Center for Disability & Elder Law
Founded by The Chicago Bar Association and its Young Lawyers Section

DRAFTING SIMPLE WILLS AND TRANSFER ON DEATH INSTRUMENTS

Presentation by
The Center for Disability & Elder Law

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CENTER FOR DISABILITY & ELDER LAW

INTRODUCTION

Founded in 1984 by the Young Lawyers Section of the Chicago Bar Association, the Center for Disability & Elder Law (CDEL), a 501c (3) not-for-profit organization, has dedicated itself to serving the needs of low-income elderly residents and persons with disabilities, some of Chicago and Cook County's most deserving and most underrepresented residents. For over a quarter of a century, CDEL has provided pro bono assistance to tens of thousands of individuals marginalized by poverty, disability and/or age. Each year, the dedicated staff and volunteers of CDEL serve the needs of these most deserving clients through direct representation, outreach presentations, trainings and other assistance.

SENIOR CENTER POWER OF ATTORNEY & LIVING WILL INITIATIVE (SCI)

The SCI brings CDEL staff and volunteer attorneys to senior citizens' residence and recreation facilities across Cook County to prepare Powers of Attorney for Health Care and Property, as well as Living Will Declarations. The reaction to the SCI workshops has been overwhelmingly positive, from both clients and attorneys.

The SCI workshop concept has been very successful and there is a demonstrated need for expansion of the program.

1) It is a positive experience for the residences, as they are able to schedule an activity that provides a much needed service.
2) It is a positive experience for the law firms and attorneys, as the SCI provides the opportunity for pro bono work in a discreet workshop, as well as the opportunity to receive MCLE credit.
3) It is a positive experience for CDEL, as it provides CDEL with the opportunity to provide service to a large number of seniors and is an incredibly efficient use of CDEL resources.
4) Most importantly, the workshop is a positive experience for the seniors as they receive these very important legal services and legal documents at no expense in an efficient manner.

CDEL has commenced a program to solicit partnerships with Chicagoland Senior Centers and Senior Residences. Since 2008, CDEL conducted SCI presentations to over 700 Senior Centers. CDEL has conducted over 475 workshops. In total, CDEL has provided Powers of Attorney to over 6,500 individuals, providing these essential advance directives and estate planning documents to low-income senior residents of Cook County.

SENIOR LEGAL ASSISTANCE CLINICS (SLAC)

The Senior Legal Assistance Clinics (SLACs) rotate between four suburban and six Chicago senior centers in order to ensure that seniors are able to access CDEL's services. At the SLAC sites seniors are able to meet with volunteer attorneys and paralegals to begin CDEL's screening and intake process. Seniors who are not appropriate for CDEL's services, either because of eligibility requirements or type of legal issue, are immediately referred to other legal professionals.

SIMPLE WILL DRAFTING

This current project primarily rose out of the two programs listed above. As a result of the Senior Center Initiative and, more recently, SLAC, the requests from seniors for having simple wills drafted have increased dramatically.

Wills are governed by Article IV of the Illinois Probate Act of 1975 (755 ILCS 5/4-1), see below. This law sets forth various rules for the capacity of a testator, the particularities of will execution, and other basic provisions.

Every adult of sound mind has the right to have a will drafted. A will allows an individual to decide how their possessions are to be divided and to whom their assets are to be given after the person passes away. This is true regardless of the amount of the assets or the number of people who are to receive under the will. There are some instances when a will may be more burdensome than beneficial. For instance, a person with very few assets and only one heir, may not *need* a will, however, our office may still be able to assist that person with drafting a will if that is what they want.

Why a Will May Be Necessary

There are a few instances when a will might be necessary for a senior, even one who has few assets. This list is not intended to be exhaustive, but to highlight a few of the most likely scenarios.

First, if testator wants to make an unequal distribution, a will would be an appropriate vehicle to do so. For instance, a testator has three children and wants to leave everything to two children and not leave anything to the third child. Or the testator wants to leave an asset to one child only. Without a will, the law of intestate succession (see Intestate Succession, below) would step in and the distribution would, by statute, be equal among the descendants.

Second, a will is appropriate in a situation where the testator wishes to leave specific bequests to an individual. If the testator wishes to leave a specific item to a specific person, a will would be the appropriate tool to communicate that desire.

Third, a will is appropriate if the testator wishes to leave something to a friend, charity or other non-relative. Friends have no ability to take under intestate succession at all. If the testator wishes to provide for a non-relative, a will would be appropriate. The same holds true for a charity, donation, etc.

Fourth, if the testator wishes to specifically exclude someone, they may do so in a will. There are times when the testator may wish to exclude a relative who would ordinarily take under intestate succession. The testator may do so, up to a point, in a will. There are special provisions for spouses who are "disinherited" in a will (see Renunciation of Will by Spouse, 755 ILCS 5/2-8 below).

Definitions

- ***Testator*** is the person signing the will.
- ***Bequest*** is a gift of personal property.
- ***Legacy*** is a gift of money.
- ***Devise*** is a gift of real property.

  Note: Modern Estate Planning usually just uses the term "gifting" or "give" instead of bequest, legacy, or devise.
- ***Executor*** is the person named in the will to carry out the terms of the will when it is entered into probate. The executor has a fiduciary duty to the estate to carry out the duties using due care.

Testamentary Capacity

- Illinois law sets out three requirements for anyone to write a valid will. In order for a will to be valid, the testator must:
  1) be 18 years old or older,
  2) be of sound mind and memory, and
  3) have the power to give away real and personal property owned at time of the testator's death.

- The requirements are intentionally left broad, so that all people with the requisite capacity can draft a will.
- There is a rebuttable presumption that a will or codicil is void if the testator has been adjudicated disabled and either a plenary guardian has been appointed or a limited guardian has been appointed in conjunction with a courts finding that the testator lacks testamentary capacity.

Will Requirements

- Illinois law requires that certain procedures and formalities be followed to draft and execute a valid will. The will must be:
    1) in writing,
    2) signed either
        (a) by the testator, or
        (b) by some other person at the testator's direction, and
    3) attested to in the presence of at least two credible and independent witnesses.
- The witness must be an adult (18 or older) and must have capacity, but may not be a beneficiary of the testator unless there are a sufficient number of non-creditor and non-beneficiary witnesses. In essence, there must be at least two independent witnesses.

Property Not Transferred by Will (Non-Probate Assets)

A will can be used to transfer the testator's "probate estate" but not certain "non-probate assets" that may pass by operation of law. Examples could be a primary residence that is owned in tenancy by the entirety, assets owned in joint tenancy with a right of survivorship and assets that have a named beneficiary (such as life insurance or pension plans with a named beneficiary). In addition, bank accounts that are held jointly would generally not pass by a will. Also, "Pay on Death" bank accounts (also called "Totten Trusts") do not pass through a will.

How to Draft a Simple Will

Drafting the will is usually a pretty straight forward matter, but one that takes a keen eye for detail, as even slight issues may have serious consequences. First and foremost, we must always remember that *our client is the testator*, not the testator's son or daughter or any third party.

