

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS
No.121199

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

Consolidated with
121241

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

BRIEF OF APPELLEE

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ORAL ARGUMENT REQUESTED

FILED

FEB - 1 2017

POINTS AND AUTHORITIES

The Trial Court erred in finding, as a matter of law, a successor agent under a power of attorney has no duty, effectively of any kind, to the principal.

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NATURE OF THE ACTION

Plaintiff-Appellee, Ruth Ann Alford as Executor of the Estate of Doris E. Shelton (hereinafter “Ruth Ann”) brought a Complaint at Law against Defendant-Appellant, Rodney Shelton (hereinafter “Rodney”) for damages to Decedent, Doris E. Shelton (hereinafter “Doris”) caused by Rodney’s breach of fiduciary duty to Doris pursuant to 755 ILCS 45/2-10.3. Rodney moved to dismiss pursuant to 735 ILCS 5/2-615 asserting no duty exists. The Trial Court granted Defendant’s Motion(s) pursuant to 735 ILCS 5/2-615.

ISSUES PRESENTED FOR REVIEW

Whether the Trial Court erred in granting Rodney’s Motion pursuant to 735 ILCS 5/2-615, finding as a matter of law, the successor agent under a power of attorney (Rodney) has no duty, effectively of any kind, to the principal (Doris).

STANDARD OF REVIEW

Appellate review of ruling on a motion pursuant to 735 ILCS 5/2-615 is de novo. *Lockwood v. Standard & Poor’s Corp.*, 682 N.E.2d 131, 289 Ill.App.3d 194, 224 Ill.Dec. 570 (1st Dist., 1997).

JURISDICTION

This appeal is taken as of right, pursuant to Illinois Supreme Court Rules 301 & 304, from a final and appealable Order entered on August 29, 2014 in favor of Rodney (C. 56; R. 27-29; A.15, 17-20)¹. Notice of Appeal required under Illinois Supreme Court Rule 303 (a) & (b), was timely filed on September 4, 2014 (C. 57; A. 44). Thereafter upon the Decision rendered by the Appellate Court, Third District, on August 1, 2016 (A.16), a

¹ References apply to record on appeal filed in 3-14-0685

timely Petition for Leave to Appeal pursuant to Illinois Supreme Court Rule 315 was filed and allowed on November 23, 2016. This Brief is timely filed pursuant to the Rule 315(h).

STATUTES INVOLVED

755 ILCS 45/2-10.3, Successor agents.

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

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

(c) Any person who acts in good faith reliance on the representation of a successor agent regarding the unavailability of a predecessor agent will be fully protected and released to the same extent as though the reliant had dealt directly with the predecessor agent. Upon request, the successor agent shall furnish an affidavit or Successor Agent's Certification

and Acceptance of Authority to the reliant, but good faith reliance on a document purporting to establish an agency will protect the reliant without the affidavit or Successor Agent's Certification and Acceptance of Authority. A Successor Agent's Certification and Acceptance of Authority shall be in substantially the following form:

SUCCESSOR AGENT'S

CERTIFICATION AND ACCEPTANCE OF AUTHORITY

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

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

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

I accept appointment as agent under this power of attorney.

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

Dated:

.....

(Agent's Signature)

.....

(Print Agent's Name)

STATEMENT OF FACTS

Pursuant to Power of Attorney executed on or about January 18, 2005, Rodney held successor Power of Attorney for Doris. (C. 2-13; A. 3-14). On December 1, 2011, Rodney was a grantee in deeds executed on December 1, 2011 and recorded January 3, 2012, Grantor of which was Thomas Shelton (hereinafter "Thomas") as POA for Doris. (C. 2-13; A. 3-14).

Ruth Ann Alford as Executor of the Estate of Doris E. Shelton, Plaintiff, brought a Complaint at Law, based on application of 755 ILCS 45/2-10.3, seeking damages from Rodney for breach of fiduciary duty and damages arising therefrom. (C.2-13; A. 3-14)

Rodney brought Motions to Dismiss pursuant to 735 ILCS 5/2-615. After briefing and oral argument, the Trial Court granted said Motions, finding as a matter of law that Rodney had no duty to Doris. (C. 56, R. 27-29; A.15, 17-21)

