12 Grandparents' Rights

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I. INTRODUCTION

A. [12.1] Scope of Chapter

In the past 25 years, few areas of family law have changed more dramatically than those concerning grandparents' rights in regards to their grandchildren. As the law has progressed, these rights have been narrowed to the degree that many are better classified as privileges or opportunities. The purpose of this chapter is to provide the general practitioner with the fundamentals of these grandparents' rights, privileges, and opportunities as comprised in these four areas: (1) visitation, (2) legal custody, (3) guardianship, and (4) adoption.

B. [12.2] Relevant Statutes

Grandparents' rights are contained in several different statutes. Visitation rights are governed by the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq.*, and the Probate Act of 1975 (Probate Act), 755 ILCS 5/1-1, *et seq.* Legal custody is governed by the IMDMA, and guardianship is governed by the Probate Act. Adoption is governed by the Adoption Act, 750 ILCS 50/0.01, *et seq.*

C. [12.3] Background

Grandparents' rights are a relatively recent innovation in the law. At common law, the superior right of the natural parents to raise and control their children was nearly inviolable barring special circumstances, such as when a father died and his parents were trustees for their grandchild, when the mother died and her parents had a close relationship with the grandchild, and the like. See *In re Marriage of Spomer*, 123 Ill.App.3d 31, 462 N.E.2d 724, 78 Ill.Dec. 605 (5th Dist. 1984). Over the years, these common law rights have begun to be codified in the various statutes.

II. [12.4] VISITATION

At common law, grandparent visitation was very difficult to obtain barring special circumstances. Beginning in the 1970s, however, significant changes in the law increased the circumstances under which grandparent visitation could be obtained. Since 2000, though, the pendulum has swung the other way as the courts have subjected grandparent visitation statutes to heightened levels of constitutional scrutiny. As of 2005, grandparent visitation can be obtained under the Probate Act and under amendments to the Illinois Marriage and Dissolution of Marriage Act. These amendments which have been ruled on by the Illinois Supreme Court in the decision *Flynn v. Henkel*, 227 Ill.2d 176, 880 N.E.2d 166, 316 Ill.Dec. 688 (2007), offers the best insight into the Illinois Supreme Court's current opinion on grandparent visitation. However, since the Supreme Court has not addressed the constitutionality of the Act head on, the new amendments have not yet passed constitutional muster, and therefore the practitioner must continue to be aware of the constitutional issues surrounding grandparent visitation, all of which have come about from challenges to the IMDMA.

A. [12.5] Grandparent Visitation Under the IMDMA

When this chapter was originally published in 2000, grandparent visitation was permitted under certain circumstances as set forth in former §§607(b)(1) and 607(b)(3) of the Illinois Marriage and Dissolution of Marriage Act. However, in *Wickham v. Byrne,* 199 Ill.2d 309, 769 N.E.2d 1, 263 Ill.Dec. 799 (2002), the Illinois Supreme Court held the grandparent visitation statute unconstitutional on its face. *Wickham* involved two cases consolidated for purposes of appeal. In one case, the maternal grandmother sought a liberal visitation schedule with her grandchild after the death of her daughter, the child's mother. The child's father refused, and the trial court split the difference by awarding the grandmother some of the visitation she sought and denying overnight visitation. The father appealed, claiming the statute was unconstitutional. In the other case, the paternal grandparents sought visitation with their grandchildren after the death of the children's father. The mother initially permitted visitation but restricted the visitation when the grandparents failed or refused to follow the mother's care instructions. Additionally, the mother expressed concern with permitting her children near an uncle, who had an alternative lifestyle. Though the mother had moved to Missouri by the time of the hearing, the trial court granted the visitation request and required the mother to split the costs of transportation. The appellate court reversed, holding the statute unconstitutional as applied to the facts of the case.

The Illinois Supreme Court, in *Wickham,* found the statute facially unconstitutional because it infringed on the natural parents' fundamental right "to make decisions concerning the care, custody, and control of their children without unwarranted state intrusion." 769 N.E.2d at 5. The Supreme Court conceded that the State often infringes on parental decision-making but that these intrusions are appropriate only when necessary to protect the health, safety, and welfare of the children. The parental rights doctrine is a fundamental liberty interest, and statutes that infringe on this liberty interest can survive only if they are narrowly tailored to serve a compelling government interest. Thus, immunization requirements, abuse prohibitions, and child labor prohibitions are permitted, but telling parents who they must permit their children to visit with is prohibited by the due process clause of the Fourteenth Amendment to the U.S. Constitution. *See also Schweigert v. Schweigert,* 201 Ill.2d 42, 772 N.E.2d 229, 265 Ill.Dec. 191 (2002) (upholding dismissal of petition for grandparent visitation because statute authorizing petition was unconstitutional on its face); *Lulay v. Lulay,* 193 Ill.2d 455, 739 N.E.2d 521, 250 Ill.Dec. 758 (2000) (finding former §607(b)(1) unconstitutional as applied to facts when grandparent sought visitation over wishes of both parents who were divorced but exercised joint custody).

Effective January 1, 2005, in answer to *Wickham, supra,* P.A. 93-911 amended the statute to provide for grandparent visitation in situations far more limited than the previous, unconstitutional statute. This statute permits grandparents to seek visitation with their grandchild if the child's parent or parents unreasonably deny visitation and at least one of five situations exists. 750 ILCS 5/607(a-5)(1). At that time (later amendments are discussed below), §607(a-5)(2) covered five situations typified by some split in the child's natural family:

1. Grandparent visitation can be considered if one parent is incompetent, deceased, or imprisoned for more than one year.

2) Visitation can be considered if the child's parents are divorced or have been legally separated for more than three months, at least one of the parents does not object to the visitation, and the grandparent visitation would not interfere with the visitation enjoyed by the parent not related to the grandparent seeking visitation.

3) Visitation can be considered if a court other then a juvenile court or an adoption court has terminated one parent's rights in the child and this parent is the child of the grandparent seeking visitation.

4) Visitation can be considered if the child was born out of wedlock, the parents do not live together, and the petitioner is a maternal grandparent.

5) Visitation can be considered if the child was born out of wedlock, a court has established paternity, the parents do not live together, and the petitioner is a paternal grandparent. *Id.*

The statute expressly prohibits grandparents from petitioning for visitation if their child's parental rights in the grandchild at issue have been terminated in an adoption proceeding. 750 ILCS 5/607(a-5)(2).

The 2005 grandparent visitation statute seeks to avoid the constitutional problems discussed in *Wickham* by clearly placing the burden of proof on the grandparents. To this end, "there is a rebuttable presumption that a fit parent's actions and decisions regarding grandparent . . . visitation are not harmful to the child's mental, physical, or emotional health." 750 ILCS 5/607(a-5)(3). To prevail on a petition for visitation, the grandparents must prove that the parent's actions and decisions in denying visitation harm the child's mental, physical, or emotional health. *Id.* In determining whether this rebuttable presumption is overcome, the trial court is directed to consider numerous factors. These factors are the child's preference, the mental and physical health of the child and the grandparents, the duration and nature of the child's relationship with the grandparents, the good faith of the grandparents in seeking visitation and of the person denying visitation, the amount of visitation time requested and whether this visitation would adversely impact the child's other activities, whether the child lived with the grandparents for at least six consecutive months with or without the current custodial parent, whether the grandparents have had frequent contact with the child for at least 12 consecutive months, and any other facts that demonstrate that severing the relationship between the grandparents and the child will harm the child's mental, physical, or emotional health. 750 ILCS 5/607(a-5)(4). If the grandparents meet the burden of proof, the court is given great flexibility in shaping its order. Thus, the court need not grant overnight visitation or even possessory visitation; rather, the court need only provide the grandparents with reasonable access to the child. See 750 ILCS 5/607(a-5)(5).

Modifications of grandparent visitation orders are similar to modifications of child custody orders. As with modifications of custody, the court cannot modify visitation within two years of entry of the previous visitation order unless the court permits this modification based on affidavits alleging facts that demonstrate "the child's present environment may endanger seriously the child's mental, physical, or emotional health." 750 ILCS 5/607(a-7)(1). (Compare this to the provisions governing modifications of child custody, 750 ILCS 5/610.) To modify a grandparent visitation order more than two years after it was entered, the petitioning party must prove by clear and convincing evidence that a change in circumstances has occurred since entry of the previous visitation order as a result of which a modification is necessary to protect the mental, physical, or emotional health of the child. The changed circumstances may be related only to the child and the child's custodian; apparently, changes in the grandparent's circumstances are irrelevant. 750 ILCS 5/607(a-7)(2). Moreover, the petition to modify may be premised only on factual allegations that were nonexistent or unknown to the court when the previous visitation order was

entered. *Id.* Finally, "[a]ttorney fees and costs shall be assessed against a party seeking modification of the visitation order if the court finds that the modification action is vexatious and constitutes harassment." 750 ILCS 5/607(a-7)(3).

In addition to the 2005 amendments, the Illinois Legislature passed a series of additional amendments in 2006 which took effect January 1, 2007. Specifically, the Grandparent Visitation Act no longer applies to children less then one year old. See 750 ILCS 5/607(a-3). This amendment was in response to concerns of legislators and lobbyists that parents of new-born children could be forced into court mandated visitation during a child's "tender years." The new amendment also contains a specific venue provision such that "[a] petition for visitation with a child by a person other than a parent must be filed in the county in which the child resides." 750 ILCS 5/607(a-3). In addition, the statute now allows a grandparent to petition for visitation during a "pending dissolution proceeding or any other proceeding that involves custody or visitation issues." *Id.* Also under the amended Grandparent Visitation statute, a grandparent will be able to petition for visitation if a parent "has been missing for at least 3 months." 750 ILCS 5/607(a-5)(1)(A-5). "For the purposes of [§607] a parent is considered to be missing if the parent's location has not been determined and the parent has been reported as missing to a law enforcement agency" *Id.* The amended statute also allows for a grandparent to petition for visitation if the parent has been "incarcerated in jail or prison during the 3 month period preceding the filing of the petition" 750 ILCS 5/607(a-5)(1)(A-15). Finally, under the new statute, if a child is adopted by a relative or a stepparent, a grandparent still has standing to petition for visitation after the adoption. This is in stark contrast to the old law which forbade a grandparent to petition for visitation after the child had been adopted. 750 ILCS 5/607(a-5)(1)(B).

After the amended statute took effect in 2007, the Illinois Supreme Court heard three cases on the subject of grandparent visitation. The first two, *Mulay v. Mulay,* 225 Ill. 2d 601, 870 N.E.2d 328, 312 Ill.Dec. 263 (2007) and *Felzak v. Hruby,* 226 Ill.2d 382, 876 N.E.2d 650, 315 Ill.Dec. 338 (2007), were dismissed on procedural grounds. The third, *Flynn v. Henkel*, 227 Ill. 2d 176, 880 N.E.2d 166, 316 Ill.Dec. 688 (2007) (*Flynn II*), was ruled on substantively.

In *Flynn,* a paternal grandmother filed a petition for visitation against the mother of a child who was born out-of-wedlock. The trial court allowed the visitation. The mother appealed, and the appellate court affirmed. *Flynn v. Henkel,* 369 Ill.App.3d 328, 859 N.E.2d 1063, 307 Ill.Dec. 386 (2d Dist. 2006) (*Flynn I*). The Illinois Supreme Court reversed the appellate court's opinion, holding that the trial court's unsupported oral pronouncement that grandmother had met her burden of proof in overcoming the statutory presumption that mother's decision denying grandparent visitation was not harmful to child's mental, physical, or emotional health was against the manifest weight of the evidence. *Flynn II, supra.* The court highlighted its opinion in *Wickham,* stating that the "best interests" standard is no longer applied. The court emphasized that it is presumed that a parent's decision to deny visitation to a grandparent is correct. The only way to overcome this is for the grandparent to show that it is harmful to the physical, emotional, and mental health of the child to deny them visitation. The court stated:

> **Neither denial of an opportunity for grandparent visitation, as the trial court found, nor a child "never knowing a grandparent who loved him and who did not undermine the child's relationship with his mother," as the appellate court held, is "harm" that will rebut the presumption stated in section 607(a-5)(3) that a fit**

parent's denial of a grandparent's visitation is not harmful to the child's mental, physical, or emotional health. 880 N.E.2d at 171.

Accordingly, under current law, a grandparent seeking court-ordered visitation must prove that the child's mental, emotional, or physical health will be harmed if visitation is denied. The fact that a child simply will be cut off from one side of the family if visitation is stopped is not enough to prove harm to the child.

The Illinois Supreme Court in *Flynn II* did not address the constitutionality of the new Grandparents Visitation Act. Until they do, *Flynn* is the controlling opinion for divorce practitioners in Illinois dealing with grandparent visitation. See Michael K. Goldberg, *Flynn v. Henkel: A Heavy Burden for Petitioners Under the Grandparent Visitation Act,* 96 Ill.B.J. 244, (2008).

Sections 12.62 and 12.63 below contain sample forms of a petition to intervene and a petition for grandparent visitation.

B. [12.6] Grandparent Visitation Under the Probate Act

Grandparents may petition for visitation under the Probate Act only if both of the child's natural or adoptive parents are deceased. 755 ILCS 5/11-7.1(a). If either of the child's natural or adoptive parents is alive, then visitation must be sought under the Illinois Marriage and Dissolution of Marriage Act. Thus, the Probate Act provides for visitation in more limited circumstances. However, as shown in §§12.7 and 12.8 below, grandparent visitation under the Probate Act should be easier to obtain. Additionally, the constitutional concerns applicable to visitation under the IMDMA do not come into play because visitation under the Probate Act does not implicate parental rights since the child's parents are deceased.

1. [12.7] Standing To Petition

Under the Probate Act, grandparents usually may petition for visitation if they can prove two elements. First, the grandparents must show that both of the child's natural or adoptive parents are deceased. Second, the grandparents must show that they are themselves the parents of a legal parent of the minor child. 755 ILCS 5/11-7.1(a). Thus, if the child has been adopted and the adoptive parents both die, the grandparents may petition for visitation only if they are the parents of one of the adoptive parents.

The Probate Act also provides for grandparent visitation in limited situations in which the child has been adopted after the death of both parents. Grandparents may petition for visitation if, after the death of both legal parents, the child is adopted by a close relative. Under the Probate Act, a close relative shall include, but not be limited to, a grandparent, aunt, uncle, first cousin, or adult brother or sister of the child. *Id.* Thus, if a child is adopted by the maternal grandparents after the death of both legal parents, the paternal grandparents have standing to seek grandparent visitation with the child.

2. [12.8] Burden of Proof

Depending on the situation, the burden of proof in a petition for grandparent visitation under the Probate Act varies. The Probate Act states as follows:

> **Whenever both natural or adoptive parents of a minor are deceased, visitation rights *shall* be granted to the grandparents of the minor who are the parents of the minor's legal parents unless it is shown that such visitation would be detrimental to the best interests and welfare of the minor. [**Emphasis added.**]** 755 ILCS 5/11-7.1(a).

Thus, if the child has not been adopted subsequent to the death of both legal parents, the grandparents bear the initial burden of proving that both parents are deceased and that the grandparents are themselves the parents of the child's deceased legal parent. Upon proving these two elements, the circuit court is required to grant visitation unless a party to the action shows this visitation to be detrimental to the child's best interests. As in visitation actions under the Illinois Marriage and Dissolution of Marriage Act, the best interests standard governs visitation actions under the Probate Act. However, unlike visitation actions under the IMDMA, the grandparents petitioning for visitation under the Probate Act do not bear the burden of proving that visitation is in the best interests of the child. Rather, §11-7.1(a) of the Probate Act creates a rebuttable presumption that grandparent visitation is in the best interests of the minor. Thus, if the petition for grandparent visitation brought under the Probate Act is challenged by the child's guardian, the guardian bears the burden of proving that visitation is not in the child's best interests.

However, if the child has been adopted by a close relative subsequent to the death of the child's parents, the grandparents bear the burden of proving numerous elements, including that granting visitation is in the best interests of the child. In these cases, the grandparents seeking visitation must prove that (a) both of the child's legal parents are deceased, (b) the grandparents are themselves the parents of a legal parent of the child, (c) the child's subsequent adoption was by a close relative, (d) the grandparents have been unreasonably denied visitation with the child, and (e) granting grandparent visitation is in the best interests of the child. *Id.* No appellate decisions reviewing grandparent visitation under §11-7.1 of the Probate Act have been published, but the burden of proof in these situations seems very difficult.

III. [12.9] LEGAL CUSTODY

Few areas of family law are more difficult than child custody litigation. The courts are vested with broad discretion in most vital areas concerning custody, most notably in applying the best interests analysis to the fact pattern presented at hearing. Of course, fact patterns vary dramatically between actions. Thus, custody actions are sui generis and, as a result, small changes in fact patterns may have great impact in the ultimate outcome of the litigation. Added to the complexity of the legal and factual issues is the tension that nearly always underlies custody litigation. Rare is the case in which the opposing parties praise each others' parenting skills. To the contrary, parties often attempt to introduce into evidence every single sordid detail of the life of the other party, which often leads to two-way mudslinging on a scale rarely witnessed in other actions.

