

Dennis R. Hower

Illinois Supplement To Accompany

WILLS, TRUSTS, AND ESTATE ADMINISTRATION FOR THE PARALEGAL

Fifth Edition

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*To Mom and Dad, thank you for your support in my education, your enthusiasm
in connection with this project, and your love.*

*To my colleagues, as well as past and current students at Rockford Business College,
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your willingness to learn, and even your tears.*

*Finally, to Margaret White, my student, colleague, and dear friend, who
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In this supplement, a page reference follows each head—(Hower 000). This page reference correlates with Dennis Hower’s textbook, *Wills, Trusts, and Estate Administration for the Paralegal*, Fifth Edition.

1

THE PURPOSE AND NEED FOR A WILL

Statutory Requirements For a Will (Hower 2)

The Illinois Probate Act of 1975, as amended from time to time, is the primary authority that contains the requirements for, and validity of, a will. This Act is found in Chapter 755 of the Illinois Compiled Statutes (referenced as Ill Comp. Stat. or ILCS). Similar acts related to estates can also be found in Chapter 755 of the Illinois Compiled Statutes. Some of these acts include the Uniform International Wills Act, the Escheats Act, the Illinois Living Will Act, and the Illinois Power of Attorney Act.

Basic Terminology Related to Wills (Hower 3)

The terminology found in the text is generally consistent with probating an estate in Illinois. Basic definitions of certain terms can be found in 755 Ill. Comp. Stat. 5/2-1 through 755 Ill. Comp. Stat. 5/1-11.

The use of the term *legacy* means a testamentary gift of real or personal property and includes a devise and a bequest. 755 Ill. Comp. Stat. 5/1-2.12. Also, the definition of a *will* under the Act means both a testament and a codicil. 755 Ill. Comp. Stat. 5/1-2.18.

Other chapters of this supplement will further highlight any differences in terminology.

2

THE CONCEPT OF PROPERTY RELATED TO WILLS, TRUSTS, AND ESTATE ADMINISTRATION

PROPERTY: TERMINOLOGY AND CLASSIFICATION (HOWER 25)

Real Property (Hower 25)

The definition of real property is found in a couple of places in the Illinois Code. It includes lands, lands underwater, structures, and improvements to the land, easements, franchises, and other legal rights to land. 315 Ill. Comp. Stat. 25/3(f) and 765 Ill. Comp. Stat. 90/3(e).

Fixtures (Hower 25)

Illinois defines fixture in relation to a couple of different acts. Essentially, the definition is a standard one dealing with an intention to attach personal property to land so that it becomes a part of the land and an interest arises in it under real property law. 30 Ill. Comp. Stat. 105/24.8 and 810 Ill. Comp. Stat. 5/9-102(a)(41).

STATUTES THAT GOVERN THE PASSAGE OF PROPERTY (HOWER 32)

In connection with the passage of property in Illinois, real and personal property are distributed to an heir through the same rules of law under the rules of descent and distribution if the decedent dies intestate. 755 Ill. Comp. Stat. 5/2-1. A testator has the power to bequeath by will the real and personal estate he or she owns at death. 755 Ill. Comp. Stat. 5/4-1.

FORMS OF PROPERTY OWNERSHIP (HOWER 32)

Forms of Concurrent Ownership—Ownership by Two or More Persons (Hower 34)

Joint Tenancy (Hower 34)

Illinois has enacted the “Joint Tenancy Act,” which sets forth statutory law on joint tenancies. This act is found in 765 Ill. Comp. Stat. 1005/0.01 through 765 Ill. Comp. Stat. 1005/4a.

Creation of a Joint Tenancy (Hower 41)

According to 765 Ill. Comp. Stat. 1005/1(b), where an instrument does not create a tenancy by the entirety but declares that the estate created be not in tenancy in common but with right of survivorship or declares that the estate created be not in tenancy in common but in joint tenancy, a joint tenancy has been created. Illinois law prefers the creation of a tenancy in common rather than a joint tenancy. 765 Ill. Comp. Stat. 1005/1.

Tenancy in Common (Hower 44)

Illinois prefers the creation of a tenancy in common rather than a joint tenancy. 765 Ill. Comp. Stat. 1005/1.

Tenancy by the Entirety (Hower 50)

Illinois does recognize tenancy by the entireties. In 765 Ill. Comp. Stat. 1005/1(c) the statute sets forth how to create a tenancy by the entirety.

Community Property (Hower 51)

Illinois is a common law state, not a community property state.

ESTATES IN REAL PROPERTY (HOWER 56)

Freehold Estates (Hower 57)

Fee Simple Estate or Fee Simple Absolute (Hower 57)

Illinois provides land to be conveyed under “The Conveyances Act” found in 765 Ill. Comp. Stat. 5/0.01 through 765 Ill. Comp. Stat. 5/39. The general rule in Illinois is that a fee simple estate is presumed to be passed under a warranty deed. 765 Ill. Comp. Stat. 5/9.

Life Estate (Hower 60)

755 Ill. Comp. Stat. 5/20-6(e) discusses the power the court has in connection with administering real estate, and how the court can use the real estate to satisfy creditors’ claims. This section, in particular, explains what a person with a life estate would receive if the real estate had to be sold to satisfy creditors’ claims.

Dower and Curtesy (Hower 64)

As the text indicates, dower and curtesy have undergone changes in Illinois. In fact, they have been abolished under 755 Ill. Comp. Stat. 5/2-9.

Spouse’s Right to Election or Elective Forced Share (Hower 65)

In Illinois a spouse may choose to renunciate the decedent’s will. If that choice is made, the surviving spouse may inherit a share proscribed by Illinois statute. Under 755 Ill. Comp. Stat. 5/2-8(a), a surviving spouse is entitled after payment of all just claims to one-third of the estate if the testator leaves a descendant or one-half of the estate if the testator leaves no descendant.

3

THE PARTICIPANTS AND THE PROPER COURT

THE PARTICIPANTS (HOWER 70)

The Personal Representative (Hower 70)

Appropriate Terminology (Hower 70)

As the textbook indicates, if a decedent has a valid will and names the representative in the will, Illinois calls him or her an executor. If the decedent dies intestate, Illinois will call the representative an administrator. Further, “representative” is defined in Illinois as an executor, administrator, administrator to collect, standby guardian, guardian, and temporary guardian. 755 Ill. Comp. Stat. 5/1-2.15. Within this supplement, the terms *personal representative* and *representative* are used interchangeably and have the same meaning.

The Role of the Personal Representative (Hower 71)

An executor is to administer all of the decedent’s estate. 755 Ill. Comp. Stat. 5/6-15.

Some of the probate duties of the personal representative are outlined here. A more thorough discussion of the probating of an estate is covered in Chapters 11 and 12.

In Illinois, one duty that a potential executor has is to institute a proceeding to have the will admitted to court within thirty (30) days of acquiring knowledge that he or she is named in the will as executor. 755 Ill. Comp. Stat. 5/6-3.

Some of the remaining pre-probate powers of the executor are contained in 755 Ill. Comp. Stat. 5/6-14. These include: (1) carrying out of any gift of the decedent’s body, (2) the burial of the decedent, and (3) the payment of funeral expenses and the preservation of the estate.

An administrator with a will annexed has the same powers and duties as an executor. 755 Ill. Comp. Stat. 5/6-16.

The main textbook contains other types of pre-probate duties required of the personal representative. These are consistent with the general practice of probating an estate and would generally apply in Illinois as well.

As indicated in the text, a personal representative should file a variety of documents and is normally the individual that petitions the court to admit the will and/or issue Letters, will receive Letters testamentary or Letters of administration, and proceed with administering the estate. This procedure will be discussed in length in Chapter 12 of this supplement.

The Attorney (Hower 75)

The personal representative may hire an attorney to help administer the estate. According to 755 Ill. Comp. Stat. 5/27-2, the attorney is entitled to reasonable compensation for his or her services.

In Illinois, the conduct of an attorney is governed by the rules of the Supreme Court of Illinois Article VII.

The Paralegal or Legal Assistant (Hower 77)

The textbook outlines the role a paralegal or legal assistant would have in connection with estate planning or administration. In Illinois, a paralegal is bound by the ethical rules of the professional organization of which he or she is a member.

The Probate Court (Hower 78)

In Illinois, as indicated in the text, the Probate Division of the Circuit Court has jurisdiction over wills, probate, and distribution of the decedent's estates.

The Clerk or Court Administrator (Hower 80)

In Illinois, each county does have different procedures to follow. It is best to contact the courthouse in the county in which you are practicing to determine the appropriate procedure. For example, in Winnebago County the clerk of circuit court receives the probate documents; however, the judge administers the oaths.

TERMINOLOGY RELATED TO PROBATE COURT PROCEEDINGS (HOWER 81)

Venue (Hower 84)

The court that has proper venue in connection with the probating of a will or of an estate where a person died intestate is as follows:

- In the county where he or she resided.
- If he or she has no known Illinois residence, in the county in which the greater part of his or her real estate is located at the time of death.
- If he or she has no known Illinois residence and no real estate located in Illinois, in the county where the greater part of his or her personal estate is located at the time of death. 755 Ill. Comp. Stat. 5/5-1.

Ancillary Administration or Ancillary Probate Administration (Hower 85)

If the decedent is not a resident of the State of Illinois or is considered a nonresident missing person, and has died either testate or intestate, the situs of the tangible personal estate is where the property is located and the situs of the intangible personal estate is where the instrument evidencing a share, interest, debt, obligation, stock, or chose in action is located. 755 Ill. Comp. Stat. 5/5-2. Once it is determined that the situs of the property is located in Illinois, the court may direct the representative appointed in Illinois to make distribution of the tangible or intangible property directly to those beneficiaries designated in the decedent's will or to the persons entitled to receive the personal estate under the laws of the decedent's domicile. 755 Ill. Comp. Stat. 5/7-6.

4

THE LAW OF SUCCESSION: DEATH TESTATE OR INTESATE

DEATH WITH A WILL—TESTACY (HOWER 90)

Terminology Related to Wills (Hower 90)

Holographic Will (Hower 91)

As the textbook indicates, Illinois does not recognize holographic wills. See the discussion in Chapter 5 regarding requirements of a valid Illinois will.

Nuncupative (Oral) Will (Hower 92)

As the textbook indicates, Illinois does not recognize nuncupative wills. See the discussion in Chapter 5 regarding requirements of a valid Illinois will.

Statutory Will (Hower 92)

As the textbook indicates, Illinois does not have a statutory will.

Types of Dispositions—Gifts Made in a Will (Hower 97)

Bequest, Legacy, or Devise (Hower 97)

In Illinois, bequeath means to dispose of real or personal property by will, and also includes devise. 755 Ill. Comp. Stat. 5/1-2.04. Legacy means a testamentary gift of real or personal property and includes a devise and bequest. 755 Ill. Comp. Stat. 5/1-2.12.

Ademption, Lapses, and Abatement (Hower 99)

Lapses (Hower 100)

In Illinois a beneficiary has the right to disclaim the receipt of a gift under a will or under the statutes of descent and distribution. Once a person has disclaimed the property, it will be distributed as though the person had predeceased the decedent. 755 Ill. Comp. Stat. 5/2-7.