ARGUMENT

A principal in a Power of Attorney may designate one or more successor agents to act if an initial or predecessor agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. 755 ILCS 45/2-10.3. As clearly set forth by 755 ILCS 45/2-10.3 (b) "An agent is not liable for the actions of another agent, *including a predecessor agent, unless the agent participates in or conceals a breach of fiduciary duty committed by the other agent. An agent who has knowledge of a breach or imminent breach of fiduciary duty by another agent must notify the principal and, if the principal is*

incapacitated, take whatever actions may be reasonably appropriate in the circumstances to safeguard the principal's best interest." [emphasis added]. This squarely and undeniably imposes a duty on a successor agent, activated or not, and irrespective as to whether the Agent has been asked to provide a "Successor Agent's Certification" (755 ILCS 45/2-10.3 (c)) or not. With the exception of a change to reflect reference to the 2012 Criminal Code from the 1961 Criminal Code, the statute remains unchanged, has not been reversed or otherwise modified. That Counsel still has not found a specific case interpreting the recent statute does NOT alter the fact of the language of the statute is the law in Illinois, and that statutory law clearly imposes a duty on a *Successor Agent* and states what that duty is.

The language of the statute, "[a]n agent is not liable for the actions of another agent, *including a predecessor agent [emphasis added]*", clearly shows that the statutory title "*Successor Agents*" is not the use of "mere catchwords" as Rodney contends. As recognized by the Third District Appellate Court Majority, in this case, "The other two subsections [within § 2-10.3] within that section both clearly apply to successor agents." *Alford v. Shelton (In re Estate of Shelton)*, 2016 IL App (3d) 140163, ¶36, 60 N.E.3d 121,132, 406 Ill.Dec.219, 130 (3rd Dist. 2016). (A21-42). The statute then, read in its entirety (as Rodney advocates), extends the duty to a principal to Successor agents as reflected by the statutory title *and* content. 755 ILCS 45/2-10.3. In this case, that Successor is Rodney.

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

Elias makes clear Rodney cannot evade such a duty by claiming he was not “an agent at the time of the execution of the deed”. The Respondent in *Elias* was POA under both a health care power of attorney and a “durable general power of attorney” that “granted broad powers to [the POA] to handle and dispose of [the Principal’s] real and personal property.” *In re Elias* at 306, 1022, 526. To avoid liability Respondent claimed in part that she had not “activated” her POA until some seventeen (17) months after being named as POA. *Id.* at 320, 1033, 537. The Court found this claim to be “neither legally nor factually sound”. *Id.* at 320, 1033, 537. The Court went on the state:

“Second, Elias [Decedent] executed a separate health care power of attorney to govern any medical decisions. The durable power of attorney granted broad powers to McDonnell [Respondent] to handle and dispose of Elias’ real and personal property. The LPL transfer-on-death document was executed after Elias’ grant of the general durable power of attorney to McDonnell. Likewise, the alleged gifting of the personal property occurred *after the power of attorney was*

executed [emphasis added] and McDonnell became Elias' fiduciary. Thus, McDonnell was Elias' fiduciary *at the time of the execution [emphasis added]* of the LPL transfer-on-death document and the disposition of the personal property.” The LPL transfer-on-death document, naming Respondent as sole beneficiary, had been executed prior to Respondent’s claimed POA activation and a portion of the disposition of personal property had occurred prior to Respondent’s claimed activation. *Id.*

Rodney asserts reliance on *In re Elias* is “erroneous and misplaced” by summarily stating there is no application here because the words “successor agent” or “secondary agent” are not in the decision. However, this argument ignores the obligations enunciated and extended to him by operation of §2-10.3.

It cannot be disputed that the primary agent under the POA at issue in this case, Thomas (father of Rodney), had a duty defined by statute and case law to Doris. The primary agent under a power of attorney has a fiduciary duty to the person who made the designation. *Spring Valley Nursing Ctr., L.P. v. Allen*, 2012 IL App (3d) 110915, 977 N.E.2d 1230, 365 Ill.Dec. 131 (3rd Dist. 2012). This mere existence of a fiduciary relationship prohibits the agent from seeking or obtaining “any selfish benefit” for himself, and if the agent does so, the transaction is presumed to be fraudulent. *Id.* This applies to conveyances of the principal's property by the agent to a third party on behalf of the principal and also to conveyances made by the principal directly to the agent. *Id.*

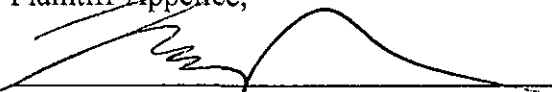
The Agent "shall act in good faith for the benefit of the principal using due care, competence, and diligence in accordance with the terms of the agency and shall be liable for negligent exercise". 755 ILCS 45/2-7(a). That agent "must act in accordance with the principal's expectations to the extent actually known to the agent and otherwise in the principal's best interests" 755 ILCS 45/2-7 (b). If a court finds that an agent is not acting for the benefit of the principal in accordance with the terms of the agency or that the agent's action or inaction has caused or threatens substantial harm to the principal's person or property in a manner not authorized or intended by the principal, a court may order a guardian of the principal's person or estate to exercise any powers of the principal under the agency, including the power to revoke the agency, or may enter such other orders without appointment of a guardian as the court deems necessary to provide for the best interests of the principal. 755 ILCS 45/2-10 (b).