This mudslinging may be increased in those instances in which grandparents seek custody over the objections of the grandchild's parents. The potential to irreparably damage familial

relationships is great and should not be undertaken without great thought. Moreover, because they are not the child's parents, grandparents have a far more difficult road to travel in attaining custody of their grandchild.

Any attorney advising clients who seek custody of their grandchild should take extra care to understand the intricacies of both the statutory law as well as the caselaw. As shown in the discussion in §§12.10 – 12.20 below, the courts do not apply the laws exactly the way that the legislature drafted them. Thus, a quick glance at the statute is often not the end of the analysis.

A. [12.10] Standing To Petition

Before they may petition for custody of their grandchildren, grandparents must first meet the standing requirement contained in the Illinois Marriage and Dissolution of Marriage Act. See 750 ILCS 5/601(b)(2). The standing requirement does not implicate the circuit court's jurisdiction; rather, it is designed to safeguard the parents' superior right to custody. As such, standing is a threshold issue to be determined before proceeding to the best interests hearing. *In re A.W.J.*, 197 Ill.2d 492, 758 N.E.2d 800, 259 Ill.Dec. 392 (2001). Section 601(b) of the IMDMA provides as follows:

> **A child custody proceeding is commenced in the court:**
>
> *** * ***
>
> **(2) by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents.**

This seemingly broad language actually provides the first difficult step that grandparents must take in seeking custody of a grandchild. The statute allows the grandparents to file a petition for child custody if the child is not at the time of filing in the "physical custody" of one of the child's parents. However, the appellate courts have consistently found that the term "physical custody" has a special meaning for purposes of standing under §601(b)(2).

To have "physical custody" of a child within the meaning of §601(b)(2), grandparents actually must have something approaching legal custody of the child at the time litigation is commenced. If physical possession were enough, then grandparents could refuse to return children from a planned visitation and file a petition for custody while the children were with them. *See In re Custody of McCuan*, 176 Ill.App.3d 421, 531 N.E.2d 102, 125 Ill.Dec. 923 (5th Dist. 1988) (refusing to confer standing on grandparents whose physical possession of child arose after they refused to return child from freely given weekend visitation). The courts have applied the more stringent test to prevent grandparents — or any non-parent, for that matter — from obtaining standing under the language of §601(b)(2) by improperly abducting or otherwise obtaining physical possession of the children. *In re Custody of Peterson*, 112 Ill.2d 48, 491 N.E.2d 1150, 96 Ill.Dec. 690 (1986). Moreover, the more stringent test evinces policies that favor the superior rights of natural parents and stability in the child's home environment. *See In re Custody of Barokas*, 109 Ill.App.3d 536, 440 N.E.2d 1036, 65 Ill.Dec. 181 (1st Dist. 1982). If the grandparents do not have standing under §601(b)(2), they are required to proceed under the more

stringent standards of the Adoption Act or the Juvenile Court Act of 1987, 705 ILCS 405/1-1, *et seq.*

Whether grandparents have physical custody of a child at the time litigation is commenced depends on several factors, three of which are repeatedly stressed by the courts in determining standing under §601(b)(2): (1) whether the parents acted in such a manner as to voluntarily relinquish custody to the petitioning grandparents; (2) how long the child has resided with the grandparents; and (3) how well the child has become integrated into the grandparents' home. In *In re Custody of Menconi*, 117 Ill.App.3d 394, 453 N.E.2d 835, 73 Ill.Dec. 10 (1st Dist. 1983), the appellate court affirmed the trial court's grant of custody to the child's grandparents. In *Menconi*, the child's mother died when the child was an infant, at which time the child's father placed her with the paternal grandparents for care. Except for occasional visits with her father, none of which lasted more than a few weeks, the child lived with her grandparents for more than six years. When the child was six years old, her father forcibly removed her from her grandparents' care and refused to return her. Four days after the removal, the grandparents petitioned for permanent custody of the child, and the court granted the petition. The father first argued that the child was not actually in the grandparents' physical possession at the time the custody proceeding was commenced; rather, the child had been in the father's possession for four days. The appellate court dismissed this argument, noting that the child "was raised from infancy by [the grandparents] and the father's forcible removal of the child disrupted the de facto family relationship which existed between the child and her grandparents." 453 N.E.2d at 839. The appellate court additionally found that the father had voluntarily relinquished custody to the grandparents when the child was an infant. Thus, the court found that "the voluntary nature of the initial transfer of the child, coupled with the lengthy period of care by the grandparents and the corresponding integration of the child into the home of her grandparents, [was] sufficient to divest the father of physical custody of the child." *Id.*

In *In re Custody of Butler*, 192 Ill.App.3d 135, 548 N.E.2d 582, 139 Ill.Dec. 197 (1st Dist. 1989), the appellate court affirmed the trial court's dismissal of a custody action because the grandparents did not have standing under §601(b)(2). In *Butler*, the child's parents were divorced, and his father was granted sole custody when the child was four years old, at which time the child and his father moved into the residence of the paternal grandparents. The child, father, and paternal grandparents resided together until October 1987, at which time the child and his father moved into their own residence. Nearly eleven months later, the child was visiting his grandparents when they noticed bruising on his buttocks allegedly caused by a spanking. Upon discovering the bruising, the grandparents refused to return the child to his father at the conclusion of visitation and, instead, filed a petition for custody. However, as the appellate court noted, the child was not residing with the grandparents at the time the petition was filed; rather, the child had resided with his father for the previous eleven months and was only visiting with his grandparents. Thus, "[a]t best, the evidence disclose[d] a joint physical custody of the grandchild between the grandparents and [the child's father] for 11 years *and custody of the child by the father at the time the petition was filed.*" [Emphasis added.] 548 N.E.2d at 584. As a result, the grandparents had literal physical possession of the child when they filed their petition, but they lacked standing because they did not have legal physical possession within the meaning of §601(b)(2).

The decision of the Illinois Supreme Court in *Peterson, supra,* is illustrative of the fine distinctions made in determining standing under §601(b)(2). In *Peterson,* the child's parents were

divorced on February 23, 1983. The judgment for dissolution of marriage granted the child's custody to her mother, and the father was granted reasonable visitation. Around the time of entry of the judgment, the child and her mother moved in with the child's maternal grandparents, where they resided until the death of the mother in May 1984. The mother's death was long and agonizing and, as a result, the maternal grandparents provided much, if not most, of the child's care. During the period from February 1983 through May 1984, the child's father lived on the same block as the grandparents and regularly exercised his visitation rights with his child. Very shortly after the death of the child's mother, the child's father approached the grandparents and requested that they turn his daughter over to him. The grandparents refused, at which time the grandparents and the father filed their respective motions to modify the previous custody award. The grandparents' motion to modify custody was dismissed for lack of standing under §601(b)(2). The appellate court reversed the trial court's dismissal, but the Illinois Supreme Court reversed the appellate court and affirmed the trial court. The Supreme Court noted that the mother had legal custody of the child and both mother and child resided with the grandparents together. Despite the care given the child by the grandparents, the court ruled that there was no transfer of custody to the grandparents because the mother resided with the child the entire time in question. Moreover, the father did not himself voluntarily relinquish his superior parental claim to custody because he sought custody of his child immediately upon the death of the child's mother. Thus, because the child had never been apart from one of her parents and because the surviving parent had never voluntarily relinquished the child's custody, the Supreme Court found that the grandparents did not have standing to petition for the child's custody.

Similarly, in *In re Custody of Groff*, 332 Ill.App.3d 1108, 774 N.E.2d 826, 266 Ill.Dec. 387 (5th Dist. 2002), the appellate court found that the grandparents lacked standing to petition for custody when the child and the child's mother resided with them at the time the petition was filed. In *Groff*, the mother signed a consent to the grandparents' petition for custody. When she signed the consent, the mother and the child were staying with the grandparents during a short visit. Based on the mother's consent, the trial court awarded the grandparents custody. One week later, upon receiving her copy of the order, the mother sought legal advice, at which time she realized the gravity and full implications of her consent. Claiming she had been tricked into signing a consent she did not fully understand, the mother filed a motion to vacate the custody award, which the trial court denied; the appellate court, in an unpublished opinion, reversed the trial court's denial. The grandparents then filed a petition for custody. The mother moved to dismiss the petition and filed a writ of habeas corpus seeking the immediate return of her child. The trial court denied both requests. The appellate court reversed, holding that the grandparents lacked standing to seek custody because the child was in the mother's care when the initial petition was filed, the mother never voluntarily relinquished custody, and her consent was mistakenly signed and almost immediately recanted.

B. [12.11] Legal Standards for Seeking Child Custody

Once the court determines that grandparents have standing to seek custody of their grandchild, the grandparents may still have more hurdles to leap before obtaining custody. Most notably, they must always prove that it is in the best interests of the child that custody be awarded to them. See 750 ILCS 5/602(a) ("The court shall determine custody in accordance with the best interest[s] of the child."). Moreover, if the grandparents intervene in an action in which a prior custody order is being modified, the grandparents bear the additional burden of proving that a substantial change in the circumstances of the child, the custodian, or any other party to the action

has occurred. However, once the court has determined that the grandparents have standing to petition for custody, the grandparents have superb chances of prevailing on the remaining issues.

1. [12.12] Superior Rights Doctrine and Burden of Proof

Under Illinois law, the natural parents' right to custody of their child is presumptively superior to claims by non-parents for custody of the child. *In re Marriage of Thompson*, 272 Ill.App.3d 257, 651 N.E.2d 222, 209 Ill.Dec. 294 (2d Dist. 1995). As a result of the superior rights doctrine, the natural parent will ordinarily prevail against non-parents in a custody action in which both parties are equally fit to provide for the child. *In re Custody of Townsend*, 86 Ill.2d 502, 427 N.E.2d 1231, 56 Ill.Dec. 685 (1981) *overturned on other grouds by In re R.L.S.*, 218 Ill. 2d 428, 844 N.E.2d 22.[1] "However, the [superior rights doctrine] is applicable only when *the* [natural parent] *is not chargeable with laches or forfeiture as having left the child with the other party* for a long period of time and further the [doctrine] always yields to the best interest[s] of the child." [Emphasis in original.] *Look v. Look*, 21 Ill.App.3d 454, 315 N.E.2d 623, 626 (3d Dist. 1974). *See also Lloyd v. Lloyd*, 92 Ill.App.3d 124, 415 N.E.2d 1105, 47 Ill.Dec. 792 (1st Dist. 1980) (holding that natural parents' superior right to custody of their child is not absolute and must yield to best interests of child). However, in *In re R.L.S.*, 218 Ill. 2d 428, 844 N.E.2d 22, 300 Ill.Dec. 350 (2007) (discussed in further detail in §12.34 below), the best interests standard was held to be subservient to the court's finding that the child has a fit parent. The court held that the *Townsend, supra*, standard (that the right of natural parent to custody of his or her child under the Probate Act must yield to the best interests of the child even though the parent is a fit person) unconstitutionally deprived a natural parent of his or her substantive due process rights to have a say in the raising of the child. If the child had a fit parent who is willing and able to make and carry out day-to-day child care decisions, this would deprive the court of jurisdiction to rule on a petition from a third party seeking custody. 844 N.E.2d at 27-28. *See also* 755 ILCS 5/11-5(b)[2]

Under *Look, supra*, the parental rights doctrine rarely plays a significant role in those actions in which grandparents seek custody of their grandchild. In *Look*, the child's parents were divorced and custody was granted to the mother. Shortly thereafter, the mother and child moved into her parents' residence, at which time the mother commenced a transitory lifestyle, moving from town to town with various boyfriends. The child resided the entire time with his maternal grandparents. Five years after the child's residential arrangement began, his father brought a motion to modify child custody, and the grandparents were granted leave by the court to intervene. After hearing on the matter, the trial court awarded custody to the grandparents and the father appealed. The appellate court affirmed based on the doctrine of laches, noting as follows:

> **For many years the father acquiesced in everything that was being done by the grandparents for his son and was pleased to have them give their care and love to the boy. The father never had any close association with his son [**beyond approximately four visitations per year**]. The arrangement was agreeable to [**the father**] for many years before he sought to change it. The best interests of [**the child**] require that it not be discontinued.** 315 N.E.2d at 626.

Although *Look* was decided prior to the enactment of the Illinois Marriage and Dissolution of Marriage Act, there is little doubt that the grandparents would have had standing under the IMDMA to intervene in the action and seek custody of the child. See 750 ILCS 5/601(b)(2).

Nearly every action in which grandparents have standing to seek custody of their grandchild will be similar to *Look.* Two of the elements necessary to have standing are voluntary relinquishment of the child by the parents and physical custody of the child by the grandparents for a long duration. By proving these two elements in the standing phase, the grandparents have also proven that the parents are chargeable with laches or forfeiture for having left the child for an extended period of time in the grandparents' care. As a result, the superior rights doctrine is generally negated in the best interests phase of the custody action.

As in cases of grandparent visitation, the parental rights doctrine is also being more frequently applied to cases in which grandparents seek custody of their grandchildren against the parent's wishes. In *In re Guardianship of Alexander O.*, 336 Ill.App.3d 325, 783 N.E.2d 673, 270 Ill.Dec. 711 (2d Dist. 2003), the appellate court affirmed the trial court's award of custody to the unwed father over the objections of the child's maternal grandmother. In *Alexander O.*, the child, his younger half sister, and his alcoholic mother lived with the maternal grandmother for three years preceding the petition for custody. During this time, the grandmother provided all care, tutoring, food, clothing, and other support for the child. The father only sporadically provided support, but he did maintain a close relationship with the child, even after his move to Georgia. When the mother committed suicide, the grandmother filed a petition for custody. The father challenged the petition on standing grounds, but the trial court found the grandmother had standing. In the best interests hearing, the court heard evidence that the child had a close and loving relationship with his grandmother and half sister, he enjoyed a stable home environment, and his scholastic improvements were due, in large part, to the grandmother's efforts. Despite this, the court found the natural parent's superior right to custody was not overcome because the father had continuously maintained a close and loving relationship with his son. Thus, the father was awarded custody.

However, *Alexander O.* aside, efforts to set forth heightened standards for overcoming the parent's superior right to custody have been unsuccessful. In *In re Marriage of Dafoe*, 324 Ill.App.3d 254, 754 N.E.2d 419, 257 Ill.Dec. 761 (5th Dist. 2001), the father argued that the court should require the grandparents to meet a heightened burden of proof to overcome his superior right to custody. The appellate court refused to do so, holding that the grandparents need only demonstrate good cause to overcome the superior rights doctrine and that the custody was in the child's best interests. The grandparents in *Dafoe* met these elements when the father had seen the child only three or four times in six years, he did not object to the original guardianship that placed the child with the grandparents, the child had resided with the grandparents for more than six years, the child had special needs that were addressed by the grandparents but denied by the father, and the child was fully integrated into the grandparents' home.

However, the superior rights doctrine is not negated in regard to which party bears the burden of proof. Rather, in custody actions between the child's parents and grandparents, the burden of proof is premised on the superior rights doctrine. In *Townsend, supra,* [3] the Illinois Supreme Court held that

> **a third party seeking to obtain or retain custody of a child over the superior right of the natural parent must demonstrate good cause or reason to overcome the presumption that a parent has a superior right to custody and further must show that it is in the child's best interests that the third party be awarded the care, custody and control of the minor.** 427 N.E.2d at 1235 – 1236.

However, this all depends on whether the grandparents have satisfied the standing requirements set forth in *In re R.L.S.* (that the child is in the grandparents' physical possession). Only then may grandparents petition the court for custody of their grandchildren.

After the standing requirements have been satisfied, the grandparent bears the burden of proving by a preponderance of the evidence that it is in the best interests of the child that custody be awarded to the grandparent in original custody proceedings.

2. [12.13] Best Interests of the Child

Child custody litigation is generally governed by the Illinois Marriage and Dissolution of Marriage Act. See 750 ILCS 5/602. At first glance, the statute seems simple, but that is not the case. Section 602 of the IMDMA provides in part as follows:

> **(a) The court shall determine custody in accordance with the best interest[**s**] of the child. The court shall consider all relevant factors including:**
>
> **(1) the wishes of the child's parent or parents as to his custody;**
>
> **(2) the wishes of the child as to his custodian;**
>
> **(3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest[**s**];**
>
> **(4) the child's adjustment to his home, school and community;**
>
> **(5) the mental and physical health of all individuals involved;**
>
> **(6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;**
>
> **(7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person;**
>
> **(8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; and**
>
> **(9) whether one of the parents is a sex offender.**
>
> *** * ***
>
> **(b) The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child.**

The factors listed in §602 are the primary factors applied by courts, but the list is not inclusive, and the courts may look at any factors they deem relevant to the child's best interests. The only

limitation on the court's inquiry is that it "shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child." 750 ILCS 5/602(b). However, the courts have found that nearly all conduct would in some way affect the relationship with the child, although the burden is on the proponent of the evidence to prove how a person's conduct would affect the relationship. *In re Marriage of Rizzo,* 95 Ill.App.3d 636, 420 N.E.2d 555, 51 Ill.Dec. 141 (1st Dist. 1981). Thus, in addition to the statutory factors, the courts have considered the parties' respective economic conditions (*Montgomery v. Roudez,* 156 Ill.App.3d 262, 509 N.E.2d 499, 108 Ill.Dec. 803 (1st Dist. 1987)); past child support arrearages of the noncustodial parent (*In re Marriage of Soraparu,* 147 Ill.App.3d 857, 498 N.E.2d 565, 101 Ill.Dec. 241 (1st Dist. 1986)); and, most significantly for grandparents, "the sufficiency and stability of the respective parties' homes and surroundings, the interaction and relationship of the child to his parent and the child's adjustment to his home" (*In re Marriage of Fahy,* 208 Ill.App.3d 677, 567 N.E.2d 552, 563, 153 Ill.Dec. 594 (1st Dist. 1991)).