Second, it is important that the Simple Will Questionnaire (if one is being used) has been filled out completely, or, at least, as completely as necessary *(note: not all aspects of the Simple Will Questionnaire are applicable to all clients).*

Fill out the name of the Testator in the Exordium Clause, prior to Article I.

Article I: The "Exordium Clause"

- Lists the family members. Include the names and relationships of the family members.

Article II: Name the Executor and Successor Executor(s).

- A qualified executor may be any person, 18 years or older who is a resident of the United States, of sound mind, not adjudged disabled by the court, and who has not been convicted of a felony.
- If a surety is being required (naming a surety is not common in the wills for CDEL clients), Article 2.2 needs to be changed, if not, nothing else needs to be done.

Article III: Payment of Expenses.

- Generally speaking, expenses are paid prior to distributions.

Article IV: Funeral Arrangements.

- Funeral Arrangements are generally not included in the Will. It is inefficient to do so, since the arrangements will normally be made prior to the Will being found, admitted to Court and the Executor named as the Personal Representative. The proper place for burial instructions is in a Power of Attorney for Healthcare, as the agent is the authorized decision maker for the disposition of the Testator's (Principal in the POA) remains.
- If the Testator wishes to have his/her funeral arrangements in the Will, that is fine, but explain that this may not be practical. We generally state that the Executor is instructed to work with the Agent under the Testator's Power of Attorney for Healthcare for purposes of funeral and burial arrangements.

Article V: Specific Gifts.

- This is where specific gifts are provided for in the Will. It is important that the Testator understand what gifts they are making and to whom they are providing the gifts. Also, it is important to determine if the specific gift will **adeem** if the item is no longer in the possession of the Testator at the moment of death.
    - For example: The Will states: "I give my 2014 VW Cabrio to my son, Chip." If the Testator sells the car, the gift has abated and Chip receives nothing.
    - Compare. The Will states: "I give any car in my possession to my son, Chip." The Testator has a 2014 VW Cabrio. In this case, if the Testator sells his car and buys another, Chip still receives the car the Testator has at death.
- Also, it is important to understand what happens if the one of beneficiaries predeceases the Testator. Does the specific gift go to another specific person, to another class of people or to the residuary estate? *This is probably the most difficult part of drafting a simple will:* Per stirpes v. Per capita. *See below*.

- **Residuary Estate**. The residuary estate covers property not previously disposed of in the specific gifts.
- **In Terrorem Provision.** This provision states that if someone taking under the will attempts to contest the will and loses, that person forfeits the gifts the person was to receive.

Article VI. Definitions.

- It is important to read and familiarize yourself with the definitions, but nothing needs to be done to this section. Please note, the *per stirpes* clause.

Article VII. Severability.

- This section states that if any part of the will is held to be illegal, invalid, or otherwise inoperative that all other provisions of the will shall continue to be effective as far as reasonable.
- Nothing needs to be changed in this section

Article VIII. Captions and Context of Terms.

- This section states that captions shall have no impact or meaning as to the terms of the document.
- Nothing needs to be changed in this section

Testimonium Clause.

- Make sure there is the correct Testator and the correct number of pages. When using a template, this can be a major problem, since it is really easy to forget to change this clause.

Attestation Clause.

- Make sure to fill out this section correctly, with the correct Testator name. Please note, in Illinois, wills are ***not*** notarized.

Self Proving Affidavit.

- The Self Proving Affidavit is not technically part of the will, but it is very important that there be a Self Proving Affidavit. Should there be a will contest, this clause will serve as the testimony of the witnesses, who may not be able to be located, may have died, and almost certainly will not remember having witnessed the will.
- The Self Proving Affidavit must be completed, signed and ***notarized*** to be effective.

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Client Information

1. Full Name: **Susan Jones**

   Address: **1356 S. Green Street, Chicago IL 60660**

   Telephone #: **(312) 897-1990** Date of Birth: **June 9, 1935**

Client's Family Information:

1. Marital Status: Married☐ Single☐ Widowed☐ Divorced x Length of Marriage: _____

Spouse's Full Name:

_____
First Middle Last If deceased, year of death

Name of former spouse (if applicable): Timothy P. Jones, deceased April 9, 2008

_____
First Middle Last

2. Do you have any Children? Yes x No ☐

Sarah Ann Miller **9 / 3 / 55**
First Name Middle Last Date of Birth

David Michael Jone **2 / 27 / 58**

_____ _____/_____/_____
First Name Middle Last Date of Birth

_____ _____/_____/_____
First Name Middle Last Date of Birth

2. If you have step-children and wish them to share in your estate, please also list their names here and indicate if they are step-children.

NA

_____ _____/_____/_____
First Name Middle Last Date of Birth

_____ _____/_____/_____
First Name Middle Last Date of Birth

Executor of the Estate:

4. The executor is the person responsible for carrying out the terms of your will. Who do you want to serve in that capacity? Please list the name and the address of the Executor for your estate:

Sarah Ann Miller, daughter, 1234 W. Wrightwood, Chicago, IL 60657
Name Relationship Address

5. Who will serve as alternate executor in the event that the executor does not serve for any reason? Name and address of your Successor Executor:

David Michael Jones, son, 2345 W. 21st Street, Chicago, IL 60635
Name Relationship Address

Funeral and Burial Arrangements:

6. Do you have a cemetery plot? Yes x No ☐

Please give the name and address of the cemetery, and list any documents needed to identify your cemetery plot: St. Ann's Catholic Cemetery, 3090 W. 40th Street, Chicago, IL 60645. Lot 47, plot 78 owned by Jones Family. I am to be buried in the plot next to my husband.

7. Have you prepaid for a funeral? Yes ☐ No x If so, please list any documents relating to the prepaid funeral, and provide copies any relevant documents:

_____

Assets of the Estate:

8. Please list all assets.

☐ Stocks Yes ☐ No x Worth:

_____

☐ Bonds Yes ☐ No x Worth:

_____

☐ Jewelry Yes x No ☐ Items: wedding ring, pearl necklace

_____

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☐ Real Estate *Yes x No ☐

Name(s) on Title: Susan Jones
Name(s) on the Mortgage: Susan Jones
Name of the Lender: Chase

*If you own real estate, please consider whether you would like a **Transfer on Death Instrument (TODI).** A TODI is a document recorded with the Cook County Recorder for a fee of approximately $50, and it allows your home to transfer automatically at the time of your death to a person or persons that you choose ("beneficiaries"). The benefit of a TODI is that it keeps your property out of probate court, which can be costly and time consuming for your family.

As property owner, you can *always* revoke the TODI, as long as you still have mental capacity.

If you would like a TODI, please list the intended beneficiary or beneficiaries below and their addresses. You must also designate a **successor beneficiary**, or someone who would inherit the property in the event that the beneficiary passes away before you do.