Thomas breached the duty he owed to Doris (C. 2-4; R. 14-16). The cited statutory language and case law make clear that Rodney as named Successor Agent in the POA had a duty to Doris. Rodney was in fact named as a successor POA well before the date the deed(s) in question were executed conveying the real property to him. As recipient of the fruits of Thomas' breach of fiduciary duty to Doris, Rodney had "knowledge of a breach or imminent breach" of fiduciary duty by Thomas. Rodney therefore had an obligation, pursuant to 755 ILCS 45/2-10.3, to notify the Doris of the violation instead of participating in the violation.

CONCLUSION

The undisputed facts of this case clearly show Rodney was the fiduciary of Doris who ended up owning Doris' Real Property. As a result of the breach of that duty Doris/Doris' Estate is damaged. It was error for the Trial Court to reward Rodney for breach of his duty.

Respectfully Submitted,
RUTH ANN ALFORD as executor of the
ESTATE OF DORIS E. SHELTON
Plaintiff-Appellee,



By One of Her Attorneys
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IN THE SUPREME COURT
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RUTH ANN ALFORD, as executor of the ESTATE OF DORIS E. SHELTON,) Honorable Lance R. Peterson Presiding) Appeal from the Circuit Court of) the 13 th Judicial Circuit, Grundy County) Illinois, Case 2014-L-13)
Plaintiff-Appellee)
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Defendant-Appellant) Honorable Lance R. Peterson Presiding

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

I certify that this Petition conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 9 pages.

Respectfully submitted,


Michael W. Fuller

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FILED

FEB - 1 2017

**SUPREME COURT
CLERK**

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IN THE SUPREME COURT
OF THE STATE OF ILLINOIS
No.121199

RUTH ANN ALFORD, as executor of the) Honorable Lance R. Peterson Presiding
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Respondent-Appellee).) Date of Appellate Judgment Appealed
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) Illinois, Case 2013-P-17

APPENDIX TO BRIEF OF APPELLEE

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APPENDIX TO SUPPLEMENTAL BRIEF OF APPELLANT

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FILED

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

MAR 24 2014

Karen E. Shetty
GRUNDY COUNTY CIRCUIT CLERK

RUTH ANN ALFORD AS EXECUTOR
OF THE ESTATE OF DORIS E. SHELTON,
Deceased

Plaintiff,

General No.: 2014 L 13

V.

RODNEY SHELTON
Defendant.

COMPLAINT AT LAW

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

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

J. C. 2

A 3

5. That said deed was upon information and belief signed by the said Thomas F. Shelton at his home in Grundy County, Illinois.
6. That upon information and belief, the defendant knew he was the first successor agent under the said power of attorney for Doris Shelton.
7. That upon information and belief, the defendant was present at the time of the execution of said Exhibit B, or was at least aware that Thomas F. Shelton was going to execute said deed, or was aware that Thomas F. Shelton had executed said deed as the same was accepted by he and his said wife.
8. That Plaintiff was unaware of the execution of said deed marked Exhibit B as she was in the state of Texas at such time and was not told that such deed was going to be executed.
9. That 755 ILCS 45/2-10.3 provides:

Sec. 2-10.3. Successor agents.

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

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

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

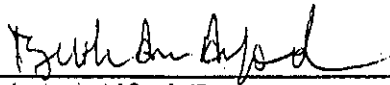
therein at a time when Doris E. Shelton was incompetent and in need of the income from said real property to sustain her.

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

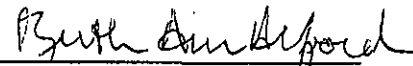
12. That as result of the foregoing, Doris E. Shelton was damaged in an amount equal to the value of the real property described in Exhibit B and was deprived of the income from said real property during the remainder of her lifetime.

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

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

By 
Ruth Ann Alford, Executor

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

(x) 
Ruth Ann Alford, Executor

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533928

ILLINOIS STATUTORY SHORT FORM POWER OF ATTORNEY FOR PROPERTY

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

Power of Attorney made this 19 day of JANUARY, 2005
(month) (year)

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

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

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

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

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

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

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

0 LIMITATIONS

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

Power to make gifts

Power to name or change beneficiaries or joint tenants

Power to exercise my Trust powers

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

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

JOC-5

Exhibit A

A-6

(YOUR AGENT WILL BE ENTITLED TO REIMBURSEMENT FOR ALL REASONABLE EXPENSES INCURRED IN ACTING UNDER THIS POWER OF ATTORNEY. STRIKE OUT THE NEXT SENTENCE IF YOU DO NOT WANT YOUR AGENT TO ALSO BE ENTITLED TO REASONABLE COMPENSATION FOR SERVICES AS AGENT.)