Stability in a child's custodial home has always been an important factor in custody disputes. For example, parties seeking to modify a child custody order within two years of the previous order must first show that the child's custodial arrangement presents a serious endangerment, and only after such a showing has been made may the court decide whether a change of custody is in the child's best interests. See 750 ILCS 5/610. The reason for the higher standard is to maximize the finality of child custody orders, thus providing stability and continuity in the child's life. *Sexton v. Sexton,* 82 Ill.App.3d 482, 402 N.E.2d 889, 37 Ill.Dec. 887 (3d Dist. 1980), *rev'd on other grounds,* 84 Ill.2d 312 (1981).

Stability in the child's environment plays a large role in those cases in which grandparents seek custody of their grandchildren. The reasons are obvious. First, due to the strenuous standing test, grandparents who have established standing under 750 ILCS 5/601(b)(2) have already established that they have had the child for an extended period of time, as a result of which the child has become integrated into and adjusted to the grandparents' home, thus giving the grandparents the advantage under §§602(a)(3) and 602(a)(4). Second, courts take the common sense approach that if the grandparents have been raising the child in a caring and nurturing environment and if this environment is the only home the child has ever known, there is no sense in taking a risk by placing the child in the home of a parent who has not demonstrated the same abilities regarding rearing the child.

Rose v. Potts, 217 Ill.App.3d 661, 577 N.E.2d 811, 160 Ill.Dec. 486 (5th Dist. 1991), is a good example of the importance of stability in a child's environment. In *Rose,* the parents were divorced at a very young age while both were still in the military. Shortly before the divorce, the parties had placed their child with her paternal grandmother. Although the judgment for dissolution of marriage granted the father custody, the child continued to reside with her paternal grandmother for the next four years. The father, mother, and grandmother all filed petitions for the child's custody when the father sought to take the child with him to Germany for his next military assignment. At trial, the mother presented evidence that she was remarried to an unemployed schoolteacher, that she was herself unemployed, that she and her new husband had moved six times in the previous two years, that she had paid the grandmother minimal support for the child, and that she had visited the child for portions of seventeen days in the preceding four years. The grandmother presented evidence that she had provided for the child for the previous four years, that she and the child resided with the grandmother's sister in exchange for housecleaning, that she earned $100 per week cleaning houses, and that she was seeking fulltime

employment. The undisputed evidence was that the child was happy and well taken care of by her grandmother, whom the child referred to as "Mommy." At the conclusion of the trial, the court awarded the child's custody to her mother, and the grandmother appealed. The appellate court reversed. As the appellate court noted, the duration of the child's residence with her grandmother was not alone sufficient to overcome the rebuttable presumption that the child's best interests would be served by residing with her mother. However, the duration of the child's residence in conjunction with the mother's lack of meaningful support for the child, the mother's lack of contact with the child, and the child's happiness and well-being while with the grandmother were sufficient to rebut the presumption created by the parental rights doctrine.

Also illustrative of the importance of stability is *Barclay v. Barclay*, 66 Ill.App.3d 1028, 384 N.E.2d 564, 23 Ill.Dec. 770 (3d Dist. 1978). In *Barclay*, a young couple was granted a judgment for dissolution of marriage when their son was 18 months old. The judgment granted the child's custody to the father. However, prior to entry of the judgment, by agreement, the parties had placed the child with his paternal grandparents. Four and one-half years after entry of the judgment for dissolution, the grandparents intervened in the dissolution of marriage action and filed a petition for custody of the child. The child's mother counterclaimed for custody of her child, and the father was defaulted for failure to respond to either the petition or the counterclaim. At trial, the mother demonstrated that she had turned her life around and was happily remarried, owned a home with her new husband, and was able to provide a good home for her son. The grandparents demonstrated that they had provided the child with a good, stable, and loving home for nearly five years, that they were upstanding members of their community and church, that the child was intelligent and well-adjusted, and that the mother, though able to do so, had seen the child only sporadically for the preceding five years. Despite the trial court's finding that the mother would be able to provide a good home for her son, the grandparents were awarded custody because the child's best interests would not be served by taking him from the only home he had ever known. The appellate court, citing *Look v. Look*, 21 Ill.App.3d 454, 315 N.E.2d 623 (3d Dist. 1974), affirmed the decision because the child had become fully integrated into his grandparents' home and the mother, despite previous opportunity to do so, before this point had not attempted to gain custody of her son.

3. [12.14] Substantial Changes in Circumstances

Grandparents bringing an independent petition for child custody must prove that they have standing to petition and that an award of custody to the grandparents is in the child's best interests. However, there is an additional element that must be proven in those cases in which the grandparents intervene and seek to modify a previous custody order. In these modification actions, the grandparents must prove that a substantial change in circumstances has occurred since entry of the last custody order in the action:

> **The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest[**s**] of the child.** 750 ILCS 5/610(b).

If there has already been a custody order entered regarding the child, the grandparents must proceed under §610(b), which both increases the burden of proof to clear and convincing evidence and adds the additional element of substantial change in circumstances.

Although §610(b) is comprised of two distinct elements, there is a nexus between the elements in that the change in circumstances must affect the child's welfare. *In re Marriage of Fuesting*, 228 Ill.App.3d 339, 591 N.E.2d 960, 169 Ill.Dec. 456 (5th Dist. 1992). For example, in *Fuesting*, the father petitioned to modify custody. In his petition and at trial, the father alleged that since entry of the parties' judgment for dissolution, in which the mother was granted custody, several substantial changes in circumstances had occurred, namely that the mother and her fiancé were cohabiting with no marriage date set and that he, the father, had remarried and was able to provide a stable, nurturing home for his daughter. However, the trial court denied the motion to modify custody because the father failed to prove how the child's welfare was adversely affected by her mother's cohabitation. To the contrary, as both the trial court and the appellate court noted, there was no evidence that the mother's cohabitation with her fiancé harmed the child in any way, particularly when the child had a warm and loving relationship with both. The appellate court noted that "[c]hanged conditions, in itself, is not sufficient to warrant a modification in custody without a finding that such changed conditions affect the welfare of the child." 591 N.E.2d at 963.

In *Barclay v. Barclay*, 66 Ill.App.3d 1028, 384 N.E.2d 564, 23 Ill.Dec. 770 (3d Dist. 1978), the appellate court disagreed with the mother's argument that the grandparents had failed to prove a substantial change in circumstances necessary to modify custody. The court noted that because the child had resided with the grandparents for so long, "the award of custody to the grandparents was not a change of custody but merely a modification of the custody order to conform to the realities of the situation." 384 N.E.2d at 568.

For grandparents who have met the standing requirement under the Illinois Marriage and Dissolution of Marriage Act (see 750 ILCS 5/601(b)(2)), proving a substantial change in circumstances should be relatively simple. To prove standing under §601(b)(2), the grandparents must have already proven that the child has resided with them for more than one year. By proving such de facto custody of the child for an extended period of time, the grandparents need only further show that the child has become integrated into their home because a child's integration into a home is sufficient to prove a substantial change in circumstances under §610(b). *See Shoff v. Shoff*, 179 Ill.App.3d 178, 534 N.E.2d 462, 128 Ill.Dec. 280 (5th Dist. 1989) (noting that substantial change in circumstances had occurred since previous custody order because mother had voluntarily relinquished child to father's custody for more than four years and child had become integrated into father's home); *In re Custody of Iverson*, 83 Ill.App.3d 493, 404 N.E.2d 411, 39 Ill.Dec. 27 (1st Dist. 1980) (holding that when five-year-old child had been residing in parent's home for more than one year, court could infer as matter of law that child had become integrated into that parent's home for purposes of determining whether substantial change in circumstances had occurred since entry of prior custody order).

C. [12.15] Procedure for Seeking Custody

The procedures used in seeking custody are contained in Part VI of the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/601, *et seq.* However, several additional provisions contained in Part V of the IMDMA, 750 ILCS 5/501, *et seq.*, also apply to different aspects of the

custody action, most notably appointment of a guardian ad litem to represent the child's interests, child support, and health insurance for the child. Attorneys representing grandparents in custody actions should become familiar with the statutes and how they interact with each other.

1. [12.16] Jurisdiction, Venue, and Notice

Regarding jurisdiction, the Illinois Marriage and Dissolution of Marriage Act provides as follows:

> **A court of this State competent to decide child custody matters has jurisdiction to make a child custody determination in original or modification proceedings as provided in Section 201 of the Uniform Child-Custody Jurisdiction and Enforcement Act as adopted by this State.** 750 ILCS 5/601(a).

Thus, as long as the jurisdiction provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act, 750 ILCS 36/101, *et seq.,* are met, the court has jurisdiction to hear original custody actions as well as modification of custody actions. See 750 ILCS 36/201.

Venue is governed by §601(b) of the IMDMA. Under 750 ILCS 5/601(b)(1)(ii) and 5/601(b)(2), all initial custody actions must be filed in the county in which the child resides. However, the courts have held that a child custody modification action is a separate proceeding that entitles a party to change venue upon filing a formally sufficient request. *In re Marriage of Cummins*, 106 Ill.App.3d 44, 435 N.E.2d 506, 61 Ill.Dec. 809 (2d Dist. 1982). Thus, in custody modification actions, the venue is initially the original venue that rendered the previous custody order, but the venue may change to any other proper venue upon proper motion duly made in the original venue.

Sections 601(c) – 601(d) of the IMDMA govern notice in custody actions. "Notice of a child custody proceeding, including an action for modification of a previous custody order, shall be given to the child's parents, guardian and custodian." 750 ILCS 5/601(c). Notice only to an attorney of any such parties is not sufficient; the required notice must be served on the parties themselves in strict accordance with the statute. Section 601(d) of the IMDMA governs notice of motions to modify child custody. If the custody proceeding is commenced more than 30 days after entry of the previous custody order, written notice and a copy of the motion to modify custody must be served on the child's parents, guardian, and custodian at least 30 days prior to hearing on the motion. 750 ILCS 5/601(d). However, nothing in §601(d) prohibits a party from moving for temporary custody of the child sooner than 30 days after notice is given.

2. [12.17] Temporary Custody

Under the Illinois Marriage and Dissolution of Marriage Act, any party to a custody proceeding may move for temporary custody of the child. 750 ILCS 5/603(a). If a hearing is conducted on the motion for temporary custody, the court determines temporary custody in accordance with the best interests of the child factors set forth in the IMDMA. See 750 ILCS 5/602. However, if no party objects to the motion for temporary custody, the court may award custody solely on the basis of affidavits filed by the moving party.

Because of §603(a) of the IMDMA, custody may actually be litigated twice: once in a temporary custody hearing and once in a permanent custody hearing. However, because both hearings generally involve identical issues, parties, and legal standards, the temporary custody hearing may become as involved as the ultimate hearing. Moreover, the party who prevails in the temporary custody hearing generally has an advantage in the permanent custody hearing because the courts in the latter are permitted to consider time the child has spent with a temporary custodian. *In re Marriage of Hefer*, 282 Ill.App.3d 73, 667 N.E.2d 1094, 217 Ill.Dec. 701 (4th Dist. 1996). However, because a temporary order is not a final adjudication on the merits, neither the temporary order nor the court's findings in support of this order are res judicata as regards the final custody order (*In re Marriage of Fields*, 283 Ill.App.3d 894, 671 N.E.2d 85, 219 Ill.Dec. 420 (4th Dist. 1996)), although the temporary order is bound to have some effect on the court's final decision when an extensive hearing on the temporary order is held. *See Hefer, supra*, 667 N.E.2d at 1097 ("In cases where there is no agreement and a substantial amount of evidence is heard on a temporary order, the trial court may be well-advised to make its permanent decision after the first hearing and not conduct a second hearing on a permanent order."). Thus, grandparents seeking custody are well advised to take the temporary custody hearing very seriously.

3. [12.18] Guardians ad Litem, Child Representatives and Custody Evaluators

Under the Illinois Marriage and Dissolution of Marriage Act, the court is authorized to appoint an attorney to represent the child, a child representative or a guardian ad litem (GAL) for the child. 750 ILCS 5/506. The statute itself is unclear as to the difference between an attorney for the child and a GAL for the child, and there is little in the way of caselaw to make the distinction clearer. However, regardless of the title, the role of both an attorney for the child and a GAL is to represent the child's best interests before the court. See Muller Davis and Jody Meyer Yazici, The Illinois Practice Of Family Law, p. 225 (6th ed. 2005-2006).

> **The child representative shall advocate what the child representative finds to be in the best interests of the child after reviewing the facts and circumstances of the case. The child representative shall meet with the child and the parties, investigate the facts of the case, and encourage settlement and the use of alternative forms of dispute resolution. The child representative shall have the same authority and obligation to participate in the litigation as does an attorney for a party and shall possess all the powers of investigation as does a guardian ad litem. The child representative shall consider, but not be bound by, the expressed wishes of the child. A child representative shall have received training in child advocacy or shall possess such experience as determined to be equivalent to such training by the chief judge of the circuit where the child representative has been appointed. The child representative shall not disclose confidential communications made by the child, except as required by law or by the Rules of Professional Conduct. The child representative shall not render an opinion, recommendation, or report to the court and shall not be called as a witness, but shall offer evidence-based legal arguments. The child representative shall disclose the position as to what the child representative intends to advocate in a pre-trial memorandum that shall be served upon all counsel of record prior to the trial. The position disclosed in the pre-trial memorandum shall not be considered evidence. The court and the parties may**

consider the position of the child representative for purposes of a settlement conference. 750 ILCS 5/506(a)(3).

The "power and authority" of the child's representative to "take part in the conduct of the litigation as does an attorney for a party" includes the ability to conduct discovery, file appropriate pleadings (including a change in custody), depose and present witnesses, and review experts' reports. *In re Marriage of Kostusik,* 361 Ill.App.3d 103, 836 N.E.2d 147, 158, 296 Ill.Dec. 732 (1st Dist. 2005). In I*n re Marriage of De Bates,* 212 Ill.2d 489, 819 N.E.2d 714, 289 Ill.Dec. 218 (2004), the trial court appointed a child representative who filed a written report concerning the child's interests, but the court did not allow the parties to question the representative. The court relied on the report in its decision on custody. The Supreme Court held that the trial court denied the parties due process when it disallowed questioning of the representative because the representative had acted as a witness observing the relationship between the child and the parties. However, when the representative does not file a report or act as a witness, the court should bar questioning and inquiry into the representative's legal strategy. *In re Marriage of Carrillo,* 372 Ill.App.3d 803, 867 N.E.2d 70, 310 Ill.Dec. 757 (1st Dist. 2007).

The courts are vested with discretion in appointing an attorney or GAL to represent the child. Thus, a court could properly refuse to appoint a GAL in an action in which the child's best interests was amply protected by the court and in which numerous witnesses testified regarding the child's best interests. *In re Marriage of Doty,* 255 Ill.App.3d 1087, 629 N.E.2d 679, 196 Ill.Dec. 134 (5th Dist. 1994). However, in some particularly complex matters, the court may be obligated to appoint a GAL or an attorney for the child. *In re Marriage of Koenig,* 211 Ill.App.3d 1045, 570 N.E.2d 861, 156 Ill.Dec. 385 (1st Dist. 1991).

Generally speaking, an attorney for the child acts as an attorney would in any other matter. For example, communications between the child and attorney are privileged, the attorney may stipulate to evidence on behalf of the child, the attorney may bind the child to settlement without first seeking the court's approval, the attorney may file pleadings on behalf of the child, and the attorney's power to protect the child's best interests is not subject to the court's supervision. See James L. Rubens and William C. Campbell, Ch. 10, *The Role of the Child's Representative, Attorney for the Child, and Guardian ad Litem in Custody Litigation,* CHILD CUSTODY LITIGATION (IICLE, 2004, Supp. 2006) (Rubens and Campbell). Attorneys for the child do not prepare written reports, and they may not be called to testify regarding any facts uncovered in investigating the action; neither can they make closing arguments not based on the evidence presented at hearing. *See In re Marriage of Wycoff,* 266 Ill.App.3d 408, 639 N.E.2d 897, 203 Ill.Dec. 338 (4th Dist. 1994).

GALs, on the other hand, act more as investigators for the court and, as such, act under the court's control and direction. Thus, GALs typically conduct an investigation of the parties' histories and present circumstances; conduct interviews with the parties, the child, and any other persons that may have information relevant to the child's best interests; and submit a written report to the court. See Rubens and Campbell, *supra.* Moreover, because they are acting on behalf of the court, and not so much as attorneys, GALs may be called to testify at hearing regarding their investigation, and they may advance their personal opinions regarding the child's best interests during closing arguments even in the absence of evidence in support of the personal opinions.

Awards for fees and costs for a GAL or an attorney for the child may be entered by the court against any adult party to the litigation and against the child's separate estate. In determining the amount of the award for fees and the parties' relative responsibility for the fees, the courts should consider the parties' respective economic circumstances; the importance, novelty, and difficulty of the questions raised in performing the attorney's duties; the time and labor required to properly perform the duties; and the customary charge for these legal services. Moreover, the petition for fees filed by the attorney should specify with particularity the time spent for the services performed. *In re Marriage of Soraparu,* 147 Ill.App.3d 857, 498 N.E.2d 565, 101 Ill.Dec. 241 (1st Dist. 1986).

The IMDMA provides as follows:

> **The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine, as a witness, any professional personnel consulted by the court, designated as a court's witness.** 750 ILCS 5/604(b).

Section 604(b) is duplicative in that it tacitly authorizes the court to appoint a GAL. However, §604(b) is used more often by the courts to appoint mental health professionals to conduct a custody evaluation. The mental health professional appointed may perform numerous functions, such as negotiating a joint parenting agreement or conducting evaluations of the parties and the child for the purpose of determining custody. In the latter case, the mental health professional will generally submit a written report of findings, conclusions, and recommendations to the court. *In re Marriage of Ford*, 91 Ill.App.3d 1066, 415 N.E.2d 546, 47 Ill.Dec. 541 (1st Dist. 1980). "The [mental health] professional who reports to the court pursuant to this Section is designated a court's witness [and] counsel for both parties may cross examine [the professional]." Muller Davis and Jody Meyer Yazici, THE ILLINOIS PRACTICE OF FAMILY LAW, p. 334 (6th ed. 2005-2006).

Illinois Supreme Court Rule 215 also permits the court to appoint a mental health professional to conduct a custody evaluation. However, appointments under S.Ct. Rule 215 are generally initiated by only one of the parties, and the expert appointed will serve as the moving party's witness. As a result of this distinction, Rule 215 differs from §604(b) in several important ways. First, Rule 215 applies when a motion for evaluation is filed by one of the parties, whereas the court may appoint a mental health professional sua sponte under §604(b). Second, the motion filed under Rule 215 specifies which mental health professional the movant wishes appointed, whereas §604(b) permits the court to decide which mental health professional shall be appointed. Third, the moving party bears the costs associated with the appointment under Rule 215, whereas the court may apportion the costs of any mental health professional appointed under §604(b). Finally, because the person appointed under Rule 215 is an expert witness for one of the parties, only the other party may cross-examine the expert at trial.

As a practical matter, GALs, child representatives, and mental health professionals appointed by the court carry significant weight in the final determination. All are presumably experienced in the field of child custody and, by virtue of their appointment, carry weight with the court. Moreover, unlike the attorneys for the respective parties, who advocate their respective clients' interests, GALs, chils representatives, and mental health professionals seek only what they

perceive to be in the child's best interests. Thus, grandparents seeking custody should be fully prepared for any meetings they may have with GALs, child representatives, or custody evaluators.

4. [12.19] Hearings

Hearings in child custody actions are generally governed by §606 of the Illinois Marriage and Dissolution of Marriage Act. Thus, custody proceedings receive priority over other matters, such as support or visitation actions, in being set for hearing. 750 ILCS 5/606(a). Additionally, the court, without a jury, acts as the finder of law and fact in all custody actions and may exclude the public from any such hearing if exclusion is deemed to be in the child's best interests. 750 ILCS 5/606(c). Finally, if deemed necessary to serve the child's best interests, the court may order "that the record of any interview, report, investigation, or testimony in a custody proceeding be kept secret." 750 ILCS 5/606(d).

For obvious reasons, the minor child whose custody is at issue is rarely called to testify in open court. Courts are loath to subject a child to the bitter and acrimonious charges that are typically heard in a hotly disputed custody action and then, in the presence of the parents, to ask the child to state his or her preference regarding custody. *Oakes v. Oakes*, 45 Ill.App.2d 387, 195 N.E.2d 840 (1st Dist. 1964). Thus, the IMDMA permits the court to conduct an in camera interview with the child to determine the child's custodial preference. 750 ILCS 5/604(a).

The court is vested with great discretion regarding these in camera interviews with the child. For example, the court does not have to conduct the interview if the court does not deem the interview necessary (*In re Marriage of Willis*, 234 Ill.App.3d 156, 599 N.E.2d 179, 174 Ill.Dec. 633 (3d Dist. 1992)), if the court finds that the harm by asking the child to state a preference outweighs the value of the stated preference due to other evidence regarding the child's preference (*In re Marriage of Doty*, 255 Ill.App.3d 1087, 629 N.E.2d 679, 196 Ill.Dec. 134 (5th Dist. 1994)), if the court believes that the child would be swayed by adult pressure (*In re Marriage of Stuckert*, 138 Ill.App.3d 788, 486 N.E.2d 395, 93 Ill.Dec. 294 (2d Dist. 1985)), or if the child is of tender years (*DeFranco v. DeFranco*, 67 Ill.App.3d 760, 384 N.E.2d 997, 24 Ill.Dec. 130 (1st Dist. 1978)). Neither, despite the clear language of §604(a), is the court's interview limited strictly to the child's custodial preference. To the contrary, the court is vested with great discretion in asking the child questions involving the parties and their respective circumstances and personalities. *In re Marriage of Milovich*, 105 Ill.App.3d 596, 434 N.E.2d 811, 61 Ill.Dec. 456 (1st Dist. 1982).

The only areas in which the court seems to have no discretion under §604(a) are whether attorneys may be present and whether a court reporter is utilized. Under §604(a), the attorneys for the parties have a right to be present during the interview unless this right is waived. However, pro se litigants have no right to be present during the interview, even though opposing counsel is permitted to be present, because the parent's presence could make it difficult for the child to openly and honestly answer the court's questions. *In re Marriage of Knoche*, 322 Ill.App.3d 297, 750 N.E.2d 297, 255 Ill.Dec. 716 (5th Dist. 2001). If the attorneys for the parties are not present during the interview, they have a right to see the transcript of the interview. *In re Marriage of Hindenburg*, 227 Ill.App.3d 228, 591 N.E.2d 67, 169 Ill.Dec. 187 (2d Dist. 1992). Moreover, the use of a court reporter to take a transcript of the in camera interview is mandatory and may not be waived by the court or the parties. *DeYoung v. DeYoung*, 62 Ill.App.3d 837, 379 N.E.2d 396, 19

Ill.Dec. 732 (3d Dist. 1978). Failure to have a court reporter present during the interview and to have a transcript of the interview made a part of the record requires vacatur of the ultimate custody order. *Gingrey v. Lamer*, 315 Ill.App.3d 486, 734 N.E.2d 186, 248 Ill.Dec. 478 (3d Dist. 2000).

5. [12.20] Child Support and Health Insurance

If the grandparents prevail on their motion for child custody, they may be entitled to child support from the child's parents. Child support is generally governed by §505 of the Illinois Marriage and Dissolution of Marriage Act, which authorizes the court to order either or both of a child's parents to pay support in any proceeding under 750 ILCS 5/601. 750 ILCS 5/505(a). Thus, any grandparent moving for custody of the child under §601 of the IMDMA is also permitted to seek child support from the child's parents under §505. *See Rose v. Potts*, 217 Ill.App.3d 661, 577 N.E.2d 811, 815, 160 Ill.Dec. 486 (5th Dist. 1991) (noting that grandmother awarded custody would be entitled to child support from each of child's parents).

Section 505 contains specific guidelines that courts are to follow in awarding child support to the child's custodian. For example, the guidelines state that a supporting parent should pay 20 percent of his or her net income (as "net income" is defined in 750 ILCS 5/505(a)(3)) for the support of one child, 28 percent of net income to support two children, 32 percent of net income to support three children, and so on. 750 ILCS 5/505(a)(1). However, the court is permitted to deviate from the guidelines if it determines that their application would be inappropriate based on any one or more of the factors enunciated in 750 ILCS 5/505(a)(2).

Although no cases have been reported in which grandparents were awarded child support under §505, the court in *Rose*, *supra*, has at least indicated that the grandparents would be eligible to receive child support from the child's parents. 577 N.E.2d at 815. Thus, the attorney seeking child support on behalf of the grandparents should be prepared to advance arguments under the minimum guidelines of §505(a)(1) and defend any attempts by the parents to seek deviation from the guidelines under §505(a)(2). However, because the guidelines are based on support being paid from only one noncustodial parent, the court will probably deviate from the guidelines and set child support at an equitable figure from each parent.

Under the IMDMA, "[w]henever the court establishes, modifies or enforces an order for child support . . . the court shall include in the order a provision for the health care coverage of the child." 750 ILCS 5/505.2(b)(1). The court's duty to enter an order providing for the child's health insurance is mandatory. The question of child support cannot be resolved until the court has also made a determination regarding health insurance, which means that until responsibility for health insurance is allocated, the court's order is not final and appealable. *Franson ex rel. Franson v. Micelli*, 172 Ill.2d 352, 666 N.E.2d 1188, 217 Ill.Dec. 250 (1996).

Generally speaking, §505.2 requires that the cost of health insurance for the child be borne by the person or persons required to pay child support, and this person is referred to in the statute as the "obligor." 666 N.E.2d at 1189 ("The duty to provide health insurance [for a child] is an integral part of a parent's current and future support obligations."). Thus, when a health insurance plan is available to cover the child through the obligor's employer, the court must order the obligor to provide, and be solely responsible for the cost of this insurance coverage unless the offered plan is not accessible to the child. *In re Marriage of Self*, 265 Ill.App.3d 804, 638 N.E.2d

699, 202 Ill.Dec. 831 (4th Dist. 1994) (holding that IMDMA mandated obligor, to whom insurance was available through employer, to maintain child as insured under policy even when cost of insurance was equal to 12.7 percent of obligor's net income).

However, the obligor's duty to provide and maintain health insurance for the child is not always mandatory. To the contrary, the court has discretion in allocating the parties' responsibility for the child's health insurance if the obligor is not permitted to add the child to the employer-offered policy or if this policy is not accessible to the child (*i.e.*, if the policy provides coverage only by healthcare providers located a long distance from the child's residence). In these situations, the court may then order the obligor to name the child as a beneficiary of a group policy available to the obligor or to procure and maintain an independent policy of health insurance for the child. Whether the court orders one of the latter two remedies is determined after the court has considered the child's medical needs, the availability of a plan to answer these needs, and the amount the plan would cost the obligor. 750 ILCS 5/505.2(b)(1).

IV. [12.21] GUARDIANSHIP

In certain situations, grandparents may be called on to act as guardians of their grandchildren. These guardianship actions are generally governed by Article XI of the Probate Act, 755 ILCS 5/11-1, *et seq.* However, certain guardianship actions require a working knowledge of the Illinois Marriage and Dissolution of Marriage Act as well; an attorney advising elderly clients should be familiar with both statutes and should know when each applies to a given case. This can prove difficult at times, given the various natures a guardianship may take.

A. [12.22] Qualifications for Guardianship

To serve as a guardian of a person, an estate, or both, a guardian must meet the following minimum requirements:

1. The guardian must be 18 years of age.

2. The guardian must be a resident of the United States, although citizenship is not required.

3. The guardian must be of sound mind and not have been adjudged a disabled person as defined in the Probate Act (see 755 ILCS 5/11a-2).

4. The guardian cannot have been convicted of any felony, except under certain court-approved conditions.

5. In the case of court-appointed guardians, the court must find that the guardian is "capable of providing an active and suitable program of guardianship" for the child. 755 ILCS 5/11-3(a).

As long as the grandparents meet all requirements, they are qualified to act as guardian of their grandchild. See *In re Estate of Cohn*, 95 Ill.App.3d 204, 419 N.E.2d 951, 50 Ill.Dec. 683 (2d Dist. 1981) (finding that appointment of petitioner as guardian of minor's person was in best interests of child when record showed that petitioner met requirements of Probate Act and that he was capable of providing good environment for child). However, merely being qualified is not

sufficient to prevail in a petition for guardianship. Rather, meeting the qualifications is a condition precedent to being permitted to seek guardianship, and the failure to allege and prove the qualifications will result in dismissal of the petition.

B. Types of Guardians

1. [12.23] Short-Term Guardian

A short-term guardianship applies to situations in which a guardian is needed for only a short duration or when a guardian is needed quickly and the child's parents cannot wait for a court order. The appointment of a short-term guardian is governed by §11-5.4 of the Probate Act and a court need not approve the appointment. See 755 ILCS 5/11-5.4(c) regarding when a short-term guardianship is effective. The powers and duties of a short-term guardian are listed in the Probate Act; the exercise of these powers and duties is not subject to the direction of the court. 755 ILCS 5/11-13.2(a).

a. [12.24] Appointment of Short-Term Guardian

The appointment of a short-term guardian is relatively simple and similar to signing a will. The appointment is made by the child's parent or parents, must be in writing, and must be executed by the parents in the presence of at least two credible witnesses over the age of 18 years. 755 ILCS 5/11-5.4(a). The written appointment must be dated; must specifically identify the appointing parent, the short-term guardian, and the child; and must be signed by the short-term guardian, although the guardian need not sign at the same time the appointing parent executes the document. Moreover, only one child may be the subject of each written instrument appointing a short-term guardian. 755 ILCS 5/11-5.4(f). Section 11-5.4(f) contains a sample form with instructions that may be used in appointing a short-term guardian. As with executing a will, it is vital that the document be properly executed and witnessed.

The statute prohibits parents from appointing a short-term guardian in limited situations. Thus a parent may not appoint a short-term guardian if

> **the minor has another living parent, adoptive parent or adjudicated parent, whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor, unless the nonappointing parent consents to the appointment by signing the written instrument of appointment.** 755 ILCS 5/11-5.4(b).

In these circumstances, the parent must petition the court for appointment of the guardian.

b. [12.25] Duration of Short-Term Guardianship

Short-term guardianships are determined based on the effective date of the appointment or on the contents of the appointment. Unless the appointment states otherwise, the appointment of a short-term guardian is effective immediately when signed. 755 ILCS 5/11-5.4(c). However, the appointment may become effective at a future date or upon the occurrence of a future event if the appointment so specifies. The appointment of a short-term guardian is valid for 365 days[4] after the effective date of the appointment unless the appointment provides for an earlier termination

date or termination on a specified event. *Id.* In no event may the short-term guardian serve for more than 365 days. Moreover, the parent who made the appointment may revoke or amend it at any time prior to its expiration. 755 ILCS 5/11-5.4(d). This revocation or amendment may be communicated in any way to either the short-term guardian or another person. If the communication is to a person other than the short-term guardian, this person must make a reasonable effort to communicate the revocation or amendment to the short-term guardian. *Id.*

c. [12.26] Powers of Short-Term Guardian

Short-term guardians have the authority to act only as the guardian of the child's person. 755 ILCS 5/11-13.2(b). As regards the child's estate, the short-term guardian is permitted only "to apply for and receive on behalf of the minor benefits to which the child may be entitled from or under federal, State, or local organizations or programs." *Id.* As short-term guardian of the child's person, the guardian is granted the child's custody, care, and education for the term of the guardianship.

Short-term guardianships are useful in several situations. For example, if a child's parents are traveling out of the country for a short period of time, they may name the child's grandparents as the child's short-term guardians. By doing so, the grandparents may then authorize medical care, obtain information from the child's school, and the like. The same would apply if the child's parent or parents are injured or ill and are thus unable to provide for the child on a short-term basis. However, if the illness or injury is expected to exceed 60 days, the parent or parents should consider immediately commencing a full guardianship action while the short-term guardianship is still in effect.

2. [12.27] Standby Guardian

A standby guardian is a person appointed by a court as the person who will act as guardian of the child when either the child's parents or the guardian of the person of the child dies or is no longer willing or able to routinely make and implement child-care decisions concerning the child. 755 ILCS 5/11-5.3.

a. [12.28] Appointment of Standby Guardian

As set forth in 755 ILCS 5/11-5.3(a), the initial designation of a standby guardian is similar to the appointment of a short-term guardian:

> **A parent, adoptive parent, or adjudicated parent whose parental rights have not been terminated, or the guardian of the person of a minor may designate in any writing, including a will, a person qualified to act under Section 11-3 to be appointed as standby guardian of the person or estate, or both, of an unmarried minor or of a child likely to be born. A parent, adoptive parent, or adjudicated parent whose parental rights have not been terminated, or the guardian of the person of a minor or a standby guardian of an unmarried minor or of a child likely to be born may designate in any writing, including a will, a person qualified to act under Section 11-3 to be appointed as successor standby guardian of the minor's person or estate, or both. The designation must be witnessed by 2 or more credible witnesses at least 18 years of age, neither of whom is the person designated as the**

> **standby guardian. The designation may be proved by any competent evidence. If the designation is executed and attested in the same manner as a will, it shall have prima facie validity. The designation of a standby guardian or successor standby guardian does not affect the rights of the other parent in the minor.** 755 ILCS 5/11-5.3(a).

The Probate Act contains a sample form with instructions that may be used in designating a standby guardian and, if the standby guardian is unable or unwilling to act when necessary, a successor standby guardian. 755 ILCS 5/11-5.3(e). Additionally, as the statute notes, this designation may also be contained in the parent's will. However, if the designation is made by only one parent and the child has another living parent, the other parent's rights to the care, custody, control, and education of his or her child will not be affected by the designation. 755 ILCS 5/11-5.3(a). In this way, a custodial parent cannot, upon his or her death, abrogate the other parent's rights regarding the child.

Unlike the appointment of a short-term guardian, the standby guardian may not act as guardian of the child's person or estate until this person is appointed standby guardian by a court of competent jurisdiction. 755 ILCS 5/11-5.3(b). Thus, either the standby guardian or the designating parent must first petition the court and request that the designated standby guardian be so appointed. As is the case with all court-appointed guardianships, the court does not have jurisdiction to proceed on such a petition if

> **the minor has a living parent, adoptive parent or adjudicated parent, whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor, unless the parent or parents consent to the appointment or, after receiving notice of the hearing . . . fail to object to the appointment at the hearing on the petition.** 755 ILCS 5/11-5.3(c).

If the surviving parent can be located and appears at the hearing, the court will apply a rebuttable presumption that this parent is willing and able to provide for the child's day-to-day care, but this presumption can be overcome by a preponderance of the evidence. However, the problem of a surviving parent may be overcome if both parents sign the form, which is permitted under §11-5.3(e).

b. [12.29] Petition, Venue, and Notice

A petition for appointment of standby guardian must contain

1. the child's name, date of birth, and residence address;

2. the names and post office addresses of the child's nearest relatives;

3. the name and post office address of the person having custody of the child;

4. the name, post office address, and occupation of the proposed standby guardian;

5. the facts concerning the designation of the standby guardian by the child's parents or the willingness and ability of the parents to make and carry out the day-to-day decisions for the child's care;

6. the facts concerning the execution or admission to probate of the written designation, a copy of which must be attached to the petition; and

7. the facts concerning any other actions regarding the child that may then be pending and whether there is already another guardian then acting for the child. 755 ILCS 5/11-8.1.

The petition for appointment of a standby guardian should be filed in the court of the county in which the child resides. If the child is not a resident of Illinois, the petition should be filed in the court of the county in which the child's real or personal estate is located. 755 ILCS 5/11-6.

Written notice of the hearing on the petition to appoint a standby guardian must be given in accordance with 755 ILCS 5/11-10.1(a). This notice must be given to the child if he or she is 14 years or older and to any of the child's relatives whose names and addresses are stated in the petition. The notice to these parties must be either personally delivered or mailed at least three days prior to the hearing.

c. [12.30] Oath and Bond

Upon appointment, the standby guardian is required to take and file an oath with the court. 755 ILCS 5/11-5.3(d). In the oath, the standby guardian must affirm that he or she "will faithfully discharge the duties of the office of standby guardian according to law." *Id.* In those instances in which the standby guardian will serve as guardian of the child's estate, the standby guardian "shall file in and have approved by the court a bond binding the standby guardian" to abide by the oath. *Id.* However, the bond need not be filed and approved until the standby guardian assumes his or her duties as the child's guardian.

d. [12.31] Commencement of Duties of Standby Guardian

After being appointed by the court, the standby guardian immediately becomes the child's guardian upon the occurrence of any one of several events. First, the standby guardian assumes the duties and responsibilities of the child's guardian if he or she learns of the death of the child's parent or parents. Second, the standby guardian assumes the duties and responsibilities of the child's guardian if he or she is told by the child's parent or parents that they cannot make and carry out day-to-day decisions for the child's care. Third, the standby guardian assumes the duties and responsibilities of the child's guardian if he or she receives written certification from the attending physician for the parent or parents that the latter cannot make and carry out day-to-day decisions for the child's care. 755 ILCS 5/11-13.1(b).

e. [12.32] Duration of Standby Guardianship

Once the standby guardian assumes his or her duties as the child's guardian, the guardianship closely resembles a short-term guardianship. For example, upon assuming his or her duties, the standby guardian may act as guardian of the child's person, estate, or both without direction of the court. 755 ILCS 5/11-13.1(b). However, the guardianship lasts for only 60 days and may be

limited or terminated sooner by a court of competent jurisdiction. *Id.* Thus, for the designated standby guardian to continue to act as the child's guardian, the designated standby guardian must file a petition requesting his or her appointment as guardian of the child's person, estate, or both. 755 ILCS 5/11-13.1(c). Moreover, the latter petition must be filed within 60 days of the guardian having received knowledge of the parents' deaths or inability to care for the child. *Id.* At the hearing on the petition for full guardianship, the court is directed to grant the petition unless the court finds that the appointment would no longer be in the child's best interests. 755 ILCS 5/11-5(b-1).

Standby guardianships are useful tools in certain limited situations. For example, standby guardianships are practical if the child's parents wish to make sure that the child will always be cared for by the guardian of their choice without a lapse in the care. However, to effect a full and permanent guardianship in this manner requires that a designation be properly executed and that two separate hearings occur. Thus, court costs and attorneys' fees will probably be high.

3. [12.33] Guardian of the Person

In certain situations, grandparents may need to petition the court for appointment as permanent guardians of the child's person. If the court approves the petition for guardianship of the person, the grandparents are permanently granted the child's care, custody, and education. See 755 ILCS 5/11-13(a). However, this court-appointed guardianship may be difficult to obtain if either of the child's parents is alive, this parent's whereabouts are known, and the parent is able to provide for the child's care.

a. [12.34] Standing To Petition

As in custody actions under the Illinois Marriage and Dissolution of Marriage Act, grandparents must have standing to seek guardianship of their grandchild's person if either or both of the child's parents are alive. The superior rights doctrine applicable to the standing requirement of the IMDMA (750 ILCS 5/601(b)(2)) is found in the Probate Act: "If both parents of a minor are living and are competent to transact their own business and are fit persons, they are entitled to the custody of the person of the minor and the direction of his education." 755 ILCS 5/11-7.

Although the language of §11-7 of the Probate Act seems broader than that contained in §601(b)(2) of the IMDMA, the standing requirements are nearly identical. To have standing to seek guardianship of a child's person when either of the child's parents is alive, the grandparents usually must prove that the child is not in the physical custody of the parents. *In re Person & Estate of Barnhart,* 232 Ill.App.3d 317, 597 N.E.2d 1238, 174 Ill.Dec. 26 (2d Dist. 1992). *See also In re Estate of LeCocq,* 17 Ill.App.3d 1011, 309 N.E.2d 84 (3d Dist. 1974) (holding that reference to "fit" parent under predecessor statute to 755 ILCS 5/11-5 required only that parent in question be able to care for child and did not vest court with authority to weigh abilities of parent against proposed guardian in determining guardianship of child's person). For example, in *In re Estate of Brown,* 207 Ill.App.3d 139, 565 N.E.2d 312, 152 Ill.Dec. 70 (4th Dist. 1990), the appellate court affirmed appointment of the maternal grandparents as co-guardians of the child's person when the child had already resided with the grandparents for an extended period of time, the child was integrated into the grandparents' home, the mother had failed to establish a meaningful relationship with the child, and the mother's life lacked both personal and financial

stability. However, in *In re Person & Estate of Newsome,* 173 Ill.App.3d 376, 527 N.E.2d 524, 123 Ill.Dec. 61 (4th Dist. 1988), the appellate court found that the maternal grandparents lacked standing to seek guardianship of the person of one of their deceased daughter's children when the child's putative father appeared in the action and established parentage (the parentage determination was reversed on other, technical grounds that did not affect the grandparents' standing), the putative father claimed to have lived with the child's mother from the time the child was conceived until the mother died, and the child had never resided with the grandparents. Thus, the language of the statute aside, when at least one of the child's parents is alive, his or her whereabouts are known, and he or she challenges the guardianship request, this parent will have a superior right to custody of the child that can be overcome only by the grandparents establishing standing pursuant to the test applied under §601(b)(2).

However, the Illinois Supreme Court, in *In re R.L.S.*, 218 Ill. 2d 428, 844 N.E.2d 22, 300 Ill.Dec. 350 (2006), differentiated between the standing requirement in the Probate Act with those contained in the Illinois Marriage and Dissolution of Marriage Act.

In *In re R.L.S.*,the maternal grandparents petitioned for the guardianship of their minor granddaughter under the Probate Act. R.L.S.'s parents had been separated, and R.L.S. had been living with her mother and maternal great-grandmother at the time her mother died in an automobile accident. The respondent moved to dismiss the petition on the grounds that the petitioners lacked standing. 844 N.E.2d at 25. The trial court dismissed the grandparents' guardianship petition for lack of standing based on the father's objection that he had not voluntarily and indefinitely relinquished custody of his child.

The appellate court reversed the decision citing the fact that the Probate Act does not contain a requirement that the parents relinquish custody before a grandparent can petition for guardianship. The court acknowledged that while this is in fact a requirement to petition for custody under the Illinois Marriage and Dissolution of Marriage Act, the court said that the two statutes' standing requirements should no longer be read together.

The Illinois Supreme Court held that because the Illinois Legislature amended the Probate Act to include a standing clause, the IMDMA standing requirement is no longer read into the Probate Act. This overturned a body of caselaw that incorporated the standing requirement from the Illinois Marriage and Dissolution of Marriage Act into the Probate Act. The Court stated that "to have standing to seek custody under the Marriage Act [IMDMA], the nonparent must first show that the child is not in the physical custody of one of his parents." 844 N.E.2d at 27. On the other hand, "[t]o have standing to proceed on a petition for guardianship under the Probate Act, when the minor has a parent whose whereabouts are known, the petitioner must rebut the statutory presumption that the parent is 'willing and able to make and carry out day-to-day child care decisions concerning the minor.'" 844 N.E.2d at 28.

The petitioner then argued that standing under the Probate Act is too broad and would allow anyone to petition for guardianship which would make it subject to the same infirmity that the IMDMA visitation statue was subject to in *Wickham v. Byrne,* 199 Ill.2d 309, 769 N.E.2d 1, 263 Ill.Dec. 799 (2002). The court distinguished the Probate Act from the Washington statute struck down in *Troxel v.Granville,* 530 U.S. 57, 147 L.d.2d 49, 120 S.Ct. 2054 (2000) (U.S. Supreme Court case cited by the *Wickham* court), stating:

> **[**A**] person who petitioned for visitation under the Washington statute would be given a hearing on merits, and the determination of the child's best interests would be made without any deference to the parents' decision. By contrast, a person who files a petition for guardianship under the Probate Act will have the petition dismissed if the child has a parent who is willing and able to carry out day-to-day childcare decisions.** 844 N.E.2d at 30.

The court reasoned that under the old visitation statute, if a petitioner could convince a court that it was in the child's best interests for the petitioner to be granted visitation, the court would grant it despite a parent's objection. Under the Probate Act, however, there is now a strict standing requirement that provides the necessary constitutional safeguards of a parent's substantive due process rights required by *Wickham, supra.*

The Illinois Supreme Court also discussed §11-7 of the Probate Act. The court overturned many previous decisions regarding this section stating:

> **Instead, this court has repeatedly held that despite the statute's pronouncement, a fit parent's custody rights are subservient to the best interests of the child.** 844 N.E.2d at 32.

The Illinois Supreme Court ruled that all of the previous interpretations of §11-7 were wrong and should no longer be followed. The petitioners therefore lacked standing to proceed with their petition

> **unless the court determines that they have rebutted the presumption that respondent is willing and able to make day-to-day child care decisions. Moreover, if respondent is a fit person who is competent to transact his own business, he is entitled to custody of [**the child**].** 844 N.E.2d at 34.

In the wake of *In re R.L.S.,* the Illinois Supreme Court heard another case in 2006 dealing with custody under the IMDMA and its relation to *In re R.L.S.* In *In re Custody of T.W.,* 365 Ill.App.3d 1075, 851 N.E.3d 881, 303 Ill.Dec. 694 (5th Dist. 2006), the central issue was whether *In re R.L.S.* stood for the proposition that substantive due process mandated that custody must always be awarded to a parent if he or she is fit.

In *In re Custody of T.W.,* the maternal grandparents of a child born out of wedlock filed a petition under the IMDMA for a change of custody after the mother voluntarily surrendered physical custody of the child to them. The Circuit Court awarded the grandparents custody. The child's father appealed. The respondent contended that *In re R.L.S.* held that substantive due process mandates that custody must always be awarded to a parent if the parent is fit. The court held that *In re R.L.S.* made no such pronouncement:

> ***In re R.L.S.* holds that fit parents are entitled to custody under the Probate Act. This means the Probate Act contains the constitutional safeguards called for in *Troxel.* That holding is of limited relevance to the case at hand, which involves a petition under the Marriage Act.** 851 N.E.3d at 888.

The court further stated that

> **[t]he court in *In re R.L.S.* appears to have assumed that the standing requirements of the Marriage Act protect the due process rights of parents. The respondent in *In re R.L.S.* argued that the incorporation of the standing requirements of the Marriage Act was necessary to protect his constitutional rights. The court rejected this argument by implying that the incorporation of the standing requirements of the Marriage Act would protect parental rights but that incorporation was not necessary.** *Id.*

The court ultimately held that "[t]he statutory framework of the Marriage Act ensures that the due process rights of parents are not violated." 851 N.E.3d at 889.

In the end, *In re Custody of T.W.* held that the decision in *In re R.L.S.* that a fit parent is entitled to custody under the Probate Act does not extend to a petition filed under the IMDMA and does not mandate that substantive due process requires custody must always be awarded to a parent if he or she is fit.

However, all of these standing issues can be avoided if the child's parents consent to the guardianship appointment. As with standby guardianships, the child's parent, adoptive parent, or adjudicated parent may appoint a guardian for the child's person as long as the appointment is in writing, is signed by the parent, and is properly witnessed by two persons aged at least 18 years. 755 ILCS 5/11-5(a-1). Parents typically make these appointments in their wills, but they may do so in any writing that is properly signed and attested to. Also, the grandparents may themselves file the petition for guardianship provided that each of the child's surviving parents whose whereabouts are known is given notice of the action and consents in writing to the appointment. 755 ILCS 5/11-5(b). Finally, the grandparents may be appointed guardian of the person if proper notice is given but the child's parents fail to appear and object to the appointment.

Section 12.64 below contains a sample form of a petition for guardianship of a minor.

b. [12.35] Nomination by the Child

A child aged 14 years or older may nominate a guardian of his or her person; however, a child's nomination is subject to the court's approval. 755 ILCS 5/11-5(c). For example, a child may not circumvent the superior rights doctrine by nominating a grandparent as guardian of the person while one or both of the child's parents are alive and willing and able to care for the child. *In re Estate of Johnson*, 284 Ill.App.3d 1080, 673 N.E.2d 386, 220 Ill.Dec. 474 (1st Dist. 1996). Moreover, the courts will probably not confirm the child's nominee if the nominee would be unable to provide the child with a proper home environment. Neither will the court permit the petition for guardianship to proceed if the child's nominee does not already have standing to petition for guardianship of the person of the child. *See In re Person & Estate of Barnhart*, 232 Ill.App.3d 317, 597 N.E.2d 1238, 174 Ill.Dec. 26 (2d Dist. 1992) (affirming dismissal of grandparents' petition for guardianship when child nominated her grandparents to be her guardians but child's parents were both alive, willing, and able to provide for child and objected to appointment). This is the correct standard. *Barnhart* was dismissed however, because the grandparents did not have standing under the old interpretation by Illinois courts that read the Illinois Marriage and Dissolution of Marriage Act standing requirement into the Probate Act. This was abrogated by *In re R.L.S.*, as discussed above. Finally, the court may appoint a guardian of

the person without the child's nomination if the child fails to nominate a guardian after being given notice of the action at least three days prior to the hearing in accordance with 755 ILCS 5/11-10.1(a). 755 ILCS 5/11-5(c).

c. [12.36] Petition, Venue, and Notice

A petition for appointment of a guardian of the person must contain (1) the child's name, date of birth, and residence address; (2) the names and post office addresses of the child's nearest relatives; (3) the names and post office addresses of the persons having custody of the child; (4) the approximate value of the child's estate; (5) the anticipated annual gross income and other receipts into the child's estate; (6) the name, post office address, age, and occupation of the proposed guardian; (7) the facts concerning the execution or admission into probate of any document appointing the proposed guardian, a copy of which must be attached to the petition; and (8) the facts concerning any other actions regarding the child that may then be pending and whether there is already another guardian then acting for the child. 755 ILCS 5/11-8.

The petition for appointment of a guardian should be filed in the court of the county in which the child resides. If the child is not a resident of Illinois, the petition should be filed in the court of the county in which the child's real or personal estate is located. 755 ILCS 5/11-6.

Written notice of hearing on the petition to appoint a guardian must be given in accordance with 755 ILCS 5/11-10.1(a). This notice must be given to the child if he or she is 14 years or older and to any of the child's relatives whose names and addresses are stated in the petition. The notice to these parties must be either personally delivered or mailed at least three days prior to the hearing.

d. [12.37] Best Interests of the Child and Guardians ad Litem

Once the grandparents have met all of the requirements discussed in §§12.34 – 12.36 above, the court may appoint a guardian of the child's person if the court finds this appointment to be in the child's best interests. 755 ILCS 5/11-5(a). The best interests standards contained in the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a)) are not the sole determinative factors considered by courts in guardianship actions, but the courts should consider the factors from §602(a) of the IMDMA when they are relevant to the proceeding. *In re Marriage of Russell*, 169 Ill.App.3d 97, 523 N.E.2d 193, 119 Ill.Dec. 725 (2d Dist. 1988). For example, in *In re Estate of Suggs*, 149 Ill.App.3d 793, 501 N.E.2d 307, 103 Ill.Dec. 286 (1st Dist. 1986), the appellate court reversed the trial court's award of guardianship of the child's person to the child's maternal grandmother rather than the child's aunt. In *Suggs*, the record showed that the appointment of either the grandmother or the aunt would serve the child's best interests, but the child's father had nominated the aunt to be guardian of the child's person in his will. This nomination is not a factor expressly to be considered under §602, but the nomination is the trump card if all other factors are equal. However, regardless of whether this nomination is present, grandparents seeking guardianship of the child's person should seek to prove best interests under as many of the factors listed in §602 as possible.

The court is permitted to appoint a guardian ad litem to represent the child's interests in the guardianship proceedings. 755 ILCS 5/11-10.1(b). The GAL's duties and responsibilities in a guardianship proceeding are similar to a GAL's duties in a custody action. See §12.18 above.

e. [12.38] Oath and Bond

Persons appointed guardians of the person must file an oath with the court. 755 ILCS 5/11-13. In the oath, the guardians affirm that they will faithfully discharge their duties in accordance with Illinois law as guardians of the child's person. 755 ILCS 5/12-2(a). However, the court is permitted to excuse a guardian from posting a bond on the oath.

f. [12.39] Removal of Guardian and Termination of Guardianship

Finally, there may arise circumstances in which the court must remove an appointed guardian. In *Layton v. Miller*, 25 Ill.App.3d 834, 322 N.E.2d 484 (5th Dist. 1975), the court awarded the children's maternal grandfather guardianship of their person after the children's mother died and their father was sentenced to a term of imprisonment. Shortly thereafter, the children's uncle filed an extremely vague and poorly drafted petition that alleged, in relevant part, that the grandfather had turned the children over to their father upon his release from prison and that the children were being neglected by their father. The appellate court reversed the trial court's dismissal of the uncle's petition, noting that the children were wards of the court and, as such, under the court's care and direction. Thus, the trial court should have been more lenient in judging the defective petition and should have conducted an investigation into the allegations contained in the petition. *Layton* ended with the appellate court remanding the matter to the trial court with directions to order a re-pleading in conformity with the statute. However, one can infer that if the uncle subsequently proved his allegations, the grandfather would be removed as guardian of the children's persons.

Guardianship of the person is terminated upon the child's emancipation. Emancipation occurs in one of three ways. First, the child is emancipated upon reaching the age of majority. 755 ILCS 5/11-1. Second, the child may become self-emancipated by voluntarily abandoning his or her home and proving able to be self-supporting. *Proctor Hospital v. Taylor*, 279 Ill.App.3d 624, 665 N.E.2d 872, 216 Ill.Dec. 614 (3d Dist. 1996). Finally, if a child is between 16 and 18 years of age and proves able to care for his or her own affairs, the child may elect emancipation under the Emancipation of Minors Act, 750 ILCS 30/1, *et seq.*

4. [12.40] Guardian of the Estate

Under 755 ILCS 5/11-5(a), the court may appoint a guardian of a child's estate. A guardian of a child's estate is given "the care, management and investment of the estate [and] shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the [child's] comfort and suitable support and education." 755 ILCS 5/11-13(b).

a. [12.41] Duties and Authority of Guardian

Guardians of the estate are not given title to the child's property; rather, they are charged with the care and management of this property. *In re Estate of Hardaway*, 26 Ill.App.2d 493, 168 N.E.2d 796 (1st Dist. 1960). In caring for the child's estate, guardians of the estate are required to exercise the care and judgment that a reasonable person would exercise in caring for his or her own personal affairs. *Roth v. Roth*, 52 Ill.App.3d 220, 367 N.E.2d 442, 10 Ill.Dec. 54 (1st Dist. 1977). If a guardian of the estate fails to exercise reasonable care and judgment, he or she can

become personally liable to the child's estate for any funds or properties improperly squandered. However, if the guardian can prove that he or she acted with reasonable diligence in managing the child's estate, a mere error of judgment does not make the guardian liable for any subsequent loss even if subsequent events show that the guardian could have chosen a better course. *Holeman v. Blue,* 10 Ill.App. 130 (2d Dist. 1882).

An additional duty of the guardian of the estate is to represent the child in legal proceedings. 755 ILCS 5/11-13(d). In performing these duties, the guardian of the estate may either defend the child or prosecute an action on behalf of the child. The guardian may prosecute an action on behalf of the child without prior permission of the court, but the guardian must file with the court a bond for costs upon commencing the action. However, the guardian need not act in this capacity if the court appoints a next friend to represent the child in the litigation. Finally, the guardian need not supervise the action, any settlement therein, or the attorney's fee charged if the action is such that the child's attorney's fee is based on a contingent fee agreement.

Courts supervise guardians of the estate in the performance of certain duties. For example, guardians of the estate may make disbursements from the child's estate only upon the court's direction. 755 ILCS 5/11-13(b). Additionally, if a child had contracts existing at the time of the guardian's appointment, the guardian may perform the contract upon the court's direction. Finally, in cases of the sale of real or personal property, the guardian must have the court's authorization to execute and deliver bills of sale, deeds, or other such instruments on the child's behalf.

b. [12.42] Procedure

Persons seeking guardianship of a child's estate must follow the same procedures as if these persons were seeking guardianship of the child's person. However, guardianship of the estate differs from guardianship of the person because a guardian of the estate is required to give an oath and bond before assuming his or her duties. 755 ILCS 5/11-13. The oath must be filed with the court and must affirm that the guardian will faithfully discharge the duties of guardian of the estate as prescribed by law. 755 ILCS 5/12-2(a). Upon filing the oath, the guardian must also file a bond binding the individual to the oath. A person who fails to post the required bond in a timely fashion may be removed as guardian. *See In re Estate of Jaeger,* 16 Ill.App.3d 872, 307 N.E.2d 202 (5th Dist. 1974) (holding that failure of co-administrator to post required bond for more than nine months after appointment was sufficient reason to remover her as co-administrator). The purpose of the bond is to give security for the child's estate against loss; it is not to secure outside parties. *Whitham v. People,* 89 Ill.App. 103 (2d Dist. 1899). Finally, the guardian of the estate need not post surety on the bond if the guardian was designated in the will of the child's parent and the will excused the guardian from giving surety. 755 ILCS 5/12-4(a). However, even when a will excuses the guardian from posting surety, the court may still require the guardian to post surety if the court believes that the rights of the child will be prejudiced by the failure to post surety.

Grandparents who seek guardianship of a child's person may also wish to seek guardianship of the child's estate. This dual guardianship is permitted by the Probate Act and is generally practical because the guardian of the person will usually be more attentive to the financial needs of the child. 755 ILCS 5/11-3(a).

V. [12.43] ADOPTION

Adoptions are governed by the Adoption Act. Under the Adoption Act, any person who adopts a child becomes that child's legal parent for all intents and purposes, and the adoptive parent has all the rights, duties, and responsibilities associated with a natural parent. As such, "[a]doption gives grandparents the ultimate in stability and unassailable parental control, ensuring as it does that the natural parent's rights to custody are terminated forever." Susan Dawson-Tibbits, *Representing Grandparents Who Raise Grandchildren: An Overview of Illinois Law,* 87 Ill.B.J. 468, 473 (1999). However, because the natural parent's rights are forever terminated, the standards for succeeding in an adoption are rigorous and difficult to meet.

Under the Adoption Act, parental rights may be terminated if (a) the parent voluntarily consents to the adoption or (b) the parent is proven unfit. The nature of termination of parental rights dictates the form the action will take. If the parents properly and voluntarily consent to the adoption, the action will be relatively straightforward and largely a matter of filing the proper documents with the court. However, if the parents are alleged unfit persons and they challenge the allegations, the action will become far more complex, consume far more time, and take a greater toll on all parties involved.

A. [12.44] Consents to Adoptions

Parental consent to an adoption is governed by 750 ILCS 50/8 – 50/11. It is vital that the consents be properly given by the persons whose consents are required. If a consent does not strictly meet the statutory requirements, the judgment for adoption may be voidable. *In re Adoption of Baby Girls Mandell,* 213 Ill.App.3d 670, 572 N.E.2d 359, 157 Ill.Dec. 290 (2d Dist. 1991).

1. [12.45] Who Must Consent to the Adoption

As set forth in the Illinois Adoption Act, parental

consents to adoption or surrenders for purposes of adoption . . . shall be required in all cases unless the [parent] shall be found by the court:

(1) to be an unfit person as defined in Section 1 of this Act, by clear and convincing evidence [see 750 ILCS 50/1D**]; or**

(2) not to be the biological or adoptive father of the child; or

(3) to have waived his parental rights to the child under Section 12a or 12.1 of this Act [see 750 ILCS 50/12a, 50/12.1**]; or**

(4) to be the parent of an adult sought to be adopted; or

(5) to be the father of the child as a result of criminal sexual abuse or assault as defined under Article 12 of the Criminal Code of 1961; or

(6) to be the father of a child who:

(i) is a family member of the mother of the child, and the mother is under the age of 18 at the time of the child's conception; for purposes of this subsection, a "family member" is a parent, step-parent, grandparent, step-grandparent, sibling, or cousin of the first degree, whether by whole blood, half-blood, or adoption, as well as a person age 18 or over at the time of the child's conception who has resided in the household with the mother continuously for at least one year; or

(ii) is at least 5 years older than the child's mother, and the mother was under the age of 17 at the time of the child's conception, unless the mother and father voluntarily acknowledge the father's paternity of the child by marrying or by establishing the father's paternity by consent of the parties pursuant to the Illinois Parentage Act of 1984; or pursuant to a substantially similar statute in another state.

A criminal conviction of any offense pursuant to Article 12 of the Criminal Code of 1961 is not required. 750 ILCS 50/8.

Thus, if the child was not born out of wedlock, both parents' consents are necessary unless both are found unfit persons under the Adoption Act. If the child is born out of wedlock, the mother's consent is necessary unless she is found an unfit person, and the father's consent is only sometimes necessary. However, despite the clear language of §8(a) of the Adoption Act, parental consent is not necessarily the proper means of obtaining a valid consent to the adoption.

In different circumstances, the consent of different parties is required. The Adoption Act specifies who may properly consent under various circumstances to the grandparents' adoption of the child. Assuming that the adoption petition alleges consent rather than parental unfitness, the mother's consent is necessary if she is alive at the time of the proceeding. 750 ILCS 50/8(b)(1)(A). The child's father must consent if he meets any of the seven statutory criteria expressed in the Adoption Act. See 750 ILCS 50/8(b)(1)(B). If a child has no surviving parents, the child's legal guardian of the person may consent to the adoption. 750 ILCS 50/8(b)(2). If the parents surrendered the child to an agency for adoption, this agency may consent to the adoption. 750 ILCS 50/8(b)(3). A consent may be given by "[a]ny person or agency having legal custody of a child by court order if the parental rights of the parents have been judicially terminated, and the court having jurisdiction of the guardianship of the child has authorized the consent." 750 ILCS 50/8(b)(4). Finally, consent may be given by the execution and verification of the petition by any petitioner who is also a parent of the child sought to be adopted, which shall be sufficient evidence of such parent's consent to the adoption. 750 ILCS 50/8(b)(5).

2. [12.46] Time for Taking Consent

Under the Adoption Act, a consent may not be taken from the mother within 72 hours immediately succeeding the child's birth. 750 ILCS 50/9(B). A consent may be taken from the child's father at any time, including prior to the birth of the child. However, if the consent is taken from the father before the expiration of 72 hours after the child's birth, the father may

revoke the consent by sending written notice of the revocation to the person, agency, or court representative who took the consent. 750 ILCS 50/9(C).

3. [12.47] Forms of Consent and Acknowledgments of Consent

All forms of consent to adoption must substantially comply with the forms provided in 750 ILCS 50/10. It is important that the proper form be executed. Thus, in cases of minor children who have been born, parents whose parental rights have not been terminated must execute the consent given in §10A of the Adoption Act. Fathers who consent to the adoption of an unborn child must execute the form provided in §10B of the Adoption Act.

Section 10 also contains the form of acknowledgment of the applicable consent. 750 ILCS 50/10B-5(1). The requirements of §10 should be complied with meticulously because execution of a consent pursuant to the guidelines of §10 is prima facie evidence of the validity of the consent. 750 ILCS 50/13A(a). The consent must be acknowledged by the presiding judge of the court in which the petition was filed or will be filed; by another judge, clerk of the circuit court, or social service person as the presiding judge may designate; or before a representative of the Illinois Department of Children and Family Services. 750 ILCS 50/10H. The Adoption Act provides the form to be used and signed by the person who acknowledges the consent. 750 ILCS 50/10J. If the consent is acknowledged by someone other than a judge or the clerk of the circuit court, the person's signature on the acknowledgment must be notarized as provided by the form contained in 750 ILCS 50/10K. If the consent is signed and acknowledged in another state, a certificate of magistracy or other such proof of office of the notary public must be attached to the consent and acknowledgment. A consent executed and acknowledged outside the state is valid if it is executed and acknowledged in accordance either with Illinois law or with the law of the state where signed and executed. 750 ILCS 50/10L. Likewise, consents executed and acknowledged in a foreign country are valid if they are executed and acknowledged in accordance with the laws of the country. 750 ILCS 50/10M.

4. [12.48] Irrevocability of Consents to Adoption

A consent is generally irrevocable if it is properly executed and acknowledged more than 72 hours after the child's birth or, in the case of a father's consent given before the birth of the child, if it is not properly revoked within 72 hours after the child's birth. 750 ILCS 50/9A, 50/9D. The general rule against irrevocability of the consent reflects the legislature's tendency to provide for finality and stability in adoptions. *In re Adoption of Hoffman,* 61 Ill.2d 569, 338 N.E.2d 862 (1975). However, the Adoption Act does provide a mechanism for a parent to revoke a previously given consent in certain circumstances.

A consent may be revoked if the person who gave the consent can prove that the consent was procured by fraud or duress on the part of the person before whom the consent was given or on the part of the adopting parents or their agents. 750 ILCS 50/11(a). Fraud or duress on the part of third parties will not invalidate an otherwise valid consent to adoption. *In re Jackson,* 243 Ill.App.3d 631, 611 N.E.2d 1356, 183 Ill.Dec. 708 (5th Dist. 1993). The party seeking to show that the consent was procured by fraud or duress bears the burden of proving this fraud or duress by clear and convincing evidence. *Regenold v. Baby Fold, Inc.,* 68 Ill.2d 419, 369 N.E.2d 858, 12 Ill.Dec. 151 (1977).

The burden of proving either fraud or duress sufficient to revoke a consent to adoption is difficult. For example, in *Regenold*, the Illinois Supreme Court refused to invalidate a young mother's surrender for adoption when the mother was under severe stress due to her recent divorce, her medical condition, the pending divorce of her own parents with whom she resided, fears that her own mother was going to ask her and her child to leave the home, and the responsibilities of a new position at her place of employment. For duress in the procurement of a consent to be sufficient to invalidate the consent, the person who gave the consent bears the burden of proving that he or she acted under a wrongful threat by one of the responsible persons and that this threat actually put the person in such fear as to execute the consent against his or her voluntary will. *Jackson, supra.* For fraud in the procurement of a consent to be sufficient to invalidate the consent, the person who gave the consent must prove that one of the responsible parties made a false statement of material fact with the intent to induce the giver of the consent to act in reliance on the trust of the statement. *Hale v. Hale,* 57 Ill.App.3d 730, 373 N.E.2d 431, 15 Ill.Dec. 85 (5th Dist. 1978).

Finally, consents given by minors are subject to the same standards as consents given by adults. Thus, provided the minor executes the consent and the consent is properly acknowledged, the minor parent cannot use his or her tender years as a means of revoking the consent. 750 ILCS 50/11(a). *See also Kathy O. v. Counseling & Family Services,* 107 Ill.App.3d 920, 438 N.E.2d 695, 63 Ill.Dec. 764 (3d Dist. 1982) (holding that fact that 15-year-old mother may have felt overwhelmed by circumstances was insufficient to invalidate properly given consent to adoption under either fraud or duress).

Regardless of the circumstances surrounding the giving of a consent, "[n]o action to void or revoke a consent to . . . adoption, including an action based on fraud or duress, may be commenced after 12 months from the date the consent . . . was executed." 750 ILCS 50/11(a).