If you intend to have more than one beneficiary, please complete the "**Title**" section. Here, you will indicate what **kind of interest in the property** you would like to grant the beneficiaries. For example, would you like to categorize their interest as a "**joint tenancy**" or a "**tenancy in common**"?

In a **joint tenancy with rights of survivorship**, beneficiaries have **equal shares of the property**. If one of the beneficiaries passes away, **their interest automatically transfers to the remaining joint tenant(s)**.

With a **tenancy in common**, beneficiaries may have **different ownership interests**. For example, Beneficiary A may have a 50% interest, while Beneficiaries C and D may each have a 25% interest. If a tenant in common passes away, **their interest is transferred through their estate**, instead of to the other tenants in common.

Intended Beneficiary A for TODI

Sarah Ann Miller, daughter, Chicago, IL
Name Relationship Address

Intended Beneficiary B for TODI

David Michael Jones, son, Chicago, IL
Name Relationship Address

Intended Beneficiary C for TODI

_____
Name Relationship Address

Title: If you have named more than one beneficiary, should the beneficiaries take as:

a) x joint tenants with rights of survivorship
b) □ tenants in common
*** if you choose tenants in common indicate percentage share next to each beneficiary's name

If one or more of the beneficiaries listed above does not survive you, would you like their portion of your real estate to go to which of the following (Check one):

a) □ their descendants,
b) x the surviving beneficiaries previously named, or
c) □ other specifically named beneficiaries?

If you would like to name other specific beneficiaries, please list them, and their relationship to you.

Name	Relationship
Name	Relationship

□ Bank Accounts Yes x No □

Name on Account: **Susan Jones**

Name of Bank: **Chase**

Type of Account: **Checking and Savings**

Amount in Each Account: **Checking: $300 Savings: $1000**

Is the Account a "Pay on Death Account?" Yes ☐ No X

(2) Name on Account:

Name of Bank:

Type of Account:

Amount in Each Account:

Is the Account a "Pay on Death Account?" Yes □ No □

□ Do you have a Safe Deposit Box? Yes □ No x

Name and address of Bank where safe deposit box is located:

Is there an additional signatory on safe deposit box? Yes □ No □

If so, name of additional signatory: _____

☐ Do you own a Vehicle? Yes x No ☐

Name on Title: Susan Jones

_____

☐ Do you have Life Insurance? Yes x No ☐

Name of the Beneficiary: David Michael Jones

Life Insurance Company: Farmer's

☐ Do you have a Retirement Plan or Pension? Yes ☐ No x

Name of the Beneficiary:

_____

Holder of Retirement Account:

_____

9. Do you have any additional property not mentioned? Yes ☐ No x
   If so, please list additional property:
   _____

Liabilities of the Estate:

10. Please list all liabilities. (Including all debts, unpaid mortgages, or other loans):

NA

Distribution of the Estate:

11. If you have any property, or items of special significance, (called "specific bequests") that you would like to leave to particular people, please list the items, the people you wish to receive those items, and their relationship to you.

Wedding Ring	**Kate Miller**	**Granddaughter**
Specific Bequest	Name of Person	Relationship
Pearl Necklace	**Sarah Miller**	**Daughter**
Specific Bequest	Name of Person	Relationship
Car	**David Jones**	**Son**
Specific Bequest	Name of Person	Relationship

China	**Alison Jones**	**Granddaughter**
Specific Bequest	Name of Person	Relationship

12. The remaining portion of your estate (called your "residual estate") includes any and all property not specially named or gifted above. Which specific people would you like to receive the remaining portion of your estate and what is their relationship to you? Would you like them to receive the remaining portions of your estate equally? If not, please explain what percentage of the estate should each person receive (**must add up to 100%**).

Sarah Miller	**Daughter**	**50%**
Name of Person	Relationship	Equal portion or percentage?

David Jones	**Son**	**50%**
Name of Person	Relationship	Equal portion or percentage?

Name of Person	Relationship	Equal portion or percentage?

13. If one or more of the beneficiaries listed above does not survive you, would you like their portion of your estate to go to which of the following (Check one):

a) x their descendants,
b) □ the surviving beneficiaries previously named, or
c) □ other specifically named beneficiaries?

If you would like to name other specific beneficiaries, please list them, and their relationship to you.

Name	Relationship
Name	Relationship

14. Please indicate whether any of your intended beneficiaries receive SSI, Medicaid or LINK ("food stamps") benefits:

_____

15. Please indicate whether any of your intended beneficiaries have a disability:

_____

Guardianship for Minor Children:

16. If you have minor children (under 18 years old), would you like to include a guardian section in your will? Yes □ No □

Do you wish to nominate a guardian only if your spouse does not survive you? Yes ☐ No ☐

Do you wish to nominate a sole guardian or co-guardians? Yes ☐ No ☐

Please give the name of the person or persons you wish to nominate. Please give the exact addresses and phone numbers for the guardians. Remember the guardian may need to act quickly to care for your children, so give the most current contact information you can include any cell phone numbers.

Name	Address	Phone Number
Name	Address	Phone Number

Powers of Attorney

Do you have a Power of Attorney for Property? Yes ☐ No x

Name of Agent serving as Power of Attorney:

_____

Do you have Power of Attorney for Health Care? Yes ☐ No x

Name of Agent serving as Power of Attorney:

_____

If you do not have Powers of Attorney, would you like CDEL to assist you in drafting a Power of Attorney for Property and Power of Attorney for Health Care? Yes x No ☐

If so:
Name of Person you would want as Agent serving as Power of Attorney:

_____

Name of Person you would want as Agent serving as Power of Attorney:

_____

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Last Will and Testament

of

Susan Jones

I, **Susan Jones,** of Chicago, County of Cook, and State of Illinois, being of sound and disposing mind and memory, do hereby make, publish, and declare this to be my Last Will and Testament, hereby revoking all prior Wills and Codicils that I have previously made. I execute this Will of my own free will and not as a result of any coercion or undue influence.

Article I

Introduction

1.1 IDENTIFICATIONS. . I was married to **TIMOTHY JONES**, who predeceased me in 2009. I have two living children, **SARAH ANN MILLER** and **DAVID MICHAEL JONES**.

1.2 REAL PROPERTY IDENTIFICATIONS. I hold title to real property located at 1356 South Green Street, Chicago, Cook County, Illinois, 60660. I have executed and will record with the Cook County Recorder of Deeds a valid Illinois Residential Real Property Transfer on Death Instrument, a copy of which is attached hereto. My Executor shall inform the beneficiaries designated under this Transfer of Death Instrument of the need to complete and sign a Notice of Death Affidavit and Acceptance of Transfer on Death Instrument (also attached hereto), and to record the executed Notice and Acceptance with the Cook County Recorder of Deeds.

Article II

Executor and Executor Powers

2.1 EXECUTOR. I appoint **SARAH ANN MILLER**, my daughter, as Executor of this Last Will and Testament. If **SARAH ANN MILLER** predeceases me, becomes incapacitated, refuses to act or resigns, I then appoint **DAVID MICHAEL JONES**, my son, as Successor Executor of this Last Will and Testament.