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

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

6. () This power of attorney shall become effective on the date hereof

(Insert a future date or event during your lifetime, such as court determination of your disability, when you want this power to first take effect)

7. () This power of attorney shall terminate on my death

(Insert a future date or event, such as court determination of your disability, when you want this power to terminate prior to your death)

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

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

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

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

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

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

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

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

Specimen signatures of agent (and successors)

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

(agent)

(principal)

(successor agent)

(principal)

(successor agent)

(principal)

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

State of Illinois

County of La Salle SS.

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

Dated: JANUARY 18, 2005.

(SEAL)

My commission expires

Notary Public

NOTARY PUBLIC STATE OF ILLINOIS
My Commission Expires 10/24/2007

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

Dated: JANUARY 18, 2005 (SEAL)

Witness

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

This document was prepared by:

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

A 7

NAME
STREET ADDRESS
CITY, STATE, ZIP

OR RECORDER'S OFFICE BOX NO. _____

(The Above Space for Recorder's Use Only)

GENERAL DESCRIPTION:

538928
FILED
FOR RECORDER
2012 NOV 21 PM 12:51
N5

STREET ADDRESS: _____

VARIANT TAX INDEX NUMBER: _____

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7
PREPARED BY:
Thomas Justice
719 Canal Street
Suite A
Ottawa, IL 61350

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

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

525385

FILED
FOR RECORD

2012 JAN -3 PM 3:37

Rene J. Phillips
GRUNDY COUNTY
CLERK & RECORDER

1/11/12
RHSP

Surcharge
\$10.00

QUITCLAIM DEED
Statutory (Illinois)

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

SEE ATTACHED EXHIBIT A.

Permanent Index Number(s): 04-31-200-617/014 and 04-31-200-015
Property Address: Unincorporated Farmland

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

Dated this 1 Day of December 20 11

Thomas F. Shelton
Thomas F. Shelton

Doris E. Shelton
Doris Shelton

Toni Shelton
as attorney in fact

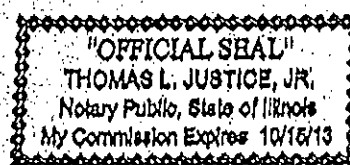
STATE OF Illinois)
COUNTY OF LaSalle) SS.

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

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

[Signature]
Notary Public
My commission expires: 10/15/13

Exempt under the provisions of paragraph C



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C 9

EXHIBIT B

Exhibit A

525385

Parcel 1:

The Northeast Quarter (N.E. $\frac{1}{4}$) of the Northeast Quarter (N.E. $\frac{1}{4}$) of Section Thirty-one (31), Township Thirty-three (33) North, Range Six (6) East of the Third Principal Meridian, situated in the County of Grundy in the State of Illinois.

EXCEPT

That part of the NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 31, lying West of County Highway 6, also known as Kinsman Road, in Township 33 North, Range 6 East of the Third Principal Meridian (Norman Twp.) Grundy County, Illinois.

A 11

525386

FILED
FOR RECORD

2012 JAN -3 PM 3:38

King J. Dierks
GRUNDY COUNTY
CLERK & RECORDER

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

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

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

1/11/12
RHSP

Surcharge
\$10.00

QUITCLAIM DEED
Statutory (Illinois)

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

SEE ATTACHED EXHIBIT A.

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

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

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

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

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

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

Dated this 6 Day of December 20 11

Thomas F. Shelton
Thomas F. Shelton

A 12

525386

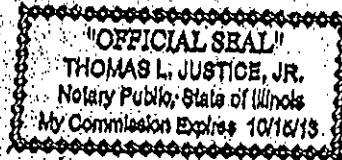
STATE OF Illinois
COUNTY OF LaSalle } SS.

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

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

Thomas F. Shelton
Notary Public
My commission expires: 10/15/13

Exempt under the provisions of paragraph e



12-1-2011

Exhibit A

525386

Parcel 1 & 2:

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

ALSO EXCEPTING

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

Parcel 3:

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

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

GRUNDY COUNTY, ILLINOIS

NO. 2014-L-13

FILED

Alford

AUG 29 2014

vs.