B. [12.49] Findings of Parental Unfitness

A parent's parental rights regarding a child may be terminated if the court finds the parent unfit. 750 ILCS 50/8(a)(1). Generally speaking, an "unfit person [is] any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption." 750 ILCS 50/1D. There are numerous grounds under which a parent may be found unfit, all of which are expressly defined in §1D of the Adoption Act. However, as the parental rights doctrine continues to enjoy its resurgence, several of the enunciated grounds have become prone to attack on constitutional grounds. d his corresponding testimony that his admissions during relevant time period were insincere). *See, e.g., In re H.G.,* 197 Ill.2d 317, 757 N.E.2d 864, 259 Ill.Dec. 1 (2001) (holding that presumption of parental unfitness premised on child's placement in foster care for 15 months of any 22-month period was unconstitutional violation of parental rights doctrine); *In re D.F.,* 321 Ill.App.3d 211, 748 N.E.2d 271, 281 – 282, 254 Ill.Dec. 825 (4th Dist. 2001) (holding provision permitting termination of parental rights upon finding of "other neglect of, or misconduct toward the child" was unconstitutionally vague), *aff'd in part, vacated in part, rev'd in part,* 201 Ill.2d 476 (2002) (vacating finding of unconstitutionality after finding separate grounds on which to terminate parental rights); *In re S.F.,* 359 Ill.App.3d 63, 834 N.E.2d 453, 295 Ill.Dec. 872 (1st Dist. 2005) (holding that mandatory irrebuttable presumption of parental unfitness due to criminal conviction resulting from death of child due to physical abuse, while allowing State to present evidence as to best interests of child in question, unconstitutionally denied equal protection of law to mother in action to terminate her parental

rights because of her first degree murder of her other child); *In re P.M.C.,* 376 Ill.App.3d 867, 876 N.E.2d 1061, 315 Ill.Dec. 471 (5th Dist. 2007) *reh'g denied, appeal pending* (determination of father's parental unfitness was improper as it was based solely on his denial of sexual abuse of his child and thus, violated his right against self-incrimination; although circuit court did not overtly require father to admit to abuse or face termination of his parental rights, because therapists' testimony did not involve time period relevant for assessing father's efforts or progress in therapy; sole remaining basis for court's order finding father unfit involved father's refusal, at hearing, to admit abuse and his testimony that admissions he made were insincere).

Whether a parent is found unfit is determined at a fitness hearing. The party alleging the unfitness bears the burden of proving the unfitness by clear and convincing evidence. 750 ILCS 50/8(a)(1). The sole focus of the fitness hearing is on the actions or omissions of the parent. In determining parental fitness, the courts may not consider the best interests of the child and to do so is reversible error. *In re Petition of Doe to Adopt Baby Boy Janikova,* 159 Ill.2d 347, 638 N.E.2d 181, 202 Ill.Dec. 535 (1994). Thus, unless the parents have consented to the adoption, a finding of parental unfitness is a condition precedent to consideration of the child's best interests and welfare. Courts are required to provide legal counsel for indigent persons facing termination of their parental rights. Failure to provide counsel in these situations violates the equal protection clauses of the Illinois and U.S. Constitutions. *In re Adoption of K.L.P.*, 198 Ill.2d 448, 763 N.E.2d 741, 261 Ill.Dec. 492 (2002).

1. Grounds of Unfitness

a. [12.50] Abandonment and Desertion

A parent may be found unfit if it is proven by clear and convincing evidence that the parent (1) abandoned the child, (2) abandoned a newborn infant in the hospital, or (3) abandoned a newborn infant in any manner in which the evidence suggests that, in so abandoning the newborn, the parent intended to relinquish his or her parental rights. 750 ILCS 50/1D(a) – 50/1D(a-2). "Abandonment" is intentional conduct by a parent that demonstrates the parent's settled purpose to forego all parental duties and to relinquish all parental claims to the child. *In re Adoption of D.A.,* 222 Ill.App.3d 73, 583 N.E.2d 612, 164 Ill.Dec. 696 (2d Dist. 1991); *In re Adoption of Garrison,* 93 Ill.App.3d 670, 417 N.E.2d 787, 49 Ill.Dec. 97 (1st Dist. 1981). The primary consideration in determining abandonment is the parent's intent (*In re Interest of Moriarity,* 14 Ill.App.3d 553, 302 N.E.2d 491 (2d Dist. 1973)), and the time during which the parent is absent from the child is not an element of abandonment, though any such period of separation is relevant to the parent's intent (*People ex rel. Bowdry v. Bowdry,* 324 Ill.App. 52, 57 N.E.2d 287 (1st Dist. 1944).

"Desertion of the child for more than 3 months next preceding the commencement of the Adoption proceeding" is also grounds for a finding of parental unfitness. 750 ILCS 50/1D(c). "Desertion" is any conduct by the parent that indicates the parent's intention to permanently terminate custody over the child, but not necessarily an intention to relinquish all parental duties and claims. *In re Dawn H.,* 281 Ill.App.3d 746, 667 N.E.2d 485, 217 Ill.Dec. 396 (1st Dist. 1996); *In re Adoption of Markham,* 91 Ill.App.3d 1122, 414 N.E.2d 1351, 47 Ill.Dec. 235 (3d Dist. 1981); *In re Sanders,* 77 Ill.App.3d 78, 395 N.E.2d 1228, 32 Ill.Dec. 847 (4th Dist. 1979)[5]. The parent's physical separation from the child for more than three months does not constitute desertion; rather, as with abandonment, the primary consideration in determining desertion is the

parent's intent. *In re Overton,* 21 Ill.App.3d 1014, 316 N.E.2d 201 (2d Dist. 1974). Thus, a natural mother was properly found to have deserted the child she sold to another person when the mother's action evidenced her intent to permanently forego custody of the child although the mother still believed that she could have some contact with the child. *In re R.B.W.,* 192 Ill.App.3d 477, 548 N.E.2d 1085, 139 Ill.Dec. 529 (4th Dist. 1989).

b. [12.51] Failure To Maintain a Reasonable Degree of Interest, Concern, or Responsibility as to the Child's Welfare

A parent may be declared unfit if the court finds by clear and convincing evidence that the parent failed "to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare" (750 ILCS 50/1D(b)) or "to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth" (750 ILCS 50/1D(*l*)). Whether a parent is unfit under either of these grounds is dependent on what efforts the parent has made to communicate with or show interest in the child. *In re A.S.B.,* 293 Ill.App.3d 836, 688 N.E.2d 1215, 228 Ill.Dec. 238 (2d Dist. 1997). In determining whether the parent has shown sufficient interest and concern for the child, the courts look at the parent's efforts to maintain contact with the child and not necessarily the success of these efforts. *In re T.D.,* 268 Ill.App.3d 239, 643 N.E.2d 1315, 205 Ill.Dec. 708 (1st Dist. 1994). Whether the parent's efforts are sufficient to show a reasonable degree of care or concern for the child is determined in light of the parent's education, employment opportunities, poor financial condition, age, and lack of any emotional support from family or friends. *In re Adoption of Syck,* 138 Ill.2d 255, 562 N.E.2d 174, 149 Ill.Dec. 710 (1990). Also relevant are the obstacles the parent may have had in maintaining contact with the child as the result of the actions of the courts, government agencies, or the child's custodians. *Id. See also In re Petition of Doe to Adopt Baby Boy Janikova,* 159 Ill.2d 347, 638 N.E.2d 181, 202 Ill.Dec. 535 (1994) (reversing finding of unfitness when father had been told by child's mother that child had died at birth, petitioners knew of father's existence but failed to ascertain his identity and serve him with process in action, father took numerous steps to ascertain whether child had actually died, and upon learning of mother's lies 57 days after child's birth, father immediately petitioned court for custody). Thus, if a parent is prevented from having regular, direct contact with the child, the court will look to alternative evidence of parental concern such as letters to the child, cards, gifts, and telephone calls. *T.D., supra.* However, even extreme circumstances in a parent's life will not excuse a complete lack of effort to maintain contact with the child. *In re Adoption of A.S.V.,* 268 Ill.App.3d 549, 644 N.E.2d 500, 205 Ill.Dec. 944 (5th Dist. 1994).

The decision in *Doe, supra,* aside, the courts impose a stricter standard in cases of newborn children. In *A.S.V., supra,* the appellate court upheld the termination of the father's parental rights when the father stated that he did not know he was the child's father, took absolutely no action to show a commitment to the child for several months after the child's birth, and took no steps to determine the paternity of the child. *See also In re Brianna B.,* 334 Ill.App.3d 651, 778 N.E.2d 724, 268 Ill.Dec. 458 (4th Dist. 2002) (holding that parents had exercised reasonable degree of care and concern for their child when they had weekly visits with child, made decisions regarding child's care, repeatedly asked questions of others regarding child's condition and progress, and missed visitation with child only when they lacked inoculations); *In re Tinya W.,* 328 Ill.App.3d 405, 765 N.E.2d 1214, 262 Ill.Dec. 606 (2d Dist. 2002) (holding father had failed to maintain reasonable degree of care or concern for his child when, though allegedly unaware of his

paternity, he had no contact with child from birth and had no contact even after learning of paternity).

c. [12.52] Additional Grounds of Unfitness

There are numerous additional grounds on which a parent may be found an unfit person:

1. the continuous or repeated substantial neglect of the child (750 ILCS 50/1D(d); *In re Henry*, 175 Ill.App.3d 778, 530 N.E.2d 571, 125 Ill.Dec. 413 (2d Dist. 1988));

2. the failure to protect the child from conditions in the child's environment that are injurious to the child's welfare (750 ILCS 50/1D(g); *In re B.R.*, 282 Ill.App.3d 665, 669 N.E.2d 347, 218 Ill.Dec. 404 (3d Dist. 1996));

3. depravity as evidenced by a series of acts or course of conduct that indicates moral deficiency and inability to conform to accepted morality (750 ILCS 50/1D(i); *In re Dawn H.*, 281 Ill.App.3d 746, 667 N.E.2d 485, 217 Ill.Dec. 396 (1st Dist. 1996));

4. a conviction of first-degree murder or of second-degree murder of a parent of the child sought to be adopted or of any child (750 ILCS 50/1D(i); *In re Marriage of T.H.*, 255 Ill.App.3d 247, 626 N.E.2d 403, 193 Ill.Dec. 370 (5th Dist. 1993));

5. "[h]abitual drunkenness or addiction to drugs, other than those prescribed by a physician, for at least one year immediately prior to the commencement of the unfitness proceeding" (750 ILCS 50/1D(k); *In re D.M.*, 298 Ill.App.3d 574, 699 N.E.2d 212, 232 Ill.Dec. 765 (3d Dist. 1998)); and

6. an inability to properly perform parental responsibilities due to mental illness or mental retardation (750 ILCS 50/1D(p); *In re A.J.*, 269 Ill.App.3d 824, 646 N.E.2d 1239, 207 Ill.Dec. 152 (1st Dist. 1994).

In addition to the grounds listed above there are grounds as set forth in 750 ILCS 50/1D(f), amended by P.A. 94-939 (eff. Jan. 1, 2007) (added in the wake of *In re S.F.*, 359 Ill.App.3d 63, 834 N.E.2d 453, 295 Ill.Dec. 872 (1st Dist. 2005) ; see §12.49 above) to read as follows:

There is a rebuttable presumption, which can be overcome only by clear and convincing evidence, that a parent is unfit if:

(1) Two or more findings of physical abuse have been entered regarding any children under Section 2-21 of the Juvenile Court Act of 1987, the most recent of which was determined by the juvenile court hearing the matter to be supported by clear and convincing evidence; or

(2) The parent has been convicted or found not guilty by reason of insanity and the conviction or finding resulted from the death of any child by physical abuse; or

(3) There is a finding of physical child abuse resulting from the death of any child under Section 2-21 of the Juvenile Court Act of 1987.

No conviction or finding of delinquency pursuant to Article 5 of the Juvenile Court Act of 1987 shall be considered a criminal conviction for the purpose of applying any presumption under this item.

Section 1D of the Adoption Act contains many other grounds under which a parent may be found unfit. However, the grounds delineated above are those that will most typically apply to actions in which grandparents seek to adopt their grandchild. In any event, a thorough review of the statutory law and caselaw should be conducted before going forward in an attempt to have a parent declared unfit.

2. [12.53] Termination of Parental Rights

As noted in §12.49 above, an adoption cannot be granted solely because to do so would be in the child's best interests. *In re Petition of Doe to Adopt Baby Boy Janikova*, 159 Ill.2d 347, 638 N.E.2d 181, 202 Ill.Dec. 535 (1994). However, once a parent has been found unfit, the parent's rights must yield to the best interests of the child. *In re E.S.*, 246 Ill.App.3d 330, 615 N.E.2d 1346, 186 Ill.Dec. 289 (4th Dist. 1993). Thus, the finding of parental unfitness does not necessarily lead to the termination of the parent's parental rights in the child. *In re Bredendick*, 74 Ill.App.3d 946, 393 N.E.2d 675, 30 Ill.Dec. 639 (1st Dist. 1979). However, as a general rule, when the parent is found unfit and there exist parties willing and able to adopt the child and to give the child a stable and loving home, the parent's rights in the child will be terminated.

C. Guidelines and Procedures for Adoptions by Grandparents

1. [12.54] Qualifications for Adoptive Parents

To seek adoption, grandparents must meet several qualifications. Namely, they must not be under legal disability, they must be reputable persons of legal age, and if married, both husband and wife must be a party to the adoption. 750 ILCS 50/2A(a). The grandparents need not meet the residency requirements of §2 of the Adoption Act because the grandparents are related to the child under 750 ILCS 50/1B. Under §1B, the adoptive grandparents are related to the child if they are related to the child by blood or marriage as the child's grandparents or step-grandparents.

2. [12.55] Who May Be Adopted

Either a male or female child or adult may be adopted. 750 ILCS 50/3. (This chapter considers only the adoption of minor children, and none of the issues related to adopting an adult are discussed.)

At first glance, the Adoption Act seems to restrict when children may be adopted. 750 ILCS 50/1F. Section 1F seems to make the finding of parental unfitness a condition precedent to the child's becoming available for adoption. For example, a child is available for adoption when he or she is "a child to whose adoption a person authorized by law, other than his parents, has consented, or to whose adoption no consent is required pursuant to Section 8 of this Act." 750 ILCS 50/1F(b). A parental consent to the adoption is not necessary if the parents have been found

unfit persons. 750 ILCS 50/8(a)(1). However, a grandparent may file a petition to adopt and, in the adoption action, seek to have the parents declared unfit persons. *See In re Adoption of L.R.B.*, 278 Ill.App.3d 1091, 664 N.E.2d 347, 215 Ill.Dec. 950 (4th Dist. 1996) (holding that related parties do not have to allege in their petition to adopt that child is available for adoption within meaning of 750 ILCS 50/1F).

3. [12.56] Jurisdiction and Venue

An adoption proceeding may be commenced in the circuit court of the county in which the petitioners reside, or the county in which the person to be adopted resides or was born, or the county in which the parents of such person reside. However, the proceeding may be commenced in the circuit court of any county if (a) a guardian has previously been appointed for the child or (b) an agency has been granted custody of the child and the agency has been authorized to consent to the child's adoption. 750 ILCS 50/4.

4. [12.57] Petition and Process

A petition to adopt a related child must contain (a) the full names of the petitioners; (b) the residence address of the petitioners and the duration of the petitioners' residence in Illinois immediately preceding the filing of the petition; (c) the child's name, sex, and, if known, place and date of birth; (d) the child's relationship to each petitioner; (e) if known, the names and places of residence of the child's parents and whether either or both of the parents are minors or under any legal disability; (f) the name the petitioners intend to give the child; and (g) a summary of any other orders or judgments previously entered by any court affecting the adoption or custody of the child or affecting "the adoptive, custodial or parental rights of either petitioner, including the prior denial of any petition for adoption pertaining to such child, or to the petitioners, or either of them" (750 ILCS 50/5B(k)(2)). 750 ILCS 50/5C (incorporating by reference the terms of 750 ILCS 50/5B(a), 50/5B(b), 50/5B(d) – 50/5B(f), 50/5B(i), 50/5B(k)). Additionally, although not expressly required by §5 of the Adoption Act, the petition should allege either (a) that the parents have consented or will consent to the adoption or (b) that the parents are unfit persons and their parental rights should be terminated. *See In re Petition of Filippelli*, 207 Ill.App.3d 813, 566 N.E.2d 412, 152 Ill.Dec. 725 (1st Dist. 1990) (holding that Adoption Act allows filing of petition that alleges parental unfitness and grounds of this unfitness); *Robinson v. Neubauer*, 79 Ill.App.2d 362, 223 N.E.2d 705 (4th Dist. 1967) (holding that petition for adoption is required to establish either that parents have consented to adoption or that parents' consent is not necessary because they are unfit persons). The only exception to the information required to be pled concerns the child's natural parents. The identity and address of the child's natural parents need not be alleged if the parental rights of the child's parents have been terminated prior to the filing of the petition, if the child has been surrendered to an agency for adoption, or if the child's putative father has been given proper notice and has filed a disclaimer of paternity or failed to file a declaration of paternity. 750 ILCS 50/5C (incorporating by reference the terms of 750 ILCS 50/5B(f)).

The petition for adoption must be verified. 750 ILCS 50/5D.

