. Weitendorf
One of her attorneys

Ryan P. Weitendorf (#6336933)
Roeder Law Offices LLC
77 West Washington Street, Suite 2100
Chicago, Illinois 60602
Telephone (312) 667-6000
Facsimile (708) 843-0618
rpw@roederlawoffices.com

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 September 23, 2021, there was electronically filed and presented to the Clerk of the Supreme Court of Illinois, a **motion for leave to file cross-reply** brief, along with the proposed **Cross-Reply Brief on behalf of appellee/cross-appellant,** and that this **Motion** with **Cross-Reply Brief** have been served via email and through the Odyssey EfileIL system to the parties and attorneys of record, indicated below:

Christopher J. Warmbold
Kinnally Flaherty Krentz & Loran P.C.
2114 Dearpath Road
Aurora, IL 60506
(630) 907-0909
PKinnally@kfkllaw.com
CWarnbold@kfkllaw.com

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.

ROEDER LAW OFFICES, LLC
By: /s/ Steven J. Roeder
Counsel for Respondent-Appellee/Cross-Appelant, Ellizzette McDonald Respondent

Dated: September 23, 2021

STEVEN J. ROEDER
RYAN WEITENDORF
ROEDER LAW OFFICES LLC
77 West Washington Street
Suite 2100
Chicago, Illinois 60602
(312) 667-6000
sjr@roederlawoffices.com
rpw@roederlawoffices.com

ROBERT G. BLACK
LAW OFFICES OF
ROBERT G. BLACK, P.C.
101 North Washington Street
Naperville, Illinois 60540
(630) 527-1440
rblack@rgb-law.com