Shelton

Kaune Elottery
GRUNDY COUNTY CIRCUIT CLERK

ORDER

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

① Defendant's Motion for Judgment on the Pleadings or, in the Alternative, Motion to Dismiss is granted, for the reasons stated on the record. Motion is granted, pursuant to 735 T.C.S. 615(a), with prejudice.

SO ORDERED.

[Signature]

DATE

8/29/14

[Signature]

JUDGE

C 56

A 15

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

RUTH ANN ALFORD AS EXECUTOR OF THE)
ESTATE OF DORIS E. SHELTON)
Plaintiff)
V.)

RODNEY SHELTON)
Defendant)

FILED

2014-L-13

SEP 04 2014

Karen E. Shetty
GRUNDY COUNTY CIRCUIT CLERK

NOTICE OF APPEAL

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

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

Respectfully Submitted by

ESTATE OF DORIS E. SHELTON
Petitioner-Appellant,

[Signature]
By one of its/her attorneys

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

FILED

STATE OF ILLINOIS)

COUNTY OF GRUNDY)

SEP 18 2014

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS *Karen D. Kelly*
GRUNDY COUNTY CLERK

RUTH ANN ALFORD AS EXECUTOR OF)
THE ESTATE OF DORIS E. SHELTON,)
Deceased,)

Plaintiff,)

- vs -)

RODNEY SHELTON,)

Defendant.)

14 L 13

REPORT OF PROCEEDINGS had in the above-entitled
cause before the HONORABLE LANCE R. PETERSON, Judge of
said Court, on the 29th day of August, 2014.

APPEARANCES:

MR. GEORGE HUPP

Attorney At Law

Appeared on behalf of the Plaintiff;

MR. DARRELL K. SEIGLER

Attorney At Law

Appeared on behalf of the Defendant.

2

1 THE COURT: 14 L 13, Alford versus Shelton. And
2 the parties are present by their counsel. And this
3 cause comes before the Court for decision today.
4 I thought I might be able to draft you
5 something, but my secretary was actually gone on a
6 week-and-a-half vacation and just got back yesterday. I
7 have re-read the parties' briefs. I think when we were
8 here last time I was under a little bit of a
9 misunderstanding and thought we would put this off
10 waiting for the appellate court on the first issue that
11 we dealt with in the other file, but since then I think
12 the one thing I needed to do before I ruled was read the
13 Elias case cited by the plaintiff. And so I re-read
14 everything, including the statute and definitions and
15 the Elias case, and I'm going to grant the defendant's
16 motion to dismiss. I think it can be dismissed under
17 Paragraph A because I think that the complaint has to
18 allege facts that establish a duty and I think that the
19 conclusioin is they don't accept all the alleged facts
20 in the complaint as true that the agency isn't
21 established under the statute and the case law, so I
22 think the proper paragraph is Paragraph A.
23 I read Elias. I guess the bottom line
24 on my ruling is that Rodney Shelton never became an

3

1 agent as a matter of law; therefore, no fiduciary duty
2 ever developed. Thomas Shelton was the agent with all
3 the discretion that Doris chose to give him and the
4 Elias case I think is actually an example of where there

5 is clearly a duty. I think the Elias case is just
6 simply a basic case that establishes when you are the
7 primary agent and you are the agent you do have a duty,
8 but I don't think it helps plaintiff's position in this
9 case at all and I think it was a narrow issue, so I
10 think that's all I need to say. I assume you want
11 304(a) language?

12 MR. HUPP: This is the final order, right?

13 THE COURT: Sure.

14 MR. HUPP: I don't know that we need --

15 MR. SEIGLER: If it's a dismissal with prejudice, I
16 think that takes care of it.

17 THE COURT: I agree.

18 MR. HUPP: Final order, so I don't think we need
19 the 304.

20 THE COURT: No, I agree.

21 MR. SEIGLER: Thank you, your Honor.

22 THE COURT: Very well.

23 (Proceeding concluded.)

24

1 STATE OF ILLINOIS)
) SS:
2 COUNTY OF GRUNDY)

3

4

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

11

12

13 Date: 9-18-2014

Sara E. Olson, CSR

14

SARA E. OLSON, CSR

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Opinion filed August 1, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

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

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

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

OPINION

¶ 1

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

A21

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

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

¶ 3

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

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

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

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

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

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

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

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

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

¶ 23 In determining whether Rodney was Thomas's fiduciary at the time of the conveyance at

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

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

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

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

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

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

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

¶ 26

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

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

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

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

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

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

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

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

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

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

(Emphasis added.) 755 ILCS 45/2-10.3(b) (West 2010)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¶ 42 CONCLUSION

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

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

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

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

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

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

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

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

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

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

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