EGBL LEGAL REPORT

A Publication of Ehrmann Gehlbach Badger & Lee, LLC — Vol. 13 No. 2, October 2011

New legislation overhauls powers of attorney

by Emily R. Vivian

As our population continues to age, it is more and more likely that each of us will, at some point in our lives, become unable to manage our financial matters and make informed health care decisions. To assist us in these situations, Illinois law authorizes the use of powers of attorney, by which we designate someone else to manage our financial matters and make health care decisions for us.

In July 2010, the Illinois General Assembly overhauled the Illinois Power of Attorney Act with amendments that took effect July 1, 2011. Then, on July 14, 2011, Gov. Quinn signed legislation that amended the amendments.

Although the amendments are now in effect, pre-existing powers of attorney remain valid as long as they were executed in compliance with Illinois law at the time of execution. In addition, the Act grants reciprocity to other states' powers of attorney.

Although the new form powers of attorney do not contain significant substantive changes, the Act requires additional notices (to both the principal and the agent), elevates the agent's standard of care and prohibits certain persons from acting as witnesses.

The statutory forms always have included language to advise the principal as to what the principal is signing. Under the prior law, however, that language was required to be printed in "ALL CAPS" and was difficult to read. One of the amendments to the Act requires that the notice now be set forth in a separate document, in 14-point font and

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Rolfe Ehrmann 1949 - 2011

Those of us in Rolfe Ehrmann's work family have experienced almost every emotion imaginable since his unexpected passing on July 27. We've cried and we've laughed. We've hurt and we've hugged. We've reflected and we've wondered. More than anything, though, we've remembered.

We've remembered Rolfe's laugh, his sense of humor, his love of the law and his embrace of the underdog. We've also remembered his faith, and we therefore know that, if he were here, he would tell us to go on, to be sure to file that motion, to not forget that hearing. Accordingly, with much appreciated cooperation from clients, colleagues and judges, we've done our best to transition Rolfe's files to other lawyers at EGBL. Dana Considine has handled most of this transition and in doing so has displayed remarkable professionalism and leadership.

All of us have been comforted by the many kind words that our clients, friends and colleagues have shared with us in recent weeks. Rolfe was a fascinating, wonderful, good man who touched countless lives. For anyone who might have missed them, Rolfe's obituary and Gary Gehlbach's eloquent eulogy can be found on our website, www.egbbl.com.

Inside

Most employers must post notice regarding employees' right to unionize

by Douglas E. Lee

By Jan. 1, 2012, each employer covered by the National Labor Relations Act must post a notice in its workplace informing employees of their right to organize, bargain collectively and engage in other concerted and/or protected activity under the Act. This new requirement initially was announced by the National Labor Relations Board on Aug. 25, 2011. The Board then extended the deadline on Oct. 5, 2011.

Government employers are not subject to the Act and therefore not affected by the new rule. Technically, all private employers outside of the airline and rail industries are subject to the Act, but the Board has adopted jurisdiction standards that effectively exempt some small employers from the Board's reach. Whether a private employer must comply with the new rule therefore depends on the nature and revenues of the employer's business.

Those private employers that must comply with the rule are retail businesses (including home construction contractors) with gross annual revenues of at least $500,000 and non-retail

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Allocation of college expenses often raises issues after divorce

by Darla A. Foulker

As high school seniors begin to explore whether and where they might continue their educations, parents find themselves wondering how they are going to afford college expenses. Many divorced parents do not realize that under Illinois law they – or even a parent who never married the child's other parent – can request assistance from the other parent to help pay those expenses.

The Illinois Marriage and Dissolution of Marriage Act allows a court to allocate post-high school educational expenses among divorced or unmarried parents until the child receives his or her first baccalaureate degree. Under the Act, these expenses include room, board, dues, tuition, transportation, books, fees, living expenses and medical and health insurance expenses.

While the Act itemizes what is included in educational expenses, it does not provide any firm guidelines with regard to allocating those expenses. In determining whether to require the payment and allocation of educational expenses, the court is required to "consider all relevant factors that appear reasonable and necessary." More specifically, the statutory factors to be included in the court's analysis

are (1) the financial resources of both parents, (2) the standard of living the child would have enjoyed had the marriage not been dissolved, that is, whether the child's college expenses would have been paid by his or her parents had they stayed married, (3) the financial resources of the child and (4) the child's academic performance. As more and more cases involving college expenses are being litigated, courts also have begun considering factors such as private versus public school tuition, in-state versus out-of-state tuition and the child's reasoning behind his or her school of choice.

If children are not college-age when the parents divorce, the issue of educational expenses is often reserved for future ruling. If the issue is reserved or not addressed at all in the parents' divorce, the parent seeking assistance with college expenses should file his or her request with the court well in advance of the first tuition bill actually being incurred. Failure to do so could result in the request for assistance being barred by the court as untimely.

A child hoping to go to college should apply for scholarships and financial aid as soon as possible so that this information also can be considered by the court. Courts generally agree that a child should take some financial responsibility for his or her education and lessen the parents' financial burden with regard to his or her educational expenses. A child considering college therefore might want to find part-time employment in order to reduce the amount of student loans that are necessary to satisfy his or her share.