2.2 WAIVER OF SURETY. I do not require my Executor to post a bond or provide security or surety to act as executor.

2.3 POWERS OF EXECUTOR. I give my Executor the powers, without authorization of any court, to carry out any duties defined by Illinois law or directed by me.

2.4 ADMINISTRATION OF ESTATE. I authorize my Executor to administer my estate as is necessary. If, under applicable state law, administration of my estate may be conducted without court supervision, then my Executor should do so, as long as doing so would not be inconsistent with the best interests of the beneficiaries as determined by the Executor.

2.5 POWERS OF SUCCESSOR EXECUTORS. Any power, duty, authority, requirement, or lack thereof that is conferred by this section, or any subsequent section, upon the appointed Executor shall apply equally to any Successor Executor, whether appointed by this Will or otherwise.

Article III

PAYMENT OF TAXES, EXPENSES, AND DEBTS

3.1 PAYMENTS. My Executor shall make the following payments:

(a) ESTATE TAXES. All of my estate taxes.

(b) EXPENSES. All of my last illness, funeral, burial, costs of safeguarding and delivering personal property, and estate administration expenses.

(c) DEBTS. All of my legally enforceable debts, other than debts secured by life insurance, by an interest in a land trust or cooperative, or by real property.

3.2 SOURCE OF PAYMENTS GENERALLY. My Executor shall make all payments required under this Article, Article 3, from my estate before distributing any gifts or bequests to my beneficiaries.

ARTICLE IV

FUNERAL AND DEATH ARRANGEMENTS

4.1 I direct my Executor to work with any Power of Attorney for Healthcare that I may have to ensure that I am buried per my previously made plans at Saint Ann's Catholic Cemetery, Lot #47, plot 78, 3090 West 40th Street, Chicago, Illinois.

5.1 SPECIFIC GIFTS. I make the following specific bequests of personal property to be dispersed as set forth in this section, following the rule of ademption:

(a) I give, devise, and bequeath my car to **DAVID MICHAEL JONES,** my son, if he survives me. If **DAVID MICHAEL JONES** does not survive me, then I leave my car to my residuary estate.

(b) I give, devise, and bequeath my china, to **ALISON JONES,** my granddaughter, if she survives me. In the event that **ALISON JONES** does not survive me, then I give, devise, and bequeath my china to **KATE MILLER,** my granddaughter.

(c) I give, devise, and bequeath my gold wedding ring to **KATE MILLER**, my granddaughter, if she survives me. In the event that **KATE MILLER** does not survive me, then I give, devise, and bequeath my china to **ALISON JONES,** my granddaughter.

(d) I give, devise, and bequeath my pearl necklace to **SARAH ANN MILLER,** my daughter, in she survives me. If **SARAH ANN MILLER** does not survive me, then I leave my pearl necklace then to my residuary estate.

5.2 ADEMPTION. If any specific bequest given to any beneficiary under this will is not in my estate at my death because of ademption, the specific devise, legacy or bequest shall be regarded as adeemed. The disposition of property specifically bequeathed by me, in my lifetime, should operate as a revocation of the specific bequest.

5.3 RESIDUARY ESTATE. I give, devise, and bequeath the residuary of my estate to equally to **SARAH ANN MILLER,** my daughter**,** and **DAVID MICHAEL JONES**, my son, *per stirpes*.

5.4 CHILDREN UNDER 21. If the recipient of any property under this Article, Article 5, has not reached the age of 21 years at the time of my death, my Executor shall transfer such property to him/herself as custodian for that recipient under the Illinois Uniform Transfers to Minors Act. If unable or unwilling to effect such transfer or function as custodian for any specific property or for any specific individual recipient, my Executor, may at his/her sole discretion, transfer that property to an adult member of the recipient's family, a trust company, or anyone else he/she chooses as custodian for that recipient under the Illinois Uniform Transfers to Minors Act.

5.5 OUTRIGHT GIFTS. Any share of my estate passing under this Article, Article 5, shall be distributed outright and free of any trust.

5.6 IN TERROREM PROVISION. If any beneficiary contests this Last Will and Testament, she shall take nothing under this Last Will and Testament. All benefits under this Last Will and Testament are forfeited by a beneficiary if the beneficiary contests this Last Will and Testament.

ARTICLE VI

DEFINITIONS

6.1 RESIDUARY ESTATE. "Residuary Estate" means:

(a) The remainder of my estate after payment of expenses, including funeral expenses, debts, death taxes required to be paid from my estate; and

(b) All property not otherwise provided for in this Last Will and Testament, including real estate, personal property tangible and intangible, of whatever kind or character, wherever located, and whenever acquired; and

(c) All interests, provisions, or gifts contained in this Last Will and Testament that lapse by reason of death of any person or persons entitled to take under this Last Will and Testament without proper direction as to how the interests, provisions, or gifts should pass; and

(d) All interests, provisions, or gifts contained in this Last Will and Testament that fail according to law or for any other reason, without proper direction as to how the interests, provisions or gifts should pass.

6.2 INCAPACITY. A person shall be considered incapacitated if under a legal disability or unable to give prompt and intelligent consideration to financial affairs. The existence of the inability may be determined by a physician or a Court of Law, and any person may rely on written notice of the determination. A person already acting as Executor or trustee shall cease to act on incapacity.

6.3 PER STIRPES. Whenever assets are to be allocated for or distributed to the descendants of a person *per stirpes*, those assets shall be divided into equal shares, one such share for each then living child of that person and one such share for the then living descendants collectively of each deceased child of that person. Any such deceased child's shares shall then be allocated for or distributed to that child's descendants *per stirpes* in accordance with the preceding sentence and this sentence.

ARTICLE VII

SEVERABILITY

7.1 If any portion of my Last Will and Testament shall be held illegal, invalid or otherwise inoperative, it is my intention that all of the other provisions of this Last Will and Testament shall continue to be fully effective and operative as far as is possible and reasonable.

ARTICLE VIII

CAPTIONS AND CONTEXT OF TERMS

8.1 Captions shall have no impact or meaning as to the terms of the document. Singular and plural and masculine, feminine, and neutral shall be interchangeable as required or permitted in the context of this instrument.

I, **SUSAN JONES**, being of sound and disposing mind and memory, do hereby make, publish, and declare this Will consisting of seven (7) pages, the next page included, and having signed each page, to be my Last Will and Testament.

Dated: _____ Signed: _____

SUSAN JONES

We certify that in our presence on _____, 2019, the Testator, **SUSAN JONES**, signed the foregoing Last Will and Testament of **SUSAN JONES** and further state:

1) Testator acknowledged it to be Testator's Last Will and Testament,

2) Testator appears to be over the age of majority;

3) That we believe Testator to be of sound mind and memory;

4) That Testator voluntarily signed of Testator's own free will and not as a result of any coercion or undue influence;

5) That at Testator's request and in Testator's presence and in the presence of each other we have signed our names below as witnesses.