Illinois has an Antilapse Statute found in 755 Ill. Comp. Stat. 5/4-11. It provides that unless the testator provides otherwise in his or her will, the property will pass as provided in this statute. First, if the gift was originally given to a descendant of the decedent, the legatee's descendants take the estate per stirpes. Second, if the gift went to a member of a class, and a member of the class dies, his or her share goes to the other members of the class, unless the class member is a descendant of the testator, in which case the gift goes to the legatee's descendants per stirpes. Third, if neither of the above situations apply, then the gift will pass as a part of the residue under the will.

Abatement (Hower 101)

If an estate is insufficient to pay all legacies, specific legacies will be satisfied pro rata before general legacies. General legacies will be satisfied pro rata next. No priority is given between real or personal property. 755 Ill. Comp. Stat. 5/24-3(b). If the property specifically bequeathed is sold by the personal representative, the other legatees will contribute to the legatee whose gift has been sold to equalize the abatement. 755 Ill. Comp. Stat. 5/24-3(c).

DEATH WITHOUT A WILL—INTESTACY (HOWER 106)

Intestate Succession Laws (Hower 109)

The main statute in Illinois which provides the rules of intestate succession is 755 Ill. Comp. Stat. 5/2-1, “Rules of Descent and Distribution.”

Illinois provides that real and personal property of the decedent be distributed in the same order. As with most states, the first in line to inherit is the surviving spouse. He or she inherits the entire estate if the decedent died without any descendants. If there are descendants, then one-half the estate passes to the decedent’s descendants per stirpes and one-half passes to the surviving spouse. If there are only descendants of the decedent and no surviving spouse, then the entire estate passes to the descendant’s per stirpes.

Illinois then does something a little different than other states. It puts the decedent’s parents and siblings on the same line for inheriting. If there are no descendants and no surviving spouse, then in Illinois the estate passes to the decedent’s parents and siblings. If one parent has predeceased the decedent, then that parent’s share goes to the surviving parent. Thus, if we have Mom, Sister, and Brother, but Dad has predeceased the decedent, then Dad’s share goes to Mom. Mom gets half of the estate while Sister gets one-quarter of the estate and Brother gets one-quarter of the estate. If the brother or sister has predeceased the decedent then his or her share passes to his or her descendants per stirpes.

The next in line to inherit would be the decedent’s grandparents. One-half of the estate goes to the maternal grandparents, or if only one survives, all of that share of the estate to that survivor, and one-half is distributed to the paternal grandparents, or if only one survives, then all of that share to that survivor. If any set of grandparents has predeceased the decedent then their share goes per stirpes to their descendants.

The statute goes on to a division between the paternal and maternal great-grandparents and their descendants.

Finally, if the decedent has no living relatives, then the estate escheats. Real property escheats to the county in which it is located. Personal property escheats to the county in which the decedent was a resident.

The final part of this statute indicates that no distinction is made between the kindred of the whole and the half blood. Thus, a sister of half blood has the same rights as a sister who had the same parents as the decedent.

Per Stirpes Distribution (Hower 111)

Illinois distributes an intestate estate through the use of per stirpes. For example, the estate initially goes to the surviving spouse and descendant of the decedent per stirpes. See the full discussion on the Illinois statute of descent and distribution. 755 Ill. Comp. Stat. 5/2-1.

Also, if a beneficiary to a will predeceases the decedent and the beneficiary was a descendant of the testator, according to statute, his or her share passes per stirpes to his or her descendants. See the discussion on Illinois’ antilapse statute. 755 Ill. Comp. Stat. 5/4-11.

Escheat (Hower 115)

Illinois has enacted the “Escheats Act” found in 755 Ill. Comp. Stat. 20/0.01 through 755 Ill. Comp. Stat. 20/7. 755 Ill. Comp. Stat. 20/1 repeats the Illinois descent and distribution statute (755 Ill. Comp. Stat. 5/2-1) and states that both real and personal property will be inherited by the state if the person dies with no known heirs or representatives. In particular, the real estate escheats to the county in which it is located. The personal property goes to the county in which the decedent was a resident. If the decedent was not a resident of Illinois, the personal property goes to the state. 755 Ill. Comp. Stat. 5/2-1(h). The remaining statutes comprising the “Illinois Escheats Act” outline the procedure the state has to take to secure the property. For example, 755 Ill. Comp. Stat. 20/2 discusses the duties of the administrator and county clerk in connection with the escheating of personal property. The proceedings for real property require the state’s attorney of the county to file a complaint on behalf of the county. Notice will be given to all those interested in the estate and require them to appear in court to show cause why the property should not go to the county. Further, a publication notice procedure is outlined in 755 Ill. Comp. Stat. 20/3. 755 Ill. Comp. Stat. 20/5 outlines the judgment requirements.

Any person has ten (10) years from the death of the decedent to make a claim against money that has escheated to the county. Any person (except one served a copy of the order under 755 Ill. Comp. Stat. 20/3 or that filed an appearance in the proceeding, or their heirs or assigns) who claims land that has escheated must file a petition within five (5) years of the judgment being entered. Thus, 755 Ill. Comp. Stat. 20/7 sets forth the time limits for an individual to object to an escheat.

RIGHTS OF FAMILY MEMBERS TO A DECEDENT’S ESTATE (HOWER 117)

Rights of a Surviving Spouse (Hower 117)

Surviving Spouse’s Elective (Forced) Share (Hower 119)

In Illinois a surviving spouse may renounce an inheritance provided for him or her under a will and elect to take a share of the decedent’s estate as prescribed by statute. According to 755 Ill. Comp. Stat. 5/2-8, the surviving spouse may take, after payment of all claims, one-third of the decedent spouse’s estate if the decedent left surviving descendants and one-half the estate if the decedent left no descendants.

The procedure for renouncing a will is described in 755 Ill. Comp. Stat. 5/2-8(b) and explains that the surviving spouse must file an instrument within seven (7) months after admission of the will to probate or within such further time as may be allowed by the court under certain specified circumstances. If the spouse files such an instrument it is a complete bar to any claim the spouse may have under the will.

If the surviving spouse decides to take based on the statutory law, and this election causes another person’s inheritance to be affected, the court shall abate or add to the legacies in a way as to apportion the loss or advantage among the legatees in proportion to the amount and value of their legacies. See 755 Ill. Comp. Stat. 5/2-8, 755 Ill. Comp. Stat. 5/2-9, and 755 Ill. Comp. Stat. 5/15-4.

Effect of Divorce and Marriage on a Spouse’s Rights (Hower 122)

The granting of a judgment of the dissolution of a marriage or the declaration of the invalidity of a marriage revokes every legacy given to the testator’s former spouse in a will executed before the entry of such judgment. The will takes effect as if the former spouse had died before the testator. 755 Ill. Comp. Stat. 5/4-7(b).

Rights of Children (Issue) (Hower 125)

Adopted Children (Hower 126)

The general rule in Illinois is that an adopted child is a descendant of the adopting parent and is entitled to inherit from the adopting parent and any lineal and collateral kindred of the adopting parent. An exception exists which states that the adopted child will only be able to inherit from the adopting parent but not the adopting parent's lineal or collateral kin if the adopted child is adopted after attaining the age of eighteen years and the child never resided with the adopting parent before attaining the age of eighteen. See 755 Ill. Comp. Stat. 5/2-4(a).

Further, an adopting parent and the lineal and collateral kindred of the adopting parent shall inherit property from an adopted child. This excludes the natural parent and the lineal and collateral kindred of the natural parent from inheriting from the child under the laws of intestate succession. 755 Ill. Comp. Stat. 5/2-4(b).

The statute continues to be even more specific and should be consulted more closely if an issue with an adopted child arises.

Nonmarital Children (Hower 127)

In Illinois, the rule regarding inheritance between an illegitimate child and his or her parent and other relatives rests on the concept of whether a parent qualifies as an "eligible parent." An "eligible parent" is defined as a parent of the child who, during the child's lifetime, was acknowledged as the child's parent, established a parental relationship with the child, and supported the individual as the parent's child. If both parents are deemed to be "eligible parents," then the Illinois statutes of intestate succession come into effect. If a parent is in arrears of in excess of one year's child support, the parent will not receive an inheritance from the child until the court determines otherwise.

If neither parent is an "eligible parent," then the parents will be treated as predeceasing the decedent and the estate will be distributed as provided in the Illinois statutes of intestate succession.

If one parent is determined to be an eligible parent, the estate will be distributed first to a surviving spouse, children, and issue of children as provided in the Illinois statutes of intestate succession. Next, the estate would be distributed to the eligible parent and any descendants of the eligible parent. The eligible parent would receive one-half of the estate and any descendants of the eligible parent would receive one-half of the estate per stirpes.

If the one eligible parent is not living, the estate goes to the grandparent on the eligible parent's side of the family, or the descendant of such grandparent. If there is no grandparent or descendant of the grandparent, the estate would be distributed to the great-grandparents and their descendants on the eligible parent's side of the family. Finally, if there are no living relatives, the estate escheats.

The illegitimate child is an heir of his or her mother and any maternal ancestor. If the father has acknowledged paternity during his lifetime, or after his death a decedent has been adjudged to be the father, the child is an heir of his father and any paternal ancestor. The statute that governs inheritance with regard to illegitimates is 755 Ill. Comp. Stat. 5/2-2.

Pretermitted (Omitted) and Posthumous Children (Hower 128)

A child that is born after the will is executed will inherit from the testator the portion of the estate that he or she would be entitled to if the testator had died intestate. If the child is provided for under the will, he or she will inherit as the will provides. If it appears by the will that the testator intended to disinherit the child, he or she will receive nothing. 755 Ill. Comp. Stat. 5/4-10. Under 755 Ill. Comp. Stat. 5/2-3, a posthumous child will receive the same share of an estate as if the child was born during the decedent's lifetime.

Disinheritance of Heirs (Children and Others) by Statute (Hower 129)

Illinois law provides that a person who intentionally causes the death of another shall be treated as predeceasing the decedent and will not receive any property from the decedent whether as an heir, beneficiary, legatee, joint tenant, etc. 755 Ill. Comp. Stat. 5/2-6.

For an interesting common law interpretation of this statute, see *In re Mueller*, 275 Ill. App. 3d 128, 655 N.E.2d 1040, *appeal denied*, 164 Ill. 2d 564, 660 N.E.2d 1269 (1995).

Additional Rights or Protection for a Surviving Spouse and Children (Hower 129)

Homestead Exemption (Hower 129)

With regard to the administration and distribution of real estate, an Illinois statute gives power to the court to use the real estate to satisfy creditors. However, it provides that a court may set-off the amount of the homestead exemption and order the sale of the balance of the premises or, if the value of the premises cannot be divided, sell the real estate free of the homestead exemption. The consent of the person entitled to the land is immaterial. The court will determine the value of the homestead and shall order that a sum of money equal to the gross value of the homestead be paid to that person from the proceeds of the sale. 755 Ill. Comp. Stat. 5/20-6(d).

Family or “Widow’s” Allowance (Hower 131)

Illinois law provides for an award of allowance to a spouse and children in 755 Ill. Comp. Stat. 5/15-1 through 755 Ill. Comp. Stat. 5/15-4.

A surviving spouse may receive a sum of money that the court determines is reasonable for the support of the spouse for the period of nine (9) months after the death of the decedent. The award will be paid to the spouse at such time, not exceeding three (3) installments, as the court directs. 75 Ill. Comp. Stat. 5/15-1.