If educational expenses are ordered payable, the student is required to sign all consents necessary for the educational institution to provide the supporting parent(s) access to the child's academic transcripts, records and grade reports.

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not in "ALL CAPS."

In addition to the notice to the principal, the power of attorney for property also now includes a notice to the agent. Because the standard of care is elevated under the Act from requiring an agent to use due care to requiring an agent to "act in good faith for the benefit of the principal using due care, competence, and diligence," the General Assembly believed the agent should have some direction as to his or her duties, which direction is provided in the notice.

The updated statutory forms also revoke all prior powers of attorney, but only if the form revocation language is used. However, a further amendment defines "excluded power of attorney" and provides that certain portions of the Act do not apply to an excluded power of attorney, such as the provisions concerning the standard of care and recordkeeping. Importantly, an excluded power of attorney is *not* revoked by executing a subsequent power of attorney and may be revoked only by the mechanism provided in that power of attorney or by a written instrument signed by the principal and agent specifically referring to the excluded power of attorney.

The appointment of multiple or co-agents is still prohibited under both statutory forms. However, non-statutory powers of attorney now are expressly recognized under the Act, and co-agents may be appointed through the use of a non-statutory power of attorney. However, a non-statutory power of attorney for property must now be notarized as well as attested by at least one witness to the principal's signature. As amended, the Act excludes certain persons (for example, the attending physician and the principal's spouse) from validly acting as witnesses.

In an attempt to provide assurance to those individuals or entities relying on a power of attorney that the power of attorney has not been revoked or amended, the Act now includes a form for Agent's Certification and Acceptance of Authority. The Act also provides a Successor Agent's Certification and Acceptance of Authority, by which a successor agent can certify that the event triggering the succession of agency has occurred and certifying that the successor agent is acting and has accepted the authority.

Powers of attorney are valid only while a person is living and thus are an essential part of almost all estate plans. Although powers of attorney executed prior to July 1, 2011, continue to be valid (assuming they were executed pursuant to the law in effect at the time of execution), powers of attorney – like wills, trusts and other estate planning documents – should be reviewed regularly to ensure that they both comply with current law and accurately express the principal's wishes.

State law governing home repairs continues to evolve

by MEGAN G. HEEG

Since 2000, contractors, consumers and courts have struggled to understand and interpret the Illinois Home Repair and Remodeling Act. Generally, the Act was passed to require contractors performing home repairs and remodeling to obtain signed written contracts from homeowners for work over $1,000 and to provide homeowners a pamphlet entitled "Home Repair: Know Your Consumer Rights."

Applying the Act in the real world, however, proved difficult. The Illinois General Assembly therefore has amended the Act several times, including twice in the last two years.

Amendments that took effect July 12, 2010, provide benefits to both homeowners and contractors. One of the amendments provides a homeowner the right to sue under the Consumer Fraud and Deceptive Business Practices Act if the homeowner suffers actual damages because of a contractor's violation of the Act. This change gives the homeowner broader legal protection than otherwise would be available. In addition, if the homeowner's fraud claim is successful, the homeowner can recover attorney's fees and, in appropriate cases, punitive damages.

The primary benefit for contractors in the July 2010 amendments is a change that effectively overruled a 2006 Illinois court decision that had barred contractors from recovering any amount from homeowners – no matter the quality or the amount of the work – if the contractor failed to provide the written contract required by the Act. The Illinois Supreme Court recently has interpreted the 2010 amendments and has held that the Act now does not render oral contracts unenforceable or prevent contractors from recovering the fair value of their work.

Another set of amendments to the Act will take effect Jan. 1, 2012. These amendments provide, among other things:

- If the home repair and remodeling contract offers to pay the contractor from the proceeds of an insurance policy, the consumer must be given the right to cancel the contract under certain circumstances if the insured is notified that all or any part of the claim is not a covered loss under the policy. Further, this type of home repair contract must contain a statement that outlines the insured's rights to cancel the contract and must include an "easily detachable" "Notice of Cancellation" that is provided to the homeowner at the time the contract is executed;

- a contractor offering home repair or remodeling services may not advertise or promise to pay or rebate any portion of an insurance deductible as an inducement to the sale;

- if the home repair or remodeling work includes roofing work, the contractor's name and state roofing license number must be included on any contracts, bids and advertisements and

- a contractor offering certain home repair or remodeling services may not offer to represent the homeowner on any claim for insurance, nor may the contractor call in or file an insurance claim on the insured's behalf in connection with a claim for the "repair or replacement of roof systems or the performance of any other interior or exterior repair, replacement, construction or reconstruction work."

Although aspects of the Act have been moving targets in recent years, it appears the legislature and courts have reached a consensus concerning how the Act should be applied. Because the Act covers most home repair and remodeling contracts, contractors and consumers should be familiar with the Act's requirements.

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businesses that have gross annual revenues of at least $50,000 and/or at least $50,000 of purchases of out-of-state goods or services. Businesses that do not fit neatly into either the retail or non-retail category have their own revenue thresholds. While those miscellaneous categories are too numerous to list here, some of local interest are apartment houses ($500,000), architects ($50,000), communications media ($100,000), child care centers ($250,000), nursing homes ($100,000), hotels and motels ($500,000), law firms ($250,000) and restaurants ($500,000).

The notice is required to be posted in conspicuous locations in the workplace, including all places where notices to employees concerning personnel rules and policies are posted. The notice informs employees that they have the right to organize and form a union; bargain collectively; discuss wages, terms of employment or union organizing with their coworkers or a union; raise work-related issues with their employer or a government agency and engage in strikes and/or picketing. The notice also informs employees that they have the right not to engage in any of these activities.

The Board will provide copies of the notice at no cost beginning on or about Nov. 1, 2011. Employers also may download the notice from the Board's website and print it on 11 x 17 inch paper. Employers also must post the notice on their company website or Intranet site if personnel policies are customarily posted electronically. An employer must post the notice in another language if at least 20 percent of the employees are not proficient in English and speak the other language.

Failure to comply with the new rule will be treated as an unfair labor practice under the Act, and non-compliance may be used to justify tolling the statutory six-month statute of limitations period with regard to other violations. Additionally, although the penalty for non-compliance does not include a fine, it is anticipated that an employer's failure to post the required notice may be used as evidence of union animus during the processing of other, unrelated unfair labor practice charges.

Employers cannot insist on direct notice of unforeseen FMLA leave

by Douglas E. Lee

After a recent ruling of the U.S. Court of Appeals for the Second Circuit, it appears employers cannot always insist that employees taking unforeseen family and medical leave notify their supervisors of the leave.

In the case, an employer granted unforeseen, intermittent family and medical leave to an employee who suffered periodic panic attacks but required the employee to notify his supervisor when he was taking the leave.

On two occasions, the employee failed to notify his supervisor, instead informing a lead clerk and asking the clerk to inform the supervisor. The employee maintained he could not notify the supervisor because the supervisor had caused the panic attacks.

When the employer disciplined the employee for not notifying the supervisor, the employee sued, claiming the employer's notice requirement was more stringent than that allowed by the Family and Medical Leave Act.

The court agreed, holding that, because the FMLA allows family members to request leave for employees unable to do so, the statute recognizes that indirect notice is sufficient in some cases. In this case, the court said, the employee's reason for not notifying his supervisor was sufficient to allow an indirect notice to the employer, even though the employer's policy clearly required direct notice to the supervisor.

In Print and At the Podium

Mrs. Considine recently was appointed by Gov. Quinn as the Lee County Public Guardian and Public Administrator . . . **Mrs. Vivian** authored an article entitled, "A means to avoid probate when real estate is involved?" that was published in the April issue of the Illinois State Bar Association *Real Property* newsletter. The article summarized Illinois House Bill 1153, which proposes the use of transfer on death designations for residential real estate through a vehicle known as a "transfer on death instrument." This instrument would work much like any other transfer on death designations and would permit an owner to designate a beneficiary to receive his or her residential real estate upon his or her death without the need for opening a probate estate . . . In one of **Mr. Lee**'s most recent commentaries for the website of the First Amendment Center, he examined how the National Labor Relations Board's decision to protect some employee speech on social media will impact employers and employees . . . In April, **Mr. Gehlbach** and **Mrs. Vivian** spoke at a Young Lawyers Section Committee meeting of the Chicago Bar Association regarding recent legislation . . . In May, **Mr. Lee** presented an employment law update to the Rock River Human Resources Professional Association . . . **Mr. Lee** recently was inducted into the Rotary Club of Dixon.

Deals and Decisions

With the unique economics that are current in agriculture, **Mr. Badger** and **Mr. Gehlbach** have been assisting both landlords and tenants in the review of farm leases for next year . . . **Mr. Lee** recently obtained a verdict for clients in three-day jury trial in Lee County . . . **Mr. Badger** has continued to advise clients on the creation of "look through" trusts to receive retirement benefits. These trusts are desired when an individual prefers not to receive retirement benefits directly but to preserve tax deferral by preserving the option of receiving benefits over the life of the trust beneficiary of the trust . . . **Mrs. Considine** recently was named Village Attorney for the Village of Franklin Grove. She also serves as attorney for the Village of Sublette . . . **Mr. Gehlbach** and **Mrs. Vivian** are involved in interepting a complex trust established in 1944 and in determining the persons now entitled to receive interests in a substantial amount of farmland . . . **Mr. Lee** successfully represented several heirs in an inheritance dispute, first obtaining a court ruling voiding a transfer of farmland out of a family trust and then assisting the heirs in obtaining a considerable settlement in mediation . . . **Mr. Badger** recently assisted clients in purchasing a residence in Chicago through a short sale . . . **Mr. Lee** has been appointed as a personal representative of deceased persons in several Lee County mortgage foreclosures . . . With bank loans difficult to obtain in many circumstances, **Mr. Badger** has helped several clients complete transactions by structuring the sale as a lease with an option to purchase or by funding the transaction with seller financing.