WITNESS: **ADDRESS OF WITNESS:**

Signed:_____ 205 W. Randolph Suite 1610

Printed:_____ Chicago, IL 60606

Dated: _____

Signed:_____ 205 W. Randolph Suite 1610

Printed:_____ Chicago, IL 60606

Dated: _____

Prepared by:
Center for Disability & Elder Law
205 W. Randolph Suite 1610
Chicago, IL 60606
(312) 376-1880

Center for Disability & Elder Law
Founded by The Chicago Bar Association and its Young Lawyers Section

Self-Proving Affidavit

I certify that in my presence on _____, 2019, the Testator, **SUSAN JONES**, signed the foregoing Last Will and Testament of **SUSAN JONES** and further state:

1) Testator acknowledged it to be Testator's Last Will and Testament,

2) Testator appears to be over the age of majority;

3) That I believe Testator to be of sound mind and memory;

4) That Testator voluntarily signed of Testator's own free will and not as a result of any coercion or undue influence;

5) That at Testator's request and in Testator's presence and in the presence of each other I have signed my name as witnesses.

If called upon to testify at trial and under oath, I would so testify based upon my personal knowledge of all the statements contained herein.

AFFIANT: **ADDRESS OF AFFIANT:**

Signed:_____ 205 W. Randolph Suite 1610

Printed:_____ Chicago, IL 60606

Dated: _____

Signed:_____ 205 W. Randolph Suite 1610

Printed:_____ Chicago, IL 60606

Dated: _____

State of Illinois
County of Cook

Signed and sworn to before me on _____, 2019 by _____ and _____, affiants.

_____
Notary Public
(seal) My Commission Expires: _____

ILLINOIS INTESTATE SUCCESSION ACT

(755 ILCS 5/Art. II heading)

DESCENT AND DISTRIBUTION

(755 ILCS 5/2-1) (from Ch. 110 1/2, par. 2-1)

Sec. 2-1. Rules of descent and distribution. The intestate real and personal estate of a resident decedent and the intestate real estate in this State of a nonresident decedent, after all just claims against his estate are fully paid, descends and shall be distributed as follows:

(a) If there is a surviving spouse and also a descendant of the decedent: 1/2 of the entire estate to the surviving spouse and 1/2 to the decedent's descendants per stirpes.

(b) If there is no surviving spouse but a descendant of the decedent: the entire estate to the decedent's descendants per stirpes.

(c) If there is a surviving spouse but no descendant of the decedent: the entire estate to the surviving spouse.

(d) If there is no surviving spouse or descendant but a parent, brother, sister or descendant of a brother or sister of the decedent: the entire estate to the parents, brothers and sisters of the decedent in equal parts, allowing to the surviving parent if one is dead a double portion and to the descendants of a deceased brother or sister per stirpes the portion which the deceased brother or sister would have taken if living.

(e) If there is no surviving spouse, descendant, parent, brother, sister or descendant of a brother or sister of the decedent but a grandparent or descendant of a grandparent of the decedent: (1) 1/2 of the entire estate to the decedent's maternal grandparents in equal parts or to the survivor of them, or if there is none surviving, to their descendants per stirpes, and (2) 1/2 of the entire estate to the decedent's paternal grandparents in equal parts or to the survivor of them, or if there is none surviving, to their descendants per stirpes. If there is no surviving paternal grandparent or descendant of a paternal grandparent, but a maternal grandparent or descendant of a maternal grandparent of the decedent: the entire estate to the decedent's maternal grandparents in equal parts or to the survivor of them, or if there is none surviving, to their descendants per stirpes. If there is no surviving maternal grandparent or descendant of a maternal grandparent, but a paternal grandparent or descendant of a paternal grandparent of the decedent: the entire estate to the decedent's paternal grandparents in equal parts or to the survivor of them, or if there is none surviving, to their descendants per stirpes.

(f) If there is no surviving spouse, descendant, parent, brother, sister, descendant of a brother or sister or grandparent or descendant of a grandparent of the decedent: (1) 1/2 of the entire estate to the decedent's maternal great-grandparents in equal parts or to the survivor of them, or if there is none surviving, to their descendants per stirpes, and (2) 1/2 of the entire estate to the decedent's paternal great-grandparents in equal parts or to the survivor of them, or if there is none surviving, to their descendants per stirpes. If there is no surviving paternal great-grandparent or descendant of a paternal great-grandparent, but a maternal great-grandparent or descendant of a maternal great-grandparent of the decedent: the entire estate to the decedent's maternal great-grandparents in equal parts or to the survivor of them, or if there is none surviving, to their descendants per stirpes. If there is no surviving maternal great-grandparent or descendant of a maternal great-grandparent, but a paternal great-grandparent or descendant of a paternal great-grandparent of the decedent: the entire estate to the decedent's paternal great-grandparents in equal parts or to the survivor of them, or if there is none surviving, to their descendants per stirpes.

(g) If there is no surviving spouse, descendant, parent, brother, sister, descendant of a brother or sister, grandparent, descendant of a grandparent, great-grandparent or descendant of a great-grandparent of the decedent: the entire estate in equal parts to the nearest kindred of the decedent in equal degree (computing by the rules of the civil law) and without representation.

(h) If there is no surviving spouse and no known kindred of the decedent: the real estate escheats to the county in which it is located; the personal estate physically located within this State and the personal estate physically located or held outside this State which is the subject of ancillary administration of an estate being administered within this State escheats to the county of which the decedent was a resident, or, if the decedent was not a resident of this State, to the county in which it is located; all other personal property of the decedent of every class and character, wherever situate, or the proceeds thereof, shall escheat to this State and be delivered to the State Treasurer pursuant to the Uniform Disposition of Unclaimed Property Act. In no case is there any distinction between the kindred of the whole and the half blood.(Source: P.A. 91-16, eff. 7-1-99.)

ILLINOIS WILLS ACT

(755 ILCS 5/Art. IV heading)
WILLS

(755 ILCS 5/4-1) (from Ch. 110 1/2, par. 4-1)
Sec. 4-1. Capacity of testator.

(a) Every person who has attained the age of 18 years and is of sound mind and memory has power to bequeath by will the real and personal estate which he has at the time of his death.

(b) Except as stated herein, there is a rebuttable presumption that a will or codicil is void if it was executed or modified after the testator is adjudicated disabled under Article XIa of this Act and either (1) a plenary guardian has been appointed for the testator under subsection (c) of Section 11a-12 of this Act or (2) a limited guardian has been appointed for the testator under subsection (b) of Section 11a-12 of this Act and the court has found that the testator lacks testamentary capacity. The rebuttable presumption is overcome by clear and convincing evidence that the testator had the capacity to execute the will or codicil at the time the will or codicil was executed. The rebuttable presumption does not apply if the will or codicil was completed in compliance with subsection (d-5) of Section lla-18 of this Act. This subsection (b) applies only to wills or codicils executed or modified after the effective date of this amendatory Act of the 99th General Assembly. (Source: P.A. 99-302, eff. 1-1-16.)