A minor child or an adult dependent child living with the spouse may also be awarded a reasonable sum of money for support; however, the money will be paid to the surviving spouse. 75 Ill. Comp. Stat. 5/15-1.

If the minor or adult dependent child is not living with the surviving spouse, a sum of money may be awarded to benefit and support the child for the period of nine (9) months after the death of the decedent. The amount shall be paid to such person as the court directs for the benefit of the child. 755 Ill. Comp. Stat. 5/15-2.

In Illinois, an allowance is requested by petition, the court makes a determination, and a copy of the award is mailed or delivered to each person in whose favor the award is made. 755 Ill. Comp. Stat. 5/15-3.

5

WILLS: VALIDITY REQUIREMENTS, MODIFICATION, REVOCATION, AND CONTESTS

REQUIREMENTS FOR THE CREATION OF A VALID WILL (HOWER 142)

Intent of the Testator (Hower 143)

Precedent and common law requires that the testator understand the business that the testator is engaged in when making his or her will, to have knowledge of the natural objects of his or her bounty, and to make disposition of property according to some plan.

Capacity of the Testator (Hower 143)

The testator must be of sound mind and memory and have attained the age of eighteen years old. 755 Ill. Comp. Stat. 5/4-1.

Formal Requirements of a Will (Hower 145)

According to Illinois statute, the will must be in writing. Illinois does not allow holographic or nuncupative wills. Illinois has made provisions in 755 Ill. Comp. Stat. 5/4-2 for proxy signature, and two credible witnesses are also required for a valid will. 755 Ill. Comp. Stat. 5/4-6, states that a beneficiary can act as a witness but with consequences. The beneficiary may not receive the legacy stated in the will unless there are a sufficient number of witnesses other than this beneficiary signing the will. Even then, the beneficiary may still forfeit any portion of the legacy that is more than what he or she would have received had there been no will.

Signature of the Testator (Hower 147)

Illinois does not have specific provisions for either the testator's or witnesses' signatures except that the will must be signed in the presence of the testator at his or her direction with two or more witnesses. 755 Ill. Comp. Stat. 5/4-3.

Signatures of Witnesses (Hower 150)

See notation regarding "Signature of the Testator" above.

REVOCATION AND REJECTION OF A WILL (HOWER 156)

Illinois has a provision for revoking a will by physical act, execution of a later will that is inconsistent with the prior will, and by the execution of an instrument declaring the previous will has been revoked as stated in 755 Ill. Comp. Stat. 5/4-7. Illinois' revocation statute 755 Ill. Comp. Stat. 5/4-7 states that a revoked will cannot be revived other than by its re-execution, or by an instrument declaring the revival which is signed and attested in the manner prescribed.

Revocation by Physical Act (Hower 156)

The testator can revoke a will in Illinois by burning, canceling, tearing, or obliterating it. The testator can do this or may have some person do this in his or her presence and by his or her direction and consent. 755 Ill. Comp. Stat. 5/4-7.

Lost Wills (Hower 157)

Illinois does not have any statutory provisions on lost wills.

Revocation by Operation of Law (Hower 159)

An act of dissolution of marriage or declaration of invalidity of the marriage of the testator will revoke a will. The will then takes effect in the same manner as if the former spouse had died before the testator. 755 Ill. Comp. Stat. 5/4-7.

Revocation by Subsequent Writing (Hower 160)

Illinois statute specifies that the later will must be inconsistent with the prior will in order to revoke it, or that a later will must declare that the prior will is revoked. 755 Ill. Comp. Stat. 5/4-7.

WILL CONTESTS (HOWER 161)

Who Can Contest a Will (Hower 161)

According to 755 Ill. Comp. Stat. 5/8-1, any interested person may contest a will within six (6) months after the admission of the will to probate. A trial by jury may also be requested. The contestant will need to prove, first, the invalidity of the will. Once the contestant's case is over, the proponent may present evidence to sustain the will. Illinois states it is the representative's duty to defend a proceeding to contest the validity of the will or prosecute an appeal from the judgment.

Grounds for Contesting a Will (Hower 162)

Illinois relies on common law and precedent to establish a cause of action to contest a will. The general statute states only that the will can be contested on the grounds that it is not the will of the testator. Successfully prosecuted case law presents alternative causes of action, such as testamentary capacity, undue influence, and revocation of the will.

In Terrorem or "No Contest" Clause—A Forfeiture Clause (Hower 166)

Though Illinois recognizes that an in terrorem clause is valid, they are interpreted very strictly through common law.



6

PREPARATION TO DRAFT A WILL: CHECKLISTS AND THE CONFERENCE WITH THE CLIENT

Though Illinois law does not require checklists when preparing to draft a will, checklists provide the paralegal and the attorney with a written plan on how to approach a client's needs. Checklists help prevent errors when used in the client interview by making sure all pertinent information is recorded.



FINAL DRAFT AND EXECUTION OF A VALID WILL

Simultaneous Death Clause (Hower 216)

Illinois does have a simultaneous death clause, 755 Ill. Comp. Stat. 5/3-1, which states that in the absence of any evidence that the persons have died other than simultaneously, the property of each person will be disposed of as if he or she had survived.

Testamentary Trust Clause (Hower 217)

Illinois provides for testamentary trust clauses in 755 Ill. Comp. Stat. 5/4-4.

Testimonium Clause (Hower 218)

As is the case with most states, Illinois does not specify wording for a testimonium clause. See Chapter 5 for the requirements of a valid will.

Testator's Signature (Hower 219)

See Chapter 5 for requirements of a valid will.

Attestation Clause of Witnesses (Hower 220)

As is the case with most states, Illinois does not specify wording for an attestation clause. See Chapter 5 for the requirements of a valid will.

Witnesses' Signatures and Addresses (Hower 220)

Though Illinois does not require the addresses of the witnesses to the will, it is good practice to include this information so that when the will is probated, the witnesses can be located.

ADDITIONAL NONTESTAMENTARY DOCUMENTS (HOWER 224)

Self-Proving Affidavit Clause That Creates a Self-Proved Will (Hower 224)

Illinois provides for a will to be proved in 755 Ill. Comp. Stat. 5/6-4 with an attestation clause or affidavit attached to the petition to admit the will to probate.

Power of Attorney (Hower 228)

Illinois has enacted Act 45, the "Illinois Power of Attorney Act." It is found in 755 Ill. Comp. Stat. 45/2-1 through 755 Ill. Comp. Stat. 45/4-12. In particular, 755 Ill. Comp. Stat. 45/2-1 through 755 Ill. Comp. Stat. 45/2-11 focuses on durable powers of attorney. The purpose of the act was to enable each person to have the right to appoint an agent to deal with property or make personal and health care decisions for the individual. This right could only be fully effective if the principal can empower the agent to act throughout the principal's lifetime, including during periods of disability, and be certain that third parties will honor the agent's authority. 755 Ill. Comp. Stat. 45/2-1. For the statutory short form power of attorney for property, see 755 Ill. Comp. Stat. 45/3-3, and for explanations of the powers granted in it, see 755 Ill. Comp. Stat. 45/3-4.

Right to Die Laws and Related Advance Medical Directive Documents (Hower 228)

Living Will: Death with Dignity (Hower 229)

Illinois provides for living wills in the "Illinois Living Will Act" (755 Ill. Comp. Stat. 35/3). The provisions in Illinois are similar to those in the text, and the Illinois statute provides sample wording for living will declarations. A living will executed in another state, according to that state's laws on living wills or executed in accordance with the laws in Illinois, will be honored in Illinois. 755 Ill. Comp. Stat. 35/9. The following is the statutory living will.

DECLARATION

This declaration is made this ____ day of ____ (month, year). I, ____, being of sound mind, willfully and voluntarily make known my desires that my moment of death shall not be artificially postponed.

If at any time I should have an incurable and irreversible injury, disease, or illness judged to be a terminal condition by my attending physician who has personally examined me and has determined that my death is imminent except for death-delaying procedures, I direct that such procedures which would only prolong the dying process be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication, sustenance, or the performance of any medical procedure deemed necessary by my attending physician to provide me with comfort care.

In the absence of my ability to give direction regarding the use of such death delaying procedures, it is my intention that this declaration shall be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences from such a refusal.

Signed _____

City, County, and State of Residence _____

The declarant is personally known to me and I believe him or her to be of sound mind. I saw the declarant sign the declaration in my presence (or the declarant acknowledged in my presence that he or she had signed the declaration) and I signed the declaration as a witness in the presence of the declarant. I did not sign the declarant's signature above for, or at, the direction of the declarant. At the date of this instrument, I am not entitled to any portion of the estate of the declarant according to the laws of intestate succession or to the best of my knowledge and belief, under any will of declarant or other instrument taking effect at declarant's death, or directly financially responsible for declarant's medical care.

Witness _____

Medical Power of Attorney (Hower 231)

Illinois has a "Powers of Attorney for Health Care" law that provides for the selection of an agent to make health care decisions for an individual who becomes incapable of making those decisions due to a physical or mental condition. 755 Ill. Comp. Stat. 45/4-1 through 755 Ill. Comp. Stat. 45/4-12. The following is a sample of the Illinois statutory short form for power of attorney for health care.

ILLINOIS STATUTORY SHORT FORM POWER OF ATTORNEY FOR HEALTH CARE

(NOTICE: THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO MAKE HEALTH CARE DECISIONS FOR YOU, INCLUDING THE POWER TO REQUIRE, CONSENT TO, OR WITHDRAW ANY TYPE OF PERSONAL CARE OR MEDICAL TREATMENT FOR ANY PHYSICAL OR MENTAL CONDITION AND TO ADMIT YOU TO OR DISCHARGE YOU FROM, ANY HOSPITAL, HOME, OR OTHER INSTITUTION. 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 AN 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, AND NO HEALTH CARE PROVIDER MAY BE NAMED. UNLESS YOU EXPRESSLY LIMIT THE DURATION OF 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 AND THE PENALTIES FOR VIOLATING THE LAW ARE EXPLAINED MORE FULLY IN SECTIONS 4-5, 4-6, 4-9, AND 4-10(b) OF THE ILLINOIS "POWERS OF ATTORNEY FOR HEALTH CARE LAW" OF WHICH THIS FORM IS A PART. THAT LAW EXPRESSLY PERMITS THE USE OF ANY DIFFERENT FORM OF POWER OF ATTORNEY YOU MAY DESIRE. IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.)

POWER OF ATTORNEY made this _____

day of _____
(month) (year)

1. I, _____
(insert name and address of the principal)

hereby appoint:

(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) to make any and all decisions for me concerning my personal care, medical treatment, hospitalization and health care, and to require, withhold, or withdraw any type of medical treatment or procedure, even though my death may ensue. My agent shall have the same access to my medical records that I have, including the right to disclose the contents to others. My agent shall also have full power to make a disposition of any part or all of my body for medical purposes, authorize an autopsy, and direct the disposition of my remains.

(THE ABOVE GRANT OF POWER IS INTENDED TO BE AS BROAD AS POSSIBLE SO THAT YOUR AGENT WILL HAVE AUTHORITY TO MAKE ANY DECISION YOU COULD MAKE TO OBTAIN OR TERMINATE ANY TYPE OF HEALTH CARE, INCLUDING WITHDRAWAL OF FOOD AND WATER AND OTHER LIFE-SUSTAINING MEASURES, IF YOUR AGENT BELIEVES SUCH ACTION WOULD BE CONSISTENT WITH YOUR INTENT AND DESIRES. IF YOU WISH TO LIMIT THE SCOPE OF YOUR AGENT'S POWERS OR PRESCRIBE SPECIAL RULES OR LIMIT THE POWER TO MAKE AN ANATOMICAL GIFT, AUTHORIZE AUTOPSY, OR DISPOSE OF REMAINS, YOU MAY DO SO IN THE FOLLOWING PARAGRAPHS.)

2. The powers granted above shall not include the following powers or shall be subject to the following rules or limitations (here you may include any specific limitations you deem appropriate, such as: your own definition of when life-sustaining measure should be withheld; a direction to continue food and fluids or life-sustaining treatment in all events; or instruction to refuse any specific types of treatment that are inconsistent with your religious beliefs or unacceptable to you for any other reason, such as blood transfusion, electro-convulsive therapy, amputation, psychosurgery, voluntary admission to a mental institution, etc.):

(THE SUBJECT OF LIFE-SUSTAINING TREATMENT IS OF PARTICULAR IMPORTANCE. FOR YOUR CONVENIENCE IN DEALING WITH THAT SUBJECT, SOME GENERAL STATEMENTS CONCERNING THE WITHHOLDING OR REMOVAL OF LIFE-SUSTAINING TREATMENT ARE SET FORTH BELOW. IF YOU AGREE WITH ONE OF THESE STATEMENTS, YOU MAY INITIAL THAT STATEMENT; BUT DO NOT INITIAL MORE THAN ONE):

I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, the expense involved, and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

Initialed _____

I want my life to be prolonged and I want life-sustaining treatment to be provided or continued unless I am in a coma, which my attending physician believes to be irreversible, in accordance with reasonable medical standards at the time of reference. If and when I have suffered irreversible coma, I want life-sustaining treatment to be withheld or discontinued.

Initialed _____

I want my life to be prolonged to the greatest extent possible without regards to my condition, the chances I have for recovery, or the cost of the procedures.

Initialed _____

(THIS POWER OF ATTORNEY MAY BE AMENDED OR REVOKED BY YOU IN THE MANNER PROVIDED IN SECTION 4-6 OF THE ILLINOIS "POWERS OF ATTORNEY FOR HEALTH CARE LAW". 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, AND BEYOND IF ANATOMICAL GIFT, AUTOPSY, OR DISPOSITION OF REMAINS IS AUTHORIZED, UNLESS A LIMITATION ON THE BEGINNING DATE OR DURATION IS MADE BY INITIALING AND COMPLETING EITHER OR BOTH OF THE FOLLOWING:)

3. () This power of attorney shall become effective on _____

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

4. () This power of attorney shall terminate on _____

(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 NAMES AND ADDRESSES OF SUCH SUCCESSORS IN THE FOLLOWING PARAGRAPH.)

5. If any agent named by me shall die, become incompetent, resign, refuse to accept the office of agent, or be unavailable, I name the following (each to act alone and successively, in the order named) as successors to such agent:

For purposes of this paragraph 5, 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 health care matters, as certified by a licensed physician.

(IF YOU WISH TO NAME YOUR AGENT AS GUARDIAN OF YOUR PERSON, 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 6 IF YOU DO NOT WANT YOUR AGENT TO ACT AS GUARDIAN.)

6. If a guardian of my person is to be appointed, I nominate the agent acting under this power of attorney as such guardian, to serve without bond or security.
7. 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 _____
(principal)

The principal has had an opportunity to read the above form and has signed the form or acknowledged his or her signature or mark on the form in my presence.

_____ residing at _____
(witness)

(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).

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

(agent)

(principal)

(successor agent)

(principal)

(successor agent)

8

INTRODUCTION TO TRUSTS

SCOPE OF THE CHAPTER (HOWER 245)

TERMINOLOGY RELATED TO TRUSTS (HOWER 245)

760 Ill. Comp. Stat. 5/2 defines the following terms: *Trust* means a “trust created by a will, deed, agreement, declaration, or other written instrument.”

Trustee means the trustee or any successor or added trustee whether appointed by the document creating the trust or by order of the court. It includes an individual and a corporation qualified to administer trusts in Illinois.

THE ESSENTIAL ELEMENTS OF A TRUST (HOWER 250)

The Settlor: The Creator of the Trust (Hower 251)

A person creating a trust may specify in the instrument all rights, powers, duties, limitations, and immunities applicable to the trustee, beneficiary, and others. The trust provisions will control as long as they do not violate the law. 760 Ill. Comp. Stat. 5/3.

The Trustee: The Fiduciary and Administrator of the Trust (Hower 253)

If all beneficiaries of a trust are adults and not incapacitated, any written agreement including, but not limited to, construing any provision of a trust or regarding any duty, power, or action of the trustee between a trustee and all of the beneficiaries of the trust shall be final and binding on the trustee and the beneficiaries of the trust.

In the trustee’s sole discretion, the trustee may obtain an opinion of counsel that any agreement proposed to be made is not clearly contrary to the express terms of the trust instrument. 760 Ill. Comp. Stat. 5/16.1(d).

Natural or Legal Person as Trustee (Hower 253)

A trustee may be either an individual or a corporation qualified to administer trusts in the state of Illinois. 760 Ill. Comp. Stat. 5/2(2).

Co-Trustees (Hower 255)

Act 5, “Trusts and Trustees Act,” specifies certain actions a co-trustee can be asked to take. In particular, a trustee may delegate to a co-trustee for any period of time any or all of the trustee’s rights, powers, and duties. 760 Ill. Comp. Stat. 5/4.10.

Removal or Resignation of Trustee (Hower 255)

A trustee may resign at any time by written notice to a living settlor, to a co-trustee if any, and to the then-entitled beneficiaries of the trust’s income. 760 Ill. Comp. Stat. 5/12.

Powers of the Trustee (Hower 256)

In 760 Ill. Comp. Stat. 5/4.01 through 760 Ill. Comp. Stat. 5/4.25, the trustee has the following statutorily created powers:

- Sell the trust estate.
- Lease property.
- Borrow money — mortgage or pledge the trust estate.
- Grant easements, subdivide, or improve real estate.
- Appoint a trustee to act in another jurisdiction.
- Open bank accounts and obtain safe deposit boxes.
- Exercise all powers in connection with stocks, bonds, or other securities.
- Pay taxes and reasonable expenses.
- Hire attorneys, auditors, financial advisers, and other agents.
- Delegate rights to a co-trustee.
- Compromise, contest, prosecute, or abandon claims.
- Execute contracts, notes, conveyances, and other instruments.
- Receive and administer additional property.
- Invest property.
- Deal with an executor or trustee of any trust in which a beneficiary has an interest.
- Equitably divide or distribute cash.
- Rely upon an affidavit, certificate, or letter as genuine evidence to make a payment or distribution in good faith without liability.
- Purchase and keep insurance to protect the trust estate.
- Distribute income and discretionary amounts of principal.
- Manage a farm property.
- Operate real estate to develop oil, gas, and other minerals.
- Continue an unincorporated business.
- Continue a partnership business.
- Sever a trust estate or consolidate two or more trusts.

Duties of the Trustee (Hower 257)

Illinois has enacted Act 65, the “Fiduciary Obligations Act.” The fiduciary duties required of a trustee are included in 760 Ill. Comp. Stat. 65/0.01 through 760 Ill. Comp. Stat. 65/12. The Act specifies that a fiduciary includes a trustee under any trust: expressed, implied, resulting, or constructive. 60 Ill. Comp. Stat. 65/1(1).

Duty to Invest the Trust Property (Hower 260)

Illinois has enacted the “Prudent Investor Rule” in 760 Ill. Comp. Stat. 5/5(a). The rule states that a trustee has a duty to invest and manage trust assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust. The trustee must use reasonable care and invest the estate using an investment strategy that should incorporate risk and return objectives suitable to the trust. The trustee may invest in every kind of property and type of investment, subject to this section. The trustee’s decisions are to be judged in relationship to the anticipated effect on the trust portfolio based on the prevailing circumstances at the time of the decision. The 760 Ill. Comp. Stat. 5/5(a)(2) states, “The prudent investor rule is a test of conduct and not of resulting performance.” The trustee has a duty to diversify unless, under the circumstances, the trustee reasonably believes it is in the interests of the beneficiary not to diversify. The trustee must review the trust assets and make determinations concerning keeping and getting rid of pre-existing investments. The investment strategy should consider both the reasonable production of income and safety of capital.

A trustee may consider the following circumstances in determining the investment strategy:

- General economic conditions.
- Effect on inflation.
- Tax consequences.
- Each investment’s role in the overall portfolio.
- Expected total return.
- Incurrence of only reasonable and appropriate costs.

Duty to Make Payments of Income and Principal to the Named Beneficiaries (Hower 262)

A trust shall be administered by the trustee with due regard to both the interests of income beneficiaries and remaindermen. Illinois has enacted the “Principal and Income Act” that governs how income and principal should be distributed and spent. This is found in 760 Ill. Comp. Stat. 15/1 through 760 Ill. Comp. Stat. 15/17.

The trustee has the power to distribute income and discretionary amounts of principal in one or more of the following ways if the trustee believes it to be for the best interests of a beneficiary when the trustee believes the beneficiary is under legal disability or is unable to properly manage his or her affairs because of illness, physical or mental disability, or any other cause:

- Directly to the beneficiary.
- To a duly appointed guardian of the beneficiary.
- To a custodian for the beneficiary under the “Uniform Transfers to Minors Act.”
- To an adult relative of the beneficiary.
- By expending the money or using the property directly for the benefit of the beneficiary.

760 Ill. Comp. Stat. 5/4.20.

Duty to Account (Hower 264)

According to Illinois statute, a trustee is required to at least annually furnish an account to the beneficiaries. It should show the receipts, disbursements, and inventory of the trust estate.

Also, upon termination of the trust, the trustee shall furnish to the beneficiaries a final account for the period from the date of the last account to the date of distribution showing the inventory, receipts, disbursements, and distributions of the trust estate. 760 Ill. Comp. Stat. 5/11.

Liability of Trustee to Beneficiary (Hower 265)

The trustee is not liable to a beneficiary for the trustee's reasonable and good faith reliance on the express provisions of the trust. 760 Ill. Comp. Stat. 5/5(b).

Cost of a Trustee (Hower 266)

Under 760 Ill. Comp. Stat. 5/7, the trustee shall be reimbursed for all proper expenses incurred in managing the trust and is entitled to reasonable compensation for services rendered.

The Beneficiary: The Recipient of the Trust Property or Benefits (Hower 267)

Nature of the Beneficiary's Interest (Hower 268)

The Illinois statutes define *primary beneficiary* as a person who is currently entitled to receive any portion of the trust income or principal or will receive, or be entitled to withdraw, a portion of the principal of the trust if the beneficiary survives to the final date of distribution with respect to the beneficiary's share.

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CLASSIFICATION OF TRUSTS, THE LIVING TRUST, AND OTHER SPECIAL TRUSTS

CLASSIFICATION OF TRUSTS (HOWER 276)

Express Trusts—Private versus Public (Charitable) (Hower 276)

Public Trust (Hower 277)

Illinois has enacted the “Charitable Trust Act,” 760 Ill. Comp. Stat. 55/1 to 760 Ill. Comp. Stat. 55/19. Illinois modifies the common law rule of perpetuities in 760 Ill. Comp. Stat. 50/8 and in the “Illinois Vesting Act” found in 765 Ill. Comp. Stat. 310/1 to 310/1.1.

Implied Trusts—Resulting and Constructive (Hower 283)

All express trusts dealing with interest in land must be manifested and proved by a writing signed by the party who is to declare such trust, or by his or her last will in writing, or they shall be utterly void and of no effect. However, a resulting trust, or a trust created by construction, implication, or operation of law, need not be in writing and may be proved by parol (oral) evidence. 740 Ill. Comp. Stat. 80/9.

Miscellaneous Trusts (Hower 287)

Spendthrift Trusts (Hower 287)

A court may not set aside a trust for the purpose of payment of a debt or judgment. However, if the beneficiary receives a set sum or percentage from the trust, this may be used to pay the debt, and claims of child support may be paid from the proceeds of the trust. 735 Ill. Comp. Stat. 5/2-1403.

Sprinkling Trusts (Hower 289)

Illinois describes the duties of the trustee in 760 Ill. Comp. Stat. 5/4.20 in regards to distribution of the principal and income if the beneficiary is physically or mentally disabled.

LIVING (INTER VIVOS) TRUSTS (HOWER 296)

According to 735 Ill. Comp. Stat. 5/13-223, the time to protest the inter vivos trust is during, and not after, the probating of the will.

Pour-Over Wills (Hower 305)

In Illinois, a testator may bequeath any real and personal estate to a trustee of a trust which is in existence when a trust is made and identified in the testator's will. Even though the trust is subject to modification, revocation, or termination, the estate will be governed by the terms and provisions of the trust instrument unless the testator's will provides otherwise.

If the trust terminates before the testator's death, the bequest shall take effect according to the terms of the trust instrument at the time the trust is terminated unless the will provides otherwise. 755 Ill. Comp. Stat. 5/4-4.

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ESTATE PLANNING AND LONG-TERM CARE

The discussion in the text is similar to practice in Illinois.

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PERSONAL REPRESENTATIVES: TYPES, PRE-PROBATE DUTIES, AND APPOINTMENT

TYPES OF PERSONAL REPRESENTATIVES (HOWER 360)

Anyone who is age eighteen or over, is a resident of the United States, is of sound mind, is not disabled, and has not been convicted of a felony may act as a personal representative. 755 Ill. Comp. Stat. 5/6-13.

In Illinois, the following persons are entitled to preference when obtaining the issuance of letters of administration:

- The surviving spouse or any person nominated by him or her.
- The legatees or any person nominated by them.
- The grandchildren or any person nominated by them.
- The parents or any person nominated by them.
- The brothers and sisters or any person nominated by them.
- The nearest kindred or any person nominated by them.
- The representative of the estate of a deceased ward.
- The public administrator.
- A creditor of the estate.

If more than one person is eligible to receive letters of administration, then the court decides to whom the letters will be issued. 755 Ill. Comp. Stat. 5/9-3.

Illinois provides for a public administrator to take on the duties of a personal administrator if there is no person that has a prior right to administer the estate. The public administrator of the county in which the decedent was a resident or the county where the decedent's property is located would perform these duties. 755 Ill. Comp. Stat. 5/13-1. Additionally, the duties of the public administrator are to secure the decedent's property from waste or mismanagement until letters of administration can be issued to the person entitled to them. 755 Ill. Comp. Stat. 5/13-1.

Illinois includes the *administrator de bonis non* in the definition of administrator. 755 Ill. Comp. Stat. 5/1-2.01. The *administrator de bonis non* is similar to the administrator *cum testamento annexo* or administrator C.T.A.

PREPARATION FOR PROBATE AND ESTATE ADMINISTRATION— GENERAL OVERVIEW (HOWER 378)

Illinois statutes detail the administrator's duties before the issuance of letters of administration in 755 Ill. Comp. Stat. 5/6-14 as organ donation, burial procedures, payment of burial expenses, and preserving the estate. The general responsibilities of the personal representatives for Illinois are consistent with the text.

Pre-Probate Duties of the Personal Representative and Paralegal (Hower 379)

Search for and Obtain the Will and Other Personal and Business Records (Hower 379)

It is the duty of the person who has the decedent's will in his or her possession to present the will to the court upon the death of the decedent. 755 Ill. Comp. Stat. 5/6-1. A petition must accompany the will in order for it to be admitted to probate. The petition should contain the following information:

- The name and place of residence of the testator at the time of his or her death.
- The date and place of death.
- The date of the will and the fact that petitioner believes the will to be a valid will.
- The approximate value of the decedent's estate.
- The names and addresses of the heirs and if any are minors.
- The name and address of the executor.
- The name and address of the personal fiduciary.

755 Ill. Comp. Stat. 5/6-2.

The executor has thirty (30) days from the date of the decedent's death to file the petition for the will to be admitted to probate or to declare if he or she refuses to be executor. 755 Ill. Comp. Stat. 5/6-3.

Appointment Procedure—The Beginning (Hower 384)

An attestation clause signed by the witness that was attached to the will, or an affidavit signed by the witnesses and attached to the will, may be attached to the petition accompanying the will in the place of having witnesses appear in court. 755 Ill. Comp. Stat. 5/6-4.

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PROBATE AND ESTATE ADMINISTRATION

PROBATE OR ESTATE ADMINISTRATION (HOWER 396)

Small Estate Settlement and Administration (Hower 398)

Collection by Affidavit (Hower 398)

Article 25, “Small Estates of the Probate Act,” outlines the method of probating a small estate upon affidavit. This is contained in 755 Ill. Comp. Stat. 5/25-1 through 755 Ill. Comp. Stat. 5/25-4.

Illinois provides that payment or delivery of a small estate upon affidavit may occur when any person or corporation (1) indebted to or holding the decedent’s personal estate, (2) controlling the right of access to the decedent’s safety deposit box, or (3) acting as registrar or transfer agent is furnished with a small estate affidavit. That person or corporation shall pay the debt, allow access to the safety deposit box, deliver the personal estate, or transfer the interest. 755 Ill. Comp. Stat. 5/25-1(a).

The statute then demonstrates the form of the affiant’s affidavit. In general, it contains the affiant’s address, the decedent’s name, the decedent’s date of death, an attached copy of the death certificate, the decedent’s residence at the time of death, a statement that the gross value of the personal estate does not exceed \$50,000, a list of each asset and its fair market value, a statement that all funeral expenses have been paid or the amount of unpaid funeral expenses and the name and address of who is entitled to be paid, that there is no known unpaid claimant or contested claim except for those unpaid funeral expenses previously listed, and the names and residences of any surviving spouse, minor children, and adult dependent children. The affidavit also contains the award that is allowable to the surviving spouse, or the minor children and adult dependent children if appropriate. If the decedent died intestate, the affidavit contains the names and residences of each heir and the portion of the estate each would receive. If the decedent died testate, the affidavit notes that the will has been filed with the appropriate clerk of court. A certified copy of the will is attached. The affidavit would also contain a list of the names and residences of legatees and a statement of how the property should be distributed. 755 Ill. Comp. Stat. 5/25-1(b).

Once payment, delivery, transfer, or access occurs, the person or corporation is released as if the action had been made to the personal representative. 755 Ill. Comp. Stat. 5/25-1(d).

If a person who receives an affidavit refuses to pay or deliver, the amount or property may be recovered in a civil action. The affidavit is prima facie proof of the facts it includes. 755 Ill. Comp. Stat. 5/25-3.

The sale of a very small interest (\$2,500) in real estate in the interest of a ward is discussed in 755 Ill. Comp. Stat. 5/25-4.

Summary Administration (Hower 400)

Illinois provides for distribution on summary administration. 755 Ill. Comp. Stat. 5/9-8 and 755 Ill. Comp. Stat. 5/9-9 contain information as to what type of estates qualify and the procedure to be used.

The court will allow summary administration upon the filing of a petition and after the determination of heirship of the decedent and admission of the will. The estates that will qualify must meet the following criteria:

- The gross value of the real and personal estate does not exceed \$50,000.
- There is no unpaid claim against the estate or all known creditors and the amounts due them are listed in the petition.
- No tax will be due to the United States or to Illinois for the death of the decedent or all taxes have been paid.
- No person is entitled to a surviving spouse or child's award under the act or, if one is owed, the name and amount of the award are listed in the petition.
- All heirs and legatees of the decedent have consented in writing to the distribution of the estate on summary administration.
- Each distributee gives bond in the value of his distributive share.
- The petitioner has published notice informing all persons of the decedent's death, of the filing of the petition for distribution on summary administration, and of the date, time, and place of the hearing on the petition. Publication of the notice is required once a week for three (3) successive weeks in a newspaper published in the county where the petition was filed, and has filed proof of publication. Then the court may determine the rights of claimants and other persons interested in the estate, direct payment of claims and distribution on summary administration, and excuse the issuance of letters of office or revoke them and discharge the personal representative.

Once a person holding the personal estate of the decedent receives an authenticated copy of the court order, he or she shall pay the indebtedness or deliver, or transfer, the personal estate in accordance with the court order. Once the amount is paid, delivered, or transferred, the person is released from payment or transfer. However, each person that receives money or property upon this payment is liable to the extent that the value received may be owed to another claimant or person having a prior right and is accountable to any representative of the decedent thereafter appointed.

If a person, upon the receipt of the authenticated court order, refuses to pay or deliver the property, it may be recovered in a civil action by or on behalf of the person entitled to receive it upon proof of the receipt of the authenticated copy of the court order.

COMMENCING PROBATE AND ESTATE ADMINISTRATION PROCEEDINGS (HOWER 406)

Petition for Probate of Will or Petition to Prove a Will (Hower 406)

In Illinois, a person desiring to have a will admitted to probate must file a petition in the court of the proper county. The petition must state:

- The name and place of the residence of the testator at the time of his or her death.
- The date and place of death.
- The date of the will and the fact that the petitioner believes the will to be the valid last will of the testator.

- The approximate value of the testator's real and personal estate in Illinois.
- The names and post office addresses of all heirs and legatees of the testator and if any of them is a minor or disabled person.
- The name and post office address of the executor.
- Unless supervised administration is requested, the name and address of any personal fiduciary acting or designated to act.

Further, if the will creates or adds to a trust, it must also state the name and address of the trustee. If letters of administration with the will annexed are also sought, the petition must state:

- The reason for the issuance of the letters.
- Facts showing the right the petitioner has to act as, or nominate, the administrator.
- The name and post office address of the person nominated and of each person entitled to administer the estate.
- If the will has been previously admitted to probate, the date of admission.

If the petition indicates that more than one person is entitled to administer the estate, the petitioner must mail a copy of the petition to each such person and file a proof of mailing. 755 Ill. Comp. Stat. 5/6-2.

Petition for Administration When No Will Exists (Hower 410)

If the decedent dies intestate, anyone desiring to have letters of administration shall file a petition in the proper county. The petition shall state, if known:

- The name and place of the decedent's residence at the time of death.
- The date and place of death.
- The approximate value of the real and personal estate in Illinois.
- The names and post office addresses of all heirs of the decedent and whether any of them is a minor or disabled.
- Name and post office address of the person nominated as administrator.
- The facts showing the right of the petitioner to act as, or to nominate, the administrator.
- Unless supervised administration is requested, the name and address of any personal fiduciary acting or designated to act pursuant to section 28-3.

This information is found in 755 Ill. Comp. Stat. 5/9-4.

Mail the Notice of Order for Hearing and Affidavit of Mailing Notice to All Interested Persons Including Creditors (Hower 411)

Not less than thirty (30) days before the hearing on the petition to issue letters of administration, the petitioner shall mail a copy of the petition, endorsed with the time and place of the hearing, to each named person in the petition. 755 Ill. Comp. Stat. 5/9-5.

PROBATE COURT PROCEDURE (HOWER 416)

Hearing on Petition to Prove the Will or Petition for Administration (Hower 416)

In Illinois, 755 Ill. Comp. Stat. 5/6-4 prescribes how a will may be admitted to probate. This can be done by testimony or affidavit of witnesses. The statute states that when each of two (2) attesting

witnesses to a will state that: (1) he or she was present and saw the testator or some person in his or her presence and by his or her direction sign the will in the presence of the witness, or the testator acknowledged it to the witness as his or her act, (2) the will was attested by the witness in the presence of the testator, and (3) he or she believed the testator to be of sound mind and memory at the time of signing or acknowledging the will. The will is sufficiently proved to admit to probate unless there is proof of fraud, forgery, compulsion, or other improper conduct.

These statements may be made by: (1) testimony before the court, (2) an attestation clause signed by the witness and forming a part of or attached to the will, or (3) an affidavit which is signed by the witness at or after the time of the attestation and which forms part of the will or is attached to the will or to an accurate facsimile of the will.

Selection of the Personal Representative (Hower 418)

Illinois statute 755 Ill. Comp. Stat. 5/6-13 outlines who may act as an executor. The individual must be eighteen years or older, a resident of the United States, of sound mind, not adjudged to be disabled as defined in this Act, and not convicted of a felony. The person nominated in the will can then proceed to being declared by the court as the executor. If the person named as executor in the will is not qualified to act at the time of admission of the will to probate, but thereafter becomes qualified and files a petition for the issuance of letters, takes oath, and gives bond, the court may issue letters testamentary to him or her as co-executor with an already existing executor. If no executor has qualified, the court may issue letters testamentary to him and revoke letters of administration.

Persons entitled to obtain letters of administration if no executor is nominated, or who cannot serve, have the following preferences:

- The surviving spouse or any person nominated by the surviving spouse.
- The legatees or any person nominated by them, with preference to legatees who are children.
- The children or any person nominated by them.
- The grandchildren or any person nominated by them.
- The parents or any person nominated by them.
- The brothers or sisters or any person nominated by them.
- The representative of the estate of a deceased ward.
- The Public Administrator.
- A creditor of the estate.

Only a person qualified to act as administrator under this Act may nominate, with some exceptions specified in the statute. 755 Ill. Comp. Stat. 5/9-3.

Order Admitting the Will or Granting Administration (Hower 418)

The court will grant an order admitting the will to probate. 755 Ill. Comp. 5/6-10.

After the court has entered an order admitting or denying the will, the representative or petitioner must mail a copy of the petition to admit the will, or for letters and a copy of the order showing the date of entry, to each of the testator's heirs and legatees whose names and addresses are stated in the petition not more than fourteen (14) days after entry of the order.

If the address of an heir or legatee is not listed in the petition, then the representative or petitioner must publish a notice once a week for three (3) successive weeks in a newspaper published in the county where the order was entered. The first publication must be done not more than fourteen (14) days after entry of the order and will describe the order.

The petitioner or representative must file proof of mailing and publication, if publication is required, with the clerk of court.

The notice would not have to be mailed or published for an individual that appeared at the hearing or who filed a waiver of notice. 755 Ill. Comp. Stat. 5/6-10.

If instead, letters of administration are granted to an administrator, not more than fourteen (14) days after entry of that order, the administrator shall mail a copy of the petition to issue letters and a copy of the order showing the date of its entry to each of the decedent's heirs who was not entitled to notice of the hearing. If an address is not known of any heir, the administrator must publish a notice once a week for three (3) successive weeks in a newspaper in the county where the order was issued. The first publication must not be more than fourteen (14) days after the entry of the order. The administrator shall file proof of mailing and publication, if publication is required, with the clerk of courts.

This notice would not have to be mailed or published for an individual that appeared at the hearing or who filed a waiver of notice. 755 Ill. Comp. Stat. 5/9-5.

Issuance of Letters Testamentary or Letters of Administration (Hower 421)

Letters testamentary will be issued to the executor named in the will if he or she qualifies and accepts the office unless the issuance is excused. This happens when the will is admitted to probate. 755 Ill. Comp. Stat. 5/6-8.

When a person dies intestate, letters of administration will be issued upon petition unless the issuance of letters is excused. 755 Ill. Comp. Stat. 5/9-2.

Notice to Creditors (Hower 424)

The entire procedure regarding creditors' claims is governed by 755 Ill. Comp. Stat. 5/18-1 through 755 Ill. Comp. Stat. 5/18-15.

According to 755 Ill. Comp. Stat. 5/18-3, the personal representative must publish, once each week for three (3) successive weeks in a newspaper published in the county where the estate is being administered and must mail or deliver to each creditor of the decedent whose name and address are known or reasonably ascertainable, a notice stating the death of the decedent, the name and address of the personal representative and of his attorney, and that claims may be filed in or before the date stated in the notice.

This date shall be not less than six (6) months from the date of first publication or three (3) months from the date of mailing or delivery, whichever is later. If the claim is not filed by the deadline, the creditor is barred from bringing it.

The personal representative must file proof of publication with the clerk of court.

Appointment of Trustees and Guardians (Hower 424)

Illinois statute 755 Ill. Comp. Stat. 5/6-12 governs the appointment procedures for a guardian ad litem if a minor or disabled person is not adequately represented by the personal fiduciary, or the appointment of the guardian is necessary to protect the ward's interests.

The Illinois statute governing appointments of trustees is found in 765 Ill. Comp. Stat. 320/1 and is substantially the same as the discussion in the text.

Order Admitting a Foreign Will to Probate (Hower 425)

The Illinois statute governing the admittance and probate procedure of a foreign will can be found in 755 Ill. Comp. Stat. 5/7, and this statute states that if the foreign will has been probated in another state or country, the will can be proved by the submission of the authenticated will and the probate of it. If the will is from a foreign country that does not have probate proceedings, then the submission of an authenticated certificate of the legal custodian of the will noting the copy is a true copy and that the will has become operative by the laws of that state or country is sufficient.

PROCEDURES BEFORE ESTATE DISTRIBUTION (HOWER 427)

Open the Safe Deposit Box (Hower 429)

Illinois has enacted the “Safety Deposit Box Opening Act” found in 755 Ill. Comp. Stat. 15/0.01 through 755 Ill. Comp. Stat. 15/1. A bank or other holder of a safety deposit box will open the box and examine the contents in the presence of a person who furnishes an affidavit which states: (a) he or she is interested in the filing of the decedent’s will or in burial arrangements, (b) he or she believes the box may contain the will or decedent’s burial documents, and (c) he or she is an interested person. The act defines interested persons as a person who, immediately prior to the decedent’s death, had a right of access to the box as a deputy, any person named as executor in a copy of the will, a spouse, an adult descendant, or parent or sibling of the decedent.

Upon the opening of the box, the bank shall remove any document which appears to be a will or codicil and deliver it to the clerk of circuit court in the county where the decedent resided or to the clerk of circuit court in the county in which the safe deposit box is located. The bank may remove any burial documents and deliver them to the interested person. No other contents may be removed.

The bank will not open the box if it has received a copy of letters testamentary or letters of administration or another applicable court order. The bank need not open the box if: (a) the box has previously been opened, (b) the bank has received notice of a written or oral objection, or (c) the decedent’s key or combination is not available. 755 Ill. Comp. Stat. 15/1.

Collect and Preserve the Decedent’s Assets (Hower 429)

Illinois statutes 755 Ill. Comp. Stat. 5/19-1 through 755 Ill. Comp. Stat. 5/19-13 govern the administration of the decedent’s personal estate. With permission of the court, the personal representative may lease, sell, mortgage, or pledge the personal estate of the decedent when necessary for the proper administration of the estate. Personal property selected by the surviving spouse or child or specifically bequeathed may not be sold, mortgaged, or pledged unless necessary for the payment of claims, administration expenses, estate taxes, or the proper administration of the estate. 755 Ill. Comp. Stat. 5/19-1.

The personal representative, by leave of the court, may obtain a loan and mortgage, or pledge for a term not to exceed one year, agricultural commodities. The proceeds of the loan are personal estate in the hands of the personal representative. 755 Ill. Comp. Stat. 5/19-4.

755 Ill. Comp. Stat. 5/19-4 through 755 Ill. Comp. Stat. 5/19-5 outlines the procedure for the personal representative to obtain permission from the court to sell, mortgage, or pledge the personal estate, the notice required, and what the court can order in connection to the sale, mortgage, or pledging of personal estate.

Except as the will directs, or as otherwise provided by law, a personal representative has the authority for the preservation and settlement of the estate to continue the decedent’s unincorporated business during one month following the date of issuance of his or her letters and for such further time as the court, from time to time, may authorize. 755 Ill. Comp. Stat. 5/19-6.

A discussion of the personal representative’s power to collect, preserve, and administer the real estate in the decedent’s estate appears later in this chapter under the heading of “Transfer of Assets/Real Estate.”

A discussion of the personal representative’s power to collect, preserve, and administer the securities in the decedent’s estate appears later in this chapter under the heading “Transfer of Assets—Securities (Corporate Stock).”

Prepare the Inventory (Hower 437)

The personal representative must file with the court a verified inventory of the real and personal estate within sixty (60) days after the issuance of the letters testamentary or letters of administration.

If the personal representative learns of additional property, he or she shall file a supplemental inventory within sixty (60) days after it comes to his or her knowledge.

The inventory must describe real estate and improvements, state the amount of money on hand, and list all of the personal estate. 755 Ill. Comp. Stat. 5/14-1.

Prepare an Appraisal (Hower 441)

A personal representative may appraise any goods or chattels of the estate, or may employ one or more competent or disinterested appraisers for the purpose of appraising, and pay a reasonable amount for their services. 755 Ill. Comp. Stat. 5/14-2.

File the Inventory and Appraisal (Hower 442)

See the previous discussion on “Preparing the Inventory and Appraisal.”

DISTRIBUTION OF THE ESTATE AND PAYMENT OF CLAIMS (HOWER 442)

Distribute Family Allowances (Including Maintenance) and/or Exempt Property to Surviving Spouse and/or Minor Children (Hower 443)

See the discussion on family allowances contained in Chapter 4 of this supplement.

Attend Hearing on Creditors’ Claims and Pay Allowed or Approved Claims (Hower 443)

755 Ill. Comp. Stat. 5/18-2 states the criteria for the form a creditor should submit. It must be in writing and state sufficient information to notify the personal representative of the claim’s nature or other relief sought. The creditor needs to file the claim with the personal representative or the court or both. If the claimant files the claim with the court, the claimant shall have a copy of the claim mailed or delivered to each personal representative who has letters, all guardians of wards, and the personal representative’s attorney unless this notice has been waived. The claimant will file proof of service of this notice with the court. 755 Ill. Comp. Stat. 5/18-1.

If a claim should not be paid, the personal representative or any other interested person may file pleadings with the clerk of court within thirty (30) days after mailing or delivery of the copy of a claim. 755 Ill. Comp. Stat. 5/18-5. Any interested person may demand a jury trial to try the issue as provided in 755 Ill. Comp. Stat. 5/18-6.

The procedure on hearing of claims in Illinois provides that a claim may be allowed, set for trial, continued, or dismissed. 755 Ill. Comp. Stat. 5/18-7.

In this section of the statutes, the Illinois legislature has created a claim of special interest. It has enacted a Statutory Custodial Claim. This claim provides any spouse, parent, brother, sister, or child of a disabled person who dedicates himself or herself to the care of the disabled person by living with, and personally caring for, him or her for at least three (3) years shall be entitled to this claim. This claim is in addition to any other claim the person has for nursing or other care. The claim is based upon the nature and extent of a person’s disability, and at a minimum (but subject to the extent of assets available) shall be:

1. 100% disability, \$100,000.00.
2. 75% disability, \$75,000.00.
3. 50% disability, \$50,000.00.
4. 25% disability, \$25,000.00.

755 Ill. Comp. Stat. 5/18-1.1.

Another statute provides for what an attorney or personal representative must do if he or she has a claim against the estate. That person must file a claim like any other creditor. The court may appoint a special administrator to appear and defend the estate. 755 Ill. Comp. Stat. 5/18-8.

In general, the personal representative of an estate shall pay from the estate all claims in order of their classification and, when the estate is insufficient to pay the claims in one class, the claims in that class shall be paid pro rata. 755 Ill. Comp. Stat. 5/18-13.

The classification of claims is stated in 755 Ill. Comp. Stat. 5/18-10. The order of preference is as follows:

1. Funeral and burial expenses, expenses of administration, and statutory custodial claims.
2. The surviving spouse or child's award.
3. Debts due the United States.
4. Money due employees of the decedent of not more than \$800.00 for each claimant for services rendered within four (4) months prior to the decedent's death and expenses attending the last illness.
5. Money and property received or held in trust by decedent which cannot be identified or traced.
6. Debts due Illinois, and any county, townships, city, town, village, or school district of Illinois.
7. All other claims.

The Illinois statutes provide that a personal representative may allow or disallow claims. Payment or a written consent by the personal representative constitutes allowance of a claim. Also, the personal representative may disallow all or a part of a claim. He or she needs to mail or deliver a notice of disallowance to the claimant or claimant's attorney. More details with regard to this procedure are found in 755 Ill. Comp. Stat. 5/18-11.

A claim against the decedent's estate, except for administration expenses or a surviving spouse's or child's award, is barred if:

1. Notice is properly given to the claimant and the claimant does not file a claim before the date stated in the notice.
2. Notice of disallowance is given to the claimant and the claimant does not file a claim with the court on or before the date stated in the notice.
3. The claimant or his or her address is not known or reasonably ascertainable by the personal representative, and the claimant does not file a claim with the personal representative or court on or before the date stated in the published notice.

Unless a claim is barred sooner based on one of the above contingencies, all claims which can be barred are barred two (2) years after the decedent's death. 755 Ill. Comp. Stat. 5/18-12.

Transfer of Assets/Real Estate (Hower 450)

Several Illinois statutes cover the administration of real estate, including 755 Ill. Comp. Stat. 5/20-1 through 755 Ill. Comp. Stat. 5/20-24. This section highlights some of the laws, but the reader should consult the statutes for more in-depth coverage.

755 Ill. Comp. Stat. 5/20-1 discusses the personal representative's role in connection with the decedent's real estate. A personal representative shall take possession of the real estate (subject to the exempt estate of homestead) unless the decedent's will provides otherwise or an heir or legatee uses the real estate as his or her residence (subject to some exceptions). The personal representative will have possession during administration of the estate and shall: (1) collect rents and earnings of it, (2) keep the buildings and fixtures in tangible repair, (3) pay taxes, mortgages, and other liens on it, (4) protect it with insurance (if necessary), (5) employ agents and custodians (if necessary), and (6) make all reasonable expenditures necessary to preserve the real estate. Further, the personal rep-

representative may maintain an action for the possession of, or to determine the title to, the real estate. However, the personal representative must have received his or her letters testamentary or letters of administration to initiate an action to determine the title to the real estate.

755 Ill. Comp. Stat. 5/20-2 discusses how and under what circumstances a personal representative may lease the real estate.

A personal representative may sell or mortgage any real estate when it is necessary for the proper administration of the decedent's estate. However, the personal representative may not sell or mortgage any real estate that is specifically bequeathed, or if the decedent's will directs that it cannot be sold or mortgaged unless necessary for the payment of claims, administration expenses or estate or inheritance taxes, or the proper distribution of the estate. 755 Ill. Comp. Stat. 5/20-4.

755 Ill. Comp. Stat. 5/20-5 through 755 Ill. Comp. Stat. 5/20-14 outline the sale or mortgage procedure. In particular, the court may appoint up to three (3) disinterested appraisers that will report to the court the appraisal figure. 755 Ill. Comp. Stat. 5/20-8.

Within thirty (30) days after the court approves a report of sale from the personal representative, the personal representative has to execute and deliver to the purchaser a deed conveying the decedent's interest. 755 Ill. Comp. Stat. 5/20-10. The personal representative must account for the proceeds of every sale or mortgage in the final account. 755 Ill. Comp. Stat. 5/20-12.

If the real estate is not sold during administration, the personal representative shall sign and record a notice of probate. The notice shall include: (1) decedent's name, address, and date of death, (2) legal description and street address of real estate, (3) court name and case number, (4) date personal representative was appointed, and (5) personal representative's name and address. Notice will be recorded in the county where the real estate is located before the personal representative is discharged. 755 Ill. Comp. Stat. 5/20-24.

Transfer of Assets—Securities (Corporate Stock) (Hower 453)

A personal representative has many powers and duties with regard to the collection of, preservation of, and administration of investments. The statutes which govern these powers and duties are found in 755 Ill. Comp. Stat. 5/21-1 through 755 Ill. Comp. Stat. 5/21-2.15.

755 Ill. Comp. Stat. 5/21-1 provides, in addition to any investments which a decedent may authorize his or her executor to make by terms of his or her will, the personal representative may in his or her discretion invest money of the estate in any one or more of the investments statutorily allowed:

1. Direct obligations of the United States 755 Ill. Comp. Stat. 5/21-1.01.
2. Local public agency obligations 755 Ill. Comp. Stat. 5/21-1.02.
3. Savings accounts or certificates of deposit 755 Ill. Comp. Stat. 5/21-1.03.
4. Savings and loan association withdrawable accounts or shares 755 Ill. Comp. Stat. 5/21-1.04.
5. Common trust funds 755 Ill. Comp. Stat. 5/21-1.05.
6. Open-end registered investment companies 755 Ill. Comp. Stat. 5/21-1.05a.
7. Investments authorized by courts or General Assembly 755 Ill. Comp. Stat. 5/21-1.06.
8. Mutual Funds 755 Ill. Comp. Stat. 5/21-1.07.

THE FINAL ACCOUNT AND CLOSING THE ESTATE (HOWER 454)

File the Final Account and Petition for Settlement and Distribution (Hower 455)

The statute governing this section is 755 Ill. Comp. Stat. 5/24-1, which provides for the final account to be presented to the court by the personal representative within sixty (60) days of twelve (12) months after the letters expire. This preparation and presentation of the account may be waived if interested parties agree in writing.

Give Notice of the Hearing to Interested Parties (Hower 455)

A notice of hearing is given to unpaid creditors and other interested parties. 755 Ill. Comp. Stat. 5/24-2. No notice is given to those creditors paid in full or who have signed waivers to such a notice.

Prepare and File Copies of Federal and State Estate and Income Tax Returns with the Final Account (Hower 455)

See Chapter 14 for the required Illinois tax returns.

Receive Order for Settlement and Decree of Distribution (Hower 456)

The court may order settlement of the estate, and the court may order the representative to distribute the estate to the appropriate persons. On final distribution of the estate, payments made from the principal and income must be accounted for in the final account. 755 Ill. Comp. Stat. 5/24-3.

Request Order Discharging Personal Representative (Hower 457)

The court issues an order discharging the personal representative upon the presentation of the final account in the absence of fraud, accident, or mistake. 755 Ill. Comp. Stat. 5/24-2.

Cancel Personal Representatives Bond (Hower 457)

After the hearing on the final account and the order is granted discharging the personal representative, the surety on the bond is released. 755 Ill. Comp. Stat. 5/12-11.

SPECIAL PROBATE PROCEEDINGS (HOWER 457)

Special Administration (Hower 457)

When a petition is filed with the court alleging wrongdoing on the part of the representative as the respondent, the court may appoint a special administrator to represent the estate. 755 Ill. Comp. Stat. 6/16-1.

The selection of the special administrator may not be made upon the recommendation of any interested persons adverse to the person represented by the special administrator. 755 Ill. Comp. Stat. 5/27-5.

A special administrator may be appointed for the deceased if there is an action that survives the decedent's death and if no letters of administration have been filed. 735 Ill. Comp. Stat. 5/2-1008.

Administration of Omitted Property (Hower 458)

Illinois procedure is consistent with the discussion in the main text. 755 Ill. Comp. Stat. 5/24-9.

LIMITATIONS ON AND LIABILITY OF THE PERSONAL REPRESENTATIVE (HOWER 459)

Illinois procedure is consistent with the discussion in the main text. 755 Ill. Comp. Stat. 5/24-18.

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INFORMAL PROBATE ADMINISTRATION

THE CHOICE OF FORMAL OR INFORMAL PROBATE (HOWER 466)

Informal probate in Illinois is governed by the statutes that make up the “Independent Administration of Decedent’s Estates Article.” This is found in 755 Ill. Comp. Stat. 5/28-1 through 755 Ill. Comp. Stat. 5/28-12. The Article permits a personal representative to administer the estate without court order or filings except as required by this Article or requested by any interested person under this Article. 755 Ill. Comp. Stat. 5/28-1.

Independent administration may be allowed unless the will expressly forbids it or supervised administration is required. Supervised administration would be required if an interested person objects to the grant of independent administration. However, the court could still grant independent administration subject to the objection if: (1) the will directs independent administration, then the court may direct supervised administration if there is good cause to require it, or (2) the objector is a creditor or a legatee other than a residuary legatee, supervised administration will be required only if the court finds it necessary to protect the objector’s interest.

If there is an interested person who is a minor or disabled person, the court may require supervised administration. 755 Ill. Comp. Stat. 5/28-2.

APPLICATION FOR INFORMAL PROBATE AND APPOINTMENT OF PERSONAL REPRESENTATIVE (HOWER 468)

The court may grant independent administration when a petition to administer an estate does not request supervised administration and is filed under certain circumstances enumerated in the statute. Further, the court may grant independent administration if the personal representative petitions the court at any time during supervised administration for independent administration and gives notice to the interested persons as the court directs. 755 Ill. Comp. Stat. 5/28-2.

Notice Requirements (Hower 472)

When independent administration is granted, the independent representative shall include with each notice mailed to heirs or legatees an explanation of their rights under this Article and the form of the petition which may be used to terminate independent administration. Each order granting independent administration and letters testamentary or letters of administration shall state that the personal representative is appointed as independent executor or independent administrator, depending on the situation. The independent representative shall file proof of mailing with the clerk of court. 755 Ill. Comp. Stat. 5/28-2.

Proper notice is given if the information is mailed to an interested person at his or her last address known to the sender. 755 Ill. Comp. Stat. 5/28-12.

DUTIES AND POWERS OF THE PERSONAL REPRESENTATIVE IN INFORMAL PROBATE (HOWER 475)

Illinois statute 755 Ill. Comp. Stat. 5/28-8 governs the personal representative's administrative powers. This person must act reasonably for the best interests of the estate. The independent representative has the powers granted to him or her in the will and the following statutory powers:

- To lease or sell for cash or credit, mortgage, or pledge the personal estate of the decedent and to distribute any personal estate.
- To borrow money with or without security.
- To mortgage or pledge agricultural commodities.
- To continue the decedent's unincorporated business.
- To settle, compound, or compromise any claim of decedent in any property and to settle and pay all claims against the estate.
- To perform any contract of the decedent.
- To employ agents, accountants, and counsel, including legal and investment counsel, to delegate to them the performance of any act of administration and to pay them reasonable compensation.
- To hold stocks, bonds, and other personal property in the name of a nominee.
- To take possession, administer, and grant possession of the decedent's real estate, to pay taxes on it, to lease it, and to sell or mortgage it subject to exceptions specified in this section.
- To retain property properly acquired and to invest money of the estate as specified in this section.

755 Ill. Comp. Stat. 5/28-8.

Payment of Creditors' Claims (Hower 476)

As previously mentioned, the personal representative has the power to pay all claims against the estate. 755 Ill. Comp. Stat. 5/28-8.

Inventory Property (Hower 476)

The personal representative must prepare an inventory. A copy of the inventory must be mailed or delivered to each interested person within thirty (30) days prior to filing the verified report. The inventory need not be filed with the court. 755 Ill. Comp. Stat. 5/28-6.

Within ninety (90) days after issuance of letters of administration, the independent administrator shall provide to the surety on the bond, by certified mail, a copy of the inventory of the real and personal estate which has come to his or her knowledge. 755 Ill. Comp. Stat. 5/28-6.

Hold and Manage the Estate (Hower 476)

Other than the rules previously discussed in this section, other duties that the personal representative has include the provision in 755 Ill. Comp. Stat. 5/28-7 which governs spouse and child awards. An independent representative may pay the allowed spouse or child's award. What amount and the notice required to be given are further discussed within this statute.

755 Ill. Comp. Stat. 5/28-10 governs the distribution procedure for an independent administration. If it appears to the independent representative that there are sufficient assets to pay all claims,

the independent representative may at any time distribute the estate to the persons entitled thereto. The statute contains provision regarding a refunding bond and when that might be required. This statute should be consulted for more particular information on distribution.

Final Account and Closing the Estate (Hower 477)

755 Ill. Comp. Stat. 5/28-11 outlines the provisions for closing the estate. An independent representative is accountable to all interested persons for his or her administration and distribution of the estate but need not present an account to the court unless an interested person requests court accounting.

The independent representative asking for discharge shall mail or deliver to all interested persons an accounting and shall file with the court a verified report, essentially stating the following:

1. In a testate estate, that notice has been given that a will is admitted or denied admission and that letters testamentary have been issued. See 755 Ill. Comp. Stat. 5/6-10.
2. In an intestate estate, that notice has been given that letters of administration have been issued. See 755 Ill. Comp. Stat. 5/9-5.
3. That the notice with regard to creditors' claims has been published, that reasonable care was used to determine the decedent's creditors, and that all known creditors have been given notice.
4. That copies of an inventory and an accounting have been mailed or delivered.
5. That each claim filed has been allowed, disallowed, compromised, dismissed, or is barred and that all claims allowed have been paid in full, or if the estate could not pay the full amount that the claims have been paid according to their respective priorities.
6. That all death taxes have been determined and paid or otherwise provided for and that the estate is not subject to death taxes.
7. That all administration expenses and other liabilities have been paid and that administration has been completed or, to the extent not completed, has been provided for as specified in the report.
8. That the remaining assets of the estate have been distributed to the persons entitled thereto.
9. That the independent representative and attorney's fees have been approved by interested persons and paid.
10. The name and address of each person entitled to notice of the filing of the report.

Notice of the report shall be given to all interested persons except: (1) creditors whose written approvals are filed with the report or whose claims have been paid, (2) in general, heirs and legatees whose signed receipts for payment or distribution in full are filed with the report, and (3) whenever a trustee of a trust is an interested person, beneficiaries of the trust by reason of the beneficiaries' interest in the trust.

If no person needs to be given notice, the court shall enter an order discharging the independent representative and declaring the estate closed. If notice must be given, not more than fourteen (14) days after the filing of the report, the independent representative shall mail a copy of the report. Published notice may be done under certain circumstances. If there is no objection to the report within forty-two (42) days after filing it, the independent representative will be discharged and the estate closed.

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TAX CONSIDERATIONS IN THE ADMINISTRATION OF ESTATES

INTRODUCTION TO TAX CONCERNS (HOWER 490)

GENERAL TAX CONSIDERATIONS (HOWER 493)

Chapter 35 of the Illinois Compiled Statutes governs revenue and taxation. In particular, Act 5 is the "Illinois Income Tax Act" contained in 35 Ill. Comp. Stat. 5/101 through 35 Ill. Comp. Stat. 5/1701, and Act 405 is the "Illinois Estate and Generation-Skipping Transfer Act" found in 35 Ill. Comp. Stat. 405/1 through 35 Ill. Comp. Stat. 405/18.

Creation of Trusts (Hower 499)

Illinois has enacted the Charitable Trust Tax Law Conformance Act found in 760 Ill. Comp. Stat. 60/0.01 through 760 Ill. Comp. Stat. 60/2.

Generation-Skipping Transfers and Their Tax Consequences (Hower 504)

Illinois has enacted Act 405, "The Illinois Estate and Generation-Skipping Transfer Tax Act." This is found in 35 Ill. Comp. Stat. 405/1 through 35 Ill. Comp. Stat. 405/18. The Act defines Illinois generation-skipping transfer tax as the tax due to Illinois with respect to a taxable transfer that gives rise to a federal generation skipping transfer tax. 35 Ill. Comp. Stat. 405/2.

An Illinois generation-skipping transfer tax is imposed on every taxable transfer resulting in federal generation-skipping transfer tax involving transferred property having a situs within Illinois. The amount of the Illinois generation-skipping transfer tax shall be the maximum state tax credit allowable with respect to the taxable transfer, reduced by the lesser of:

1. The amount of the state tax credit paid to any other state or states.
2. The amount determined by multiplying the maximum state tax credit allowable with respect to the taxable transfer by the percentage which the gross value of the transferred property not having a situs in Illinois bears to the gross value of the total transferred property.

35 Ill. Comp. Stat. 405/4.

35 Ill. Comp. Stat. 405/6 discusses returns and payments for the Illinois generation-skipping transfer tax.

TAX RETURNS (HOWER 506)

Decedent's Final Income Tax Returns, Federal and State (Hower 507)

State Individual Income Tax Return (Hower 508)

A tax measured by net income is imposed on every individual, corporation, trust, and estate for each taxable year. A further discussion on the income tax imposed is found in 35 Ill. Comp. Stat. 5/201. If an individual is deceased, any income tax return required of the individual will be made by his or her executor, administrator, or other person charged with the decedent's property. 35 Ill. Comp. Stat. 5/502(a)(1).

Extensions for Federal and State Returns (Hower 509)

35 Ill. Comp. Stat. 5/505(b) and 35 Ill. Comp. Stat. 5/505(c) govern extensions for filing federal and state returns.

Fiduciary's Income Tax Returns, Federal and State (Hower 509)

State Fiduciary Income Tax Return (Hower 511)

The Illinois income tax is imposed on every trust and estate earning income in Illinois. The Illinois income tax is heavily based on the federal income tax code. To comply with the tax requirements for trusts and estates, file Form IL-1041, "Illinois Fiduciary Income and Replacement Tax Return," annually by the 15th day of the fourth month following the close of the tax year. 35 Ill. Comp. Stat. 5/505(a)(2).

Returns required of an estate or trust shall be made by the fiduciary. 35 Ill. Comp. Stat. 5/502(a)(3).

Decedent's Gift Tax Returns, Federal and State (Hower 512)

State Gift Tax Return (Hower 512)

As the main textbook indicates, Illinois does not have a state gift tax.

Decedent's Estate Tax Returns, Federal and State (Hower 512)

State Estate Tax Return (Hower 525)

Illinois has enacted Act 405, "The Illinois Estate and Generation-Skipping Transfer Tax Act." This is found in 35 Ill. Comp. Stat. 405/1 through 35 Ill. Comp. Stat. 405/18. Illinois defines its Illinois estate tax as the tax due to this state with respect to a taxable transfer that gives rise to a federal estate tax and is considered a "pick-up tax." 35 Ill. Comp. Stat. 405/2.

An Illinois estate tax is imposed on every taxable transfer involving transferred property having a tax situs within Illinois. The amount of the Illinois estate tax shall be the maximum state tax credit allowable with respect to the taxable transfer reduced by the lesser of:

1. The amount of the state tax credit paid to any other state or states.
2. The amount determined by multiplying the maximum state tax credit allowable with respect to the taxable transfer by the percentage which the gross value of the transferred property not having a situs in Illinois bears to the gross value of the total transferred property. 35 Ill. Comp. Stat. 405/3.

The Illinois estate tax shall be paid to the treasurer of the county in which the decedent was a resident on the date of the decedent's death if the decedent was not a resident of Illinois on the date of death, the county in which the greater part, by gross value, of the transferred property with a tax situs in Illinois is located (35 Ill. Comp. Stat. 405/6(e)(1)).

In Illinois, the Attorney General's Office administers the estate tax. It is imposed on the fair market value of the decedent's estate as of the decedent's date of death. The estate does not include any expenses or deductions such as funeral bills, costs of administration, or personal debts. Further, any amount given to a spouse or charity is exempt. The Illinois estate tax is like the Federal estate tax and is a progressive tax. The tax is due nine (9) months after death and should be filed on Illinois Estate Tax Return Form 700. Check Act 405 for more information.

If a Paralegal had additional questions about the Illinois Estate Tax, he or she could contact the Illinois Attorney General's Office Estate Tax section in Springfield, Illinois at 1-217-524-5095 or Chicago, Illinois at 1-312-814-2491.

State Inheritance Tax Return (Hower 525)

As the main textbook indicates, Illinois does not have a state inheritance tax.

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ETHICAL PRINCIPLES RELEVANT TO PRACTICING LEGAL ASSISTANTS

The discussion in the text is applicable to practice in Illinois, and the licensing and practice of attorneys in Illinois is governed by the rule of the Supreme Court of Illinois, Article VII, found at the Illinois Bar Association website <http://www.illinoisbar.org/>.

The Illinois paralegal is bound by the ethical rules or code of a professional organization of which he or she may be a member, including national, local, and statewide associations. The Illinois Paralegal Association, an organization made up of many local paralegal associations in Illinois, has adopted an ethical code. The ethics code may be found at the IPA website <http://www.ipaonline.org/>.