Any person named in the petition for adoption, except the petitioners, must be named as a defendant in the action. 750 ILCS 50/7A. Thus, not only are the child's natural parents defendants to the action, but so too is the child. As a result, summons generally should be served personally

on all named defendants. Furthermore, in cases in which the child's parents were not married, it is important that process be properly served on any putative father of the child as more specifically delineated in 750 ILCS 50/7C.

If any of the defendants cannot be located, notice by publication is sufficient to obtain jurisdiction over the parties and terminate their parental rights. However, prior to publication of the notice, the petitioners or their attorney must file with the clerk of the court an affidavit stating (a) the fact that service on the defendant cannot be obtained because the defendant does not reside in Illinois, has left Illinois, or is concealed within Illinois; and (b) the defendant's residence address, if known, or the fact that the defendant's address cannot be ascertained after diligent inquiry. 750 ILCS 50/7A. The notice should be published in a newspaper in the county in which the action is pending and should identify the defendants, the minor sought to be adopted, the pendency of the action, and the date after which the defendants may be defaulted. Within ten days of the first publication, the clerk of the court is required to send a copy of the published notice to the last known address of any defendant listed.

At one time, a court did not have subject matter jurisdiction if any necessary party was not properly served with process by either personal service of summons or notice by publication. *Burstein v. Millikin Trust Co.,* 350 Ill.App. 462, 113 N.E.2d 339 (3d Dist. 1953), *rev'd on other grounds,* 2 Ill.2d 243 (1954). However, under the Adoption Act, "it shall be no basis for attack as to the validity of an adoption judgment that the court lacked jurisdiction over some other person or persons over whom it should have had jurisdiction." 750 ILCS 50/20. Even if a person over whom the court did not have jurisdiction manages to have the adoption judgment set aside, the judgment is set aside "only insofar as it affects such person." *Id.* Moreover, no petition to set aside a judgment for adoption may be filed more than one year after entry of the judgment for adoption. 750 ILCS 50/20b.

Section 12.65 below contains a sample form of a petition to adopt.

5. [12.58] Interim Orders and Guardians ad Litem

Interim orders are governed by §13 of the Adoption Act. The court should conduct a hearing on the interim order as quickly as practicable after the filing of the petition for adoption. In a related adoption, the interim order should (a) appoint a licensed attorney to act as guardian ad litem for the child sought to be adopted (the GAL is granted the power to consent to the adoption if this consent is required); (b) appoint a GAL to represent any other named minors in the action; (c) if one or both of the parents is alleged unfit due to mental illness, mental retardation, or other mental incompetence, appoint an attorney to represent this parent's interests; and (d) determine after reasonable investigation whether termination of parental rights would be in the child's best interests and, if so, terminate the parental rights of the parents and temporarily commit the child to an agency or to the custody of another person (usually the petitioners) deemed competent by the court. 750 ILCS 50/13B(a) – 50/13B(d). Generally, the interim order will terminate parental rights only if the child's natural parents have already voluntarily and properly terminated their parental rights. If the petition seeks to have parental rights terminated due to parental unfitness, the court will generally set a hearing date on the allegations of unfitness.

Although §13 requires that the hearing on the interim order be held as soon as practicable after the filing of the petition for adoption, the court must usually have jurisdiction over all defendants

before proceeding on certain issues. For example, an interim order may not award custody to petitioners or others before service of summons has been obtained on the child's natural parents. 750 ILCS 50/13(B)(e). If the parents have been served with summons, they are entitled to reasonable notice and an opportunity to be heard at the hearing on custody. However, the natural parents' rights to be heard are not absolute, and the court may enter an interim custody award without prior notice to the child's natural parents if the petitioners file a written petition for custody supported by an affidavit stating that there is an immediate danger to the child and that irreparable harm would occur to the child if the parents are given prior notice of the hearing. 750 ILCS 50/13B(f). Such an ex parte interim custody order is valid only for ten days, and the matter must be scheduled for full hearing with prior notice to the parents before the expiration of the ten-day period. At the full hearing, the burden is on the petitioners to show that the interim order was properly entered without notice and that the child's custody should remain with the petitioners during the pendency of the adoption action.

GALs in adoption actions perform much the same function as they do in custody actions. The GAL investigates the matter and submits a report to the court that contains his or her findings. The GAL's report may also contain a recommendation regarding the ultimate outcome of the action, but the court is vested with discretion in following the GAL's recommendations. *See Taylor v. Starkey,* 20 Ill.App.3d 630, 314 N.E.2d 620 (5th Dist. 1974). The GAL's fees are usually paid by the petitioners, but the court is vested with inherent authority to apportion the fees among any parties to the action. *In re Adoption of Kindgren,* 184 Ill.App.3d 661, 540 N.E.2d 485, 132 Ill.Dec. 745 (2d Dist. 1989).

6. [12.59] Consent by Child

Some adoption actions require that the child consent to the adoption, such as when the child is aged 14 years or more on the date the judgment for adoption is entered. 750 ILCS 50/12. In these circumstances, the child's consent is mandatory unless the child has died prior to entry of the judgment or, in the court's discretion, the consent is waived because the child is in need of mental treatment or is mentally retarded. The consent must be in writing and signed by the child, the form of the writing must substantially conform to the form given in the Adoption Act, and the consent must be acknowledged before a presiding judge. 750 ILCS 50/10F, 50/10J. Section 10J of the Adoption Act provides the form for the certificate of acknowledgment of the child's consent, and the form should be signed by the presiding judge or such other person as the presiding judge directs, such as the clerk of the court.

7. [12.60] Judgment for Adoption

Once the parent's rights have been terminated, the guardian ad litem's report has been filed, the summonses have all been properly served, and the return day cited therein has passed, the petitioners may apply to the court for entry of a judgment of adoption. 750 ILCS 50/14(f). The procedure for proving up an uncontested adoption varies from court to court, and some courts may excuse a prove-up altogether and waive the presence of the petitioners and the child if all were present when the interim order was entered. This is because the judgment for adoption need not be accompanied by findings of fact. 750 ILCS 50/14(g). However, it is a good practice for the court to expressly find that the adoption is in the best interests of the child. Finally, the order generally changes the child's last name to that of the petitioners.

Upon entry of the judgment for adoption, the grandparents should take all steps necessary to secure a new birth certificate for the child. The new birth certificate lists the child under his or her new name and lists the child's adoptive parents as his or her parents; all other information, such as date of birth, remains unchanged. The new birth certificate can be obtained by sending to the Illinois Department of Public Health duplicate copies of a certificate of adoption and a filing fee. Typically, the clerk of the circuit court will perform some of the tasks necessary to secure a new birth certificate. Upon issuance of the new certificate, the original birth certificate cannot be accessed by any person without an order permitting access, and this order may be given only by the circuit court that entered the judgment for adoption. 750 ILCS 50/14(h).

8. [12.61] Denial of the Petition To Adopt

Under the Adoption Act, if "a judgment order for adoption is vacated or a petition for adoption is denied, the court shall promptly conduct a hearing as to the temporary and permanent custody of the minor child who is the subject of the proceedings pursuant to Part VI of the Illinois Marriage and Dissolution of Marriage Act." 750 ILCS 50/20. This language is one of a group of additions to the Adoption Act collectively referred to as the "Baby Richard Amendments," enacted in response to the decision of the Illinois Supreme Court in *In re Petition of Doe to Adopt Baby Boy Janikova,* 159 Ill.2d 347, 638 N.E.2d 181, 202 Ill.Dec. 535 (1994). A straightforward reading of the language in §20 of the Adoption Act indicates that any grandparents who file a petition for adoption and lose the petition have an automatic right to a hearing in which the grandparents may obtain custody of the child. If such a reading is appropriate, then grandparents have a means of bypassing the rigid standing requirements of the IMDMA and the Probate Act. They need only file and lose a petition for adoption to have an opportunity to seek custody of the child. To date, however, no published opinion has been rendered interpreting the amendment to §20.

VI. APPENDIX — SAMPLE FORMS

A. [12.62] Petition To Intervene

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
_____ COUNTY, ILLINOIS

In re the Marriage of	**)**	
	)	
_____,	**)**	
Petitioner,	**)**	
	)	
vs.	**)**	
	)	**No. _____**
	)	
_____,	**)**	
Respondent.	**)**	

PETITION FOR LEAVE TO INTERVENE

Intervenors, _____ and _____, by their attorney, _____, pursuant to 750 ILCS 5/607(a-5), petition this Honorable Court for leave to intervene in this action. In support thereof, Intervenors state as follows:

1. Intervenors are the biological parents of Respondent, _____, and the [paternal**] [**maternal**] grandparents of the children of the parties hereto, namely _____, aged _____ years, and _____, aged _____ years.**

2. Petitioner and Respondent, the parents of said minor children, have not resided together on a permanent basis since _____ 20__.

3. A Judgment of Dissolution of Marriage was entered in this action in _____ 20__, which Judgment did not provide for grandparent visitation between Intervenors and the children of the parties.

4. Intervenors desire to see their grandchildren, the children of the parties hereto.

WHEREFORE, Intervenors respectfully pray that this Honorable Court grant them leave to intervene in this action to file a Petition for Grandparent Visitation, and for such other and further relief as in equity may be just.

Respectfully submitted,

_____
Intervenors

B. [12.63] Petition For Grandparent and Great Grandparent Visitation Rights

[Caption**]**

IN THE CIRCUIT COURT OF _____ JUDICIAL CIRCUIT
_____ COUNTY, ILLINOIS

IN RE:

_____,	**)**	
	)	
Plaintiffs,	**)**	
	)	
and	**)**	
	)	**No.**
	)	
_____,	**)**	
Defendant.	**)**	

VERIFIED PETITION FOR GRANDPARENT AND GREAT GRANDPARENT VISITATION RIGHTS AND FOR EVALUATION/RECOMMENDATIONS OF PROFESSIONALS, MINOR CHILDREN

NOW COMES the Plaintiffs, _____ by and through their counsel, _____ and in support of their Verified Petition For Grandparent and Great Grandparent Visitation Rights pursuant to 750 ILCS 5/607 (a-5)(1)(A-5) and for Evaluation pursuant to 750 ILCS 5/604(b) states as follows:

1. **_____ are the parents of _____.**

2. **_____ are the Grandparents of _____.**

3. **_____ reside in the State of _____.**

4. **_____ reside in _____, Illinois.**

5. **_____ was born on _____.**

6. **_____ married _____.**

7. **As a result of _____ marriage _____ children were born: _____.**

8. **Both _____ are residents of _____ County, Illinois for a period of in excess of 6 months immediately prior to this action. The current address of the children is _____**

9. **_____ filed for divorce on _____.**

10. **On _____, _____ disappeared. _____'s whereabouts remain unknown. _____'s disappearance was reported to a law enforcement agency.**

11. **_____ has prohibited any contact between _____ and _____'s parents and Grandparents. Given _____'s disappearance, such prohibition is an unreasonable denial of visitation.**

12. **For a period of time after _____'s disappearance, _____ did allow some access to _____'s siblings to the children. Such access has now been terminated.**

13. **The Plaintiff's do not believe _____ is a fit parent in accordance with 750 ILCS 5/607 (a-5)(3). Plaintiff's reserve the right to amend the pleading to provide more detail of same if requested to do so.**

14. **In order to facilitate the visitation sought, contact and access the Plaintiffs are willing to seek the assistance of counselors to facilitate transitions and contact.**

15. **It is in the best interests of the children that their maternal Grandparents and Great Grandparents, have access to and visitation with _____. Further, it is in the children's best interests that they have contact with _____ siblings during such periods.**

WHEREFORE, _____, by and through their counsel, _____, and prays this Honorable Court grant the following relief:

A. An order establishing reasonable access and visitation between _____ and their maternal Grandparents (_____) and their maternal Great Grandparents (_____).

B. An order referring the parties to an evaluation concerning the best interests of the children as it relates to visitation and access between _____ and the maternal Grandparents and Great Grandparents.

C. For such other and further relief as this court deems equitable and just.

_____

BY: _____

C. [12.64] Petition for Guardianship of Minor

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
_____ COUNTY, ILLINOIS

In re the Guardianship of	**)**	
	)	
_____,	**)**	**No. _____**
a minor.	**)**	

PETITION FOR GUARDIAN OF MINOR

Petitioners, _____ and _____, by their attorney, _____, petition for guardianship of the person and the estate of _____, a minor. In support thereof, Petitioners state as follows:

1. Respondent, _____, a minor, was born on _____, ____; currently resides with Petitioners at _____, _____, Illinois; and has resided with Petitioners since _____ 20__.

2. Said minor's mother is _____, who resides at _____, _____, Illinois; said minor's father is _____, who resides at _____, _____, Illinois; said minor has no spouse or adult siblings.

3. Both of said minor's parents are living, and each has, in writing, consented to the appointment of Petitioners as guardians of the person and estate of the minor as requested herein. These consents are attached hereto and made a part hereof as Exhibit A.

4. Custody of said minor is currently vested jointly in _____ and _____ pursuant to a Judgment of Dissolution of Marriage entered

_____, ____, in the Circuit Court of the _____ Judicial Circuit, _____ County, Illinois in a case entitled "In re the Marriage of _____ and _____," No. _____.

5. The personal estate of the minor consists of clothing, playthings, and personal items and does not exceed $_____.

6. There is no anticipated gross income or receipts for the minor.

7. Petitioner _____ is the [paternal**] [**maternal**] grandfather of the minor child, is aged _____ years, is employed as _____, and resides at _____, _____, Illinois; Petitioner _____ is the [**paternal**] [**maternal**] grandmother of the minor child, is aged _____ years, is employed as _____, and resides at _____, _____, Illinois; and each of said Petitioners is qualified and willing to act as guardians of the minor's person and estate.**

8. The duration of the guardianship should be permanent.

9. No actions concerning the minor are pending in any jurisdiction; no actions concerning any of the parties named herein are pending in any jurisdiction; and no guardian is currently acting for the minor.

WHEREFORE, Petitioners respectfully pray as follows:

A. That this Honorable Court appoint Petitioners, _____ and _____, as guardians of the person and of the estate of _____, a minor, until said minor is emancipated.

B. That this Honorable Court waive surety.

C. For such other and further relief as in equity may be just.

Respectfully submitted,

_____
Petitioners

D. [12.65] Petition To Adopt

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
_____ COUNTY, ILLINOIS

In the Matter of the Petition of	**)**	
_____ and _____,	**)**	
Husband and Wife,	**)**	
	)	
To Adopt	**)**	
_____,	**)**	**No. _____**
A minor,	**)**	

And)
_____ and _____,)
Defendants.)

PETITION TO ADOPT

Petitioners, _____ and _____, by their attorney, _____, petition this Honorable Court to adopt _____, a minor. In support thereof, Petitioners state as follows:

1. The full names of Petitioners are _____ and _____.

2. Petitioners are husband and wife, of legal age, and under no legal disability; they reside in _____, _____ County, Illinois; and they have resided in the State of Illinois continuously for a period of at least six months preceding the filing of this Petition.

3. Petitioners desire to adopt _____, a male child who was born on _____, ____, in _____, _____ County, Illinois; Petitioners, _____ and _____ are the parents of said minor's [father**] [**mother**], _____, and the [**paternal**] [**maternal**] grandparents of said minor child.**

4. The natural parents of the child sought to be adopted are the father, _____, who resides in _____, _____ County, Illinois, and the mother, _____, who resides in _____, _____ County, Illinois.

5. The natural [father**] [**mother**] of the child sought to be adopted has indicated [**his**] [**her**] willingness to consent to the adoption prayed for herein.**

6. The parental rights of the natural [mother**] [**father**] should be terminated because [**she**] [**he**] is unfit due to [**her**] [**his**] failure to maintain a reasonable degree of care, concern, or responsibility as to the child's welfare as evidenced by said natural [**mother**] [**father**]'s failure to communicate with the minor child for a period in excess of _____ months.**

7. Petitioners are reputable persons with the character, ability, and means to rear, nurture, and educate the child in a suitable and proper manner.

8. No actions concerning the minor are pending or have previously been entered in any jurisdiction; no actions concerning any of the parties named herein are pending or have previously been entered in any jurisdiction; and no guardian is currently acting for the minor.

9. The name to be given the minor child is _____.

WHEREFORE, Petitioners, _____ and _____, respectfully pray as follows:

A. That this Honorable Court appoint a Guardian ad Litem to represent the interest of the child sought to be adopted.

B. That this Honorable Court terminate the parental rights of Defendants, _____ and _____.

C. That this Honorable Court enter a Judgment for Adoption.

D. For such other and further relief as in equity may be just.

Respectfully submitted,

_____
Petitioners

Author Queries?

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[1] This was overruled by *In re R.L.S.*, 218 Ill.2d 428, 844 N.E.2d 22. 300 Ill.Dec. 350 (2006). Does this have any impact on the discussion?

[2] Please check to see that we have the correct pinpoint citation.

[3] See note above regarding *Townsend.*

[4] Effective June 1, 2008 , by P.A. 95-568 which substituted "365 days" for "60 days."

[5] This case was superseded by statute as stated in *In re Travarius O.,* 343 Ill.App.3d 844, 799 N.E.2d 510, 278 Ill.Dec. 792 (1st Dist. 2003). Does this have any impact on the discussion?