(755 ILCS 5/4-2) (from Ch. 110 1/2, par. 4-2)
Sec. 4-2. Testamentary powers of appointment. This Section applies only to powers of appointment exercisable by a will.

(a) Capacity of holder of power. A power of appointment under a will which is not subject to an express condition that it may be exercised only by a holder of a greater age may be exercised by a holder who has attained the age of 18 years.

(b) Manner of exercise of power. Unless the contrary intent is evidenced by the terms of the instrument creating or limiting a power of appointment, a donee of a power of appointment may (1) make appointments of present or future interests or both; (2) make appointments with conditions and limitations; (3) make appointments with restraints on alienation upon the appointed interests; (4) make appointments of interests to a trustee for the benefit of one or more objects of the power; (5) make appointments that create in the object of the power additional powers of appointment to permissible objects of the power of appointment pursuant to which such powers are created; and (6) if the donee could appoint outright to the object of a power, make appointments that create in the object of the power additional powers of appointment and such powers of appointment may be exercisable in favor of such persons or entities as the person creating such power may direct, even though the objects of such powers of appointment may not have been permissible objects of the power of appointment pursuant to which such powers are created.

(c) Disposition of trust property subject to power. In disposing of trust property subject to a power of appointment exercisable by will, a trustee acting in good faith shall have no liability to any appointee or taker in default of appointment for relying upon a will believed to be the will of the donee of the power of appointment, for assuming that there is no will in the absence of actual knowledge thereof within 3 months after the death of the donee, or for requiring that any will purporting to exercise a power of appointment be admitted to probate. The trustee's action in accordance with the preceding sentence shall not affect the rights of any appointee or taker in default of appointment to recover the distributed property from any person to whom the trustee shall have made distribution.

(d) Applicability. This amendatory Act of 1995 shall be construed as being declarative of existing law and shall apply to all instruments granting general and special powers of appointment and all wills exercising those powers, whether existing or exercised before, on, or after the effective date of this amendatory Act of 1995, except that no trustee shall be liable to any person in whose favor a power of appointment may have been exercised for any distribution of property made to persons entitled to take in default of the effective exercise of the power of appointment to the extent that the distribution shall have been completed prior to the effective date of this amendatory Act of 1995.(Source: P.A. 89-364, eff. 8-18-95.)

(755 ILCS 5/4-3) (from Ch. 110 1/2, par. 4-3)
Sec. 4-3. Signing and attestation.

(a) Every will shall be in writing, signed by the testator or by some person in his presence and by his direction and attested in the presence of the testator by 2 or more credible witnesses.

(b) A will that qualifies as an international will under the Uniform International Wills Act is considered to meet all the requirements of subsection (a).(Source: P.A. 86-1291.)

(755 ILCS 5/4-4) (from Ch. 110 1/2, par. 4-4)

Sec. 4-4. Testamentary additions to trusts. By a will signed and attested as provided in this Act a testator may bequeath or appoint real and personal estate to a trustee of a trust evidenced by an instrument, including the will of another who predeceases the testator, which is in existence when the testator's will is made and which is identified in the testator's will, even though the trust is subject to amendment, modification, revocation or termination. Unless the testator's will provides otherwise, the estate so bequeathed or appointed shall be governed by the terms and provisions of the instrument creating the trust, including any amendments or modifications in writing made at any time before or after the execution of the testator's will and before, or after if the testator's will so directs, the death of the testator. The existence, size or character of the corpus of the trust is immaterial to the validity of the bequest. If the trust is terminated prior to the testator's death by revocation of the trust or by revocation of that portion of the instrument creating the trust, the bequest or appointment shall take effect according to the terms and provisions of the instrument creating the trust as they existed at the time of the termination, unless the testator's will otherwise provides. (Source: P.A. 80-759.)

(755 ILCS 5/4a-5)

Sec. 4a-5. Definitions. As used in this Article:

(1) "Caregiver" means a person who voluntarily, or in exchange for compensation, has assumed responsibility for all or a portion of the care of another person who needs assistance with activities of daily living. "Caregiver" includes a caregiver's spouse, cohabitant, child, or employee. "Caregiver" does not include a family member of the person receiving assistance.

(2) "Family member" means a spouse, child, grandchild, sibling, aunt, uncle, niece, nephew, first cousin, or parent of the person receiving assistance.

(3) "Transfer instrument" means the legal document intended to effectuate a transfer effective on or after the transferor's death and includes, without limitation, a will, trust, deed, form designated as payable on death, contract, or other beneficiary designation form.

(4) "Transferee" means a legatee, a beneficiary of a trust, a grantee of a deed, or any other person designated in a transfer instrument to receive a nonprobate transfer.

(5) "Transferor" means a testator, settlor, grantor of a deed, or a decedent whose interest is transferred pursuant to a nonprobate transfer. (Source: P.A. 98-1093, eff. 1-1-15.)

(755 ILCS 5/4a-10)

Sec. 4a-10. Presumption of void transfer.

(a) In any civil action in which a transfer instrument is being challenged, there is a rebuttable presumption, except as provided in Section 4a-15, that the transfer instrument is void if the transferee is a caregiver and the fair market value of the transferred property exceeds $20,000.

(b) Unless a shorter limitations period is required by Section 8-1 or 18-12 of this Act, any action under this Section shall be filed within 2 years of the date of death of the transferor. (Source: P.A. 98-1093, eff. 1-1-15.)

(755 ILCS 5/4a-15)

Sec. 4a-15. Exceptions. The rebuttable presumption established by Section 4a-10 can be overcome if the transferee proves to the court either:

(1) by a preponderance of evidence that the transferee's share under the transfer instrument is not greater than the share the transferee was entitled to under the transferor's transfer instrument in effect prior to the transferee becoming a caregiver; or

(2) by clear and convincing evidence that the transfer was not the product of fraud, duress, or undue influence. (Source: P.A. 98-1093, eff. 1-1-15.)

(755 ILCS 5/4a-20)

Sec. 4a-20. Common law. The provisions of this Article do not abrogate or limit any principle or rule of the common law, unless the common law principle or rule is inconsistent with the provisions of this Article. Notwithstanding the limited definition of "caregiver" in Section 4a-5 of this Article, nothing in this Article precludes

any action against any individual under the common law, or any other applicable law, regardless of the individual's familial relationship with the person receiving assistance. The provisions of this Article are in addition to any other principle or rule of law. (Source: P.A. 98-1093, eff. 1-1-15.)

(755 ILCS 5/4a-25)
Sec. 4a-25. Attorney's fees and costs. If the caregiver attempts and fails to overcome the presumption under Section 4a-15, the caregiver shall bear the costs of the proceedings, including, without limitation, reasonable attorney's fees. (Source: P.A. 98-1093, eff. 1-1-15.)

(755 ILCS 5/4a-30)
Sec. 4a-30. No independent duty. The rebuttable presumption set forth in Section 4a-10 of this Article applies only in a civil action in which a transfer instrument is being challenged, and does not create or impose an independent duty on any financial institution, trust company, trustee, or similar entity or person related to any transfer instrument. (Source: P.A. 98-1093, eff. 1-1-15.)

(755 ILCS 5/4-5) (from Ch. 110 1/2, par. 4-5)
Sec. 4-5. Insurance and death benefits payable to testamentary trustee. A person having the right to designate a beneficiary of benefits payable under any insurance, annuity or endowment contract (including any agreement issued or entered into by an insurance company in connection therewith, supplemental thereto or in settlement thereof), or the right to designate the beneficiary of benefits payable upon or after the death of a person under any pension, retirement, death benefit, deferred compensation, employment, agency, stock bonus or profit sharing contract, plan, system or trust, may designate as a beneficiary a trustee named or to be named in his will whether or not the will is in existence at the time of the designation. The benefits received by the trustee shall be held and disposed of as part of the trust estate under the terms of the will. If no qualified trustee makes claim to the benefits within 18 months after the death of the decedent or if within that period it is established that no trustee can qualify to receive the benefits, payment shall be made to the representative of the estate of the person making the designation, unless it is otherwise provided by a beneficiary designation or by the policy or other controlling agreement. The benefits received by the trustee shall not be subject to claims or other charges enforceable against the estate or to estate or inheritance taxes (including interest and penalties thereon) to any greater extent than if the benefits were payable to a named beneficiary other than the estate of the person making the designation, and in the case of benefits which otherwise qualify for exclusion from the gross estate for federal estate tax purposes, such benefits shall not be used by or for the benefit of the estate of the decedent. (Source: P.A. 79-328; 79-711; 79-1454.)

(755 ILCS 5/4-6) (from Ch. 110 1/2, par. 4-6)
Sec. 4-6. Beneficiary or creditor as witness. (a) If any beneficial legacy or interest is given in a will to a person attesting its execution or to his spouse, the legacy or interest is void as to that beneficiary and all persons claiming under him, unless the will is otherwise duly attested by a sufficient number of witnesses as provided by this Article exclusive of that person and he may be compelled to testify as if the legacy or interest had not been given, but the beneficiary is entitled to receive so much of the legacy or interest given to him by the will as does not exceed the value of the share of the testator's estate to which he would be entitled were the will not established.
(b) No individual or corporation is disqualified to act or to receive compensation for acting in any fiduciary capacity with respect to a will of a decedent by reason of the fact that any employee or partner of such individual or any employee or shareholder of such corporation attests the execution of the will or testifies thereto. No attorney or partnership of attorneys is disqualified to act or to receive compensation for acting as attorney for any fiduciary by reason of the fact that the attorney or any employee or partner of the attorney or partnership attests the execution of the will or testifies thereto.
(c) If real or personal estate is charged with any debt by a will and the creditor whose debt is so secured attests the execution of the will, the creditor may testify to its execution. (Source: P.A. 79-328.)

(755 ILCS 5/4-7) (from Ch. 110 1/2, par. 4-7)
Sec. 4-7. Revocation - revival. (a) A will may be revoked only (1) by burning, cancelling, tearing or obliterating it by the testator himself or by some person in his presence and by his direction and consent, (2) by the execution of a later will declaring the revocation, (3) by a later will to the extent that it is inconsistent with the prior will or (4) by the execution of an instrument declaring the revocation and signed and attested in the manner prescribed by this Article for the signing and attestation of a will.

(b) No will or any part thereof is revoked by any change in the circumstances, condition or marital status of the testator, except that dissolution of marriage or declaration of invalidity of the marriage of the testator revokes every legacy or interest or power of appointment given to or nomination to fiduciary office of the testator's former spouse in a will executed before the entry of the judgment of dissolution of marriage or declaration of invalidity of marriage and the will takes effect in the same manner as if the former spouse had died before the testator.

(c) A will which is totally revoked in any manner is not revived other than by its re-execution or by an instrument declaring the revival and signed and attested in the manner prescribed by this Article for the signing and attestation of a will. If a will is partially revoked by an instrument which is itself revoked, the revoked part of the will is revived and takes effect as if there had been no revocation. (Source: P.A. 81-230.)

(755 ILCS 5/4-8) (from Ch. 110 1/2, par. 4-8)

Sec. 4-8. Contract for sale. If after making his will the testator makes a contract for the sale or transfer of real or personal property specifically bequeathed therein and the whole or any part of the contract remains executory at his death, the disposition of the property by the contract does not revoke the bequest but the property passes to the legatee subject to the contract. (Source: P.A. 79-328.)

(755 ILCS 5/4-9) (from Ch. 110 1/2, par. 4-9)

Sec. 4-9. Effect of alteration. An addition to a will or an alteration, substitution, interlineation or deletion of any part of a will which does not constitute a revocation of a will is of no effect, unless made by the testator or by some person in his presence and by his direction and consent and unless the will is thereafter signed and attested in the manner prescribed by this Article for the execution of a will. (Source: P.A. 81-1509.)

(755 ILCS 5/4-10) (from Ch. 110 1/2, par. 4-10)

Sec. 4-10. Effect of child born after will. Unless provision is made in the will for a child of the testator born after the will is executed or unless it appears by the will that it was the intention of the testator to disinherit the child, the child is entitled to receive the portion of the estate to which he would be entitled if the testator died intestate and all legacies shall abate proportionately therefor. (Source: P.A. 79-328.)

(755 ILCS 5/4-11) (from Ch. 110 1/2, par. 4-11)

Sec. 4-11. Legacy to a deceased legatee. Unless the testator expressly provides otherwise in his will, (a) if a legacy of a present or future interest is to a descendant of the testator who dies before or after the testator, the descendants of the legatee living when the legacy is to take effect in possession or enjoyment, take per stirpes the estate so bequeathed; (b) if a legacy of a present or future interest is to a class and any member of the class dies before or after the testator, the members of the class living when the legacy is to take effect in possession or enjoyment take the share or shares which the deceased member would have taken if he were then living, except that if the deceased member of the class is a descendant of the testator, the descendants of the deceased member then living shall take per stirpes the share or shares which the deceased member would have taken if he were then living; and (c) except as above provided in (a) and (b), if a legacy lapses by reason of the death of the legatee before the testator, the estate so bequeathed shall be included in and pass as part of the residue under the will, and if the legacy is or becomes part of the residue, the estate so bequeathed shall pass to and be taken by the legatees or those remaining, if any, of the residue in proportions and upon estates corresponding to their respective interests in the residue. The provisions of (a) and (b) do not apply to a future interest which is or becomes indefeasibly vested at the testator's death or at any time thereafter before it takes effect in possession or enjoyment.(Source: P.A. 79-328.)

(755 ILCS 5/4-13) (from Ch. 110 1/2, par. 4-13)

Sec. 4-13. Effect of order admitting will to probate. Every will when admitted to probate as provided by this Act is effective to transfer the real and personal estate of the testator bequeathed in that will.(Source: P.A. 79-328.)

(755 ILCS 5/4-14) (from Ch. 110 1/2, par. 4-14)

Sec. 4-14. Intestate estate of testator. The real and personal estate of a testator that is not bequeathed by his will descends and shall be distributed as intestate estate.(Source: P.A. 79-328.)

(755 ILCS 5/4-15) (from Ch. 110 1/2, par. 4-15)

Sec. 4-15. Debtor as executor. The appointment of the debtor of the testator as executor of his will does not extinguish any debt due from the executor to the testator, unless the testator in the will expressly declares his

intention to extinguish the debt and unless the estate of the testator without collection of the debt due from the executor is sufficient to discharge all claims against the testator's estate.(Source: P.A. 79-328.)

(755 ILCS 5/6-13) (from Ch. 110 1/2, par. 6-13)

Sec. 6-13. Who may act as executor.

(a) A person who has attained the age of 18 years and is a resident of the United States, is not of unsound mind, is not an adjudged person with a disability as defined in this Act and has not been convicted of a felony, is qualified to act as executor.

(b) If a person named as executor in a will is not qualified to act at the time of admission of the will to probate but thereafter becomes qualified and files a petition for the issuance of letters, takes oath and gives bond as executor, the court may issue letters testamentary to him as co-executor with the executor who has qualified or if no executor has qualified the court may issue letters testamentary to him and revoke the letters of administration with the will annexed.

The court may in its discretion require a nonresident executor to furnish a bond in such amount and with such surety as the court determines notwithstanding any contrary provision of the will.
(Source: P.A. 99-143, eff. 7-27-15.)

RENUNCIATION OF WILL BY SPOUSE

(755 ILCS 5/2-8) (from Ch. 110 1/2, par. 2-8)

Sec. 2-8. Renunciation of will by spouse.

(a) If a will is renounced by the testator's surviving spouse, whether or not the will contains any provision for the benefit of the surviving spouse, the surviving spouse is entitled to the following share of the testator's estate after payment of all just claims: 1/3 of the entire estate if the testator leaves a descendant or 1/2 of the entire estate if the testator leaves no descendant.

(b) In order to renounce a will, the testator's surviving spouse must file in the court in which the will was admitted to probate a written instrument signed by the surviving spouse and declaring the renunciation. The time of filing the instrument is: (1) within 7 months after the admission of the will to probate or (2) within such further time as may be allowed by the court if, within 7 months after the admission of the will to probate or before the expiration of any extended period, the surviving spouse files a petition therefor setting forth that litigation is pending that affects the share of the surviving spouse in the estate. The filing of the instrument is a complete bar to any claim of the surviving spouse under the will.

(c) If a will is renounced in the manner provided by this Section, any future interest which is to take effect in possession or enjoyment at or after the termination of an estate or other interest given by the will to the surviving spouse takes effect as though the surviving spouse had predeceased the testator, unless the will expressly provides that in case of renunciation the future interest shall not be accelerated.

(d) If a surviving spouse of the testator renounces the will and the legacies to other persons are thereby diminished or increased in value, the court, upon settlement of the estate, shall abate from or add to the legacies in such a manner as to apportion the loss or advantage among the legatees in proportion to the amount and value of their legacies. (Source: P.A. 79-328.)

(755 ILCS 5/2-9) (from Ch. 110 1/2, par. 2-9)

Sec. 2-9. Dower and Curtesy.) There is no estate of dower or curtesy. All inchoate rights to elect to take dower existing on January 1, 1972, are extinguished.(Source: P.A. 80-808.)

PER STIRPES VS. PER CAPITA

Per Stirpes

"Per stirpes" means taking "by representation" or "by class." This means that if the beneficiaries are to share in a distribution "per stirpes," then the living member in the class of beneficiaries who is closest in relationship to the person making the distribution will receive an equal share. However, if a member in the class of beneficiaries who is closest in relationship to the person making the distribution is deceased and survived by any descendants, then that deceased beneficiary's descendants will take "by representation" what their deceased parent would have taken, split evenly.

One way to explain this is by examples
Assume the following:
There are three children, Amy, Bob and Cal
Amy has two children, Dave and Ellen
Bob, Cal, Dave and Ellen all have no descendants
If the Last Will and Testament states that property is to be distributed to the "then living descendants, per stirpes," here's what happens in different scenarios:

Amy, Bob, Cal, Dave and Ellen have all survived:
Amy, Bob and Cal will each receive a 1/3 share
Dave and Ellen will receive nothing

Amy has predeceased and Bob, Cal, Dave and Ellen have all survived:
Bob and Cal will each receive a 1/3 share
Dave and Ellen will each receive a 1/6 share; they take in equal shares what Amy would have taken: 1/3 divided by 2 = 1/6 each

Amy, Cal, Dave and Ellen have all survived and Bob has predeceased:
Amy and Cal will each receive a 1/2 share; a share will not be created for Bob since he has predeceased and was not survived by any descendants
Dave and Ellen will receive nothing, since Amy is still alive.

Amy and Dave have predeceased and Bob, Cal and Ellen have all survived:
Bob and Cal will each receive a 1/3 share and Ellen will receive a 1/3 share; she takes by representation what Amy would have taken and there is no need to create a share for Dave since he has predeceased and wasn't survived by any descendants

Assume that Amy has predeceased and Bob has predeceased, but Bob had one child-Frank.
Cal would receive 1/3, Dave and Ellen would receive 1/6 (they would split Amy's 1/3) and Frank would receive 1/3 (taking Bob's 1/3).

Assume that Amy, Bob and Cal have all predeceased. Amy has two children-Dave and Ellen, Bob has one child-Frank, and Cal has three children-Greg, Hank and Izzy.

Frank would receive 1/3, Dave and Ellen would receive 1/6 each, Greg, Hank and Izzy would receive 1/9 each.

If the Testator does not want this pattern, it is important to make that clear, as it is the "default" provision in CDEL's simple wills and also in the Intestate Succession Act.

Per Capita
Contrast "per stirpes" to "per capita," which means taking "by total head count" or "by total number of individuals." In the estate planning context, this means that if the beneficiaries are to share in a distribution "per capita," then all of the living members of the identified group will receive an equal share.

However, if a member of the identified group is deceased, then a share will not be created for the deceased member and all of the shares of the other members will be increased accordingly.

As with explaining "per stirpes," the easiest way to understand the concept is by a few examples. If the same facts as described above are assumed and the Last Will and Testament states that property is to be distributed to the "then living descendants, per capita," here's what happens in the same scenarios described above:

Amy, Bob and Cal survive:
Amy, Bob and Cal each receive a 1/3 share.

Assume that Amy has predeceased and Bob, Cal, Dave and Ellen have all survived:
Bob, Cal, Dave and Ellen will each receive a 1/4 share.

Assume that Amy and Dave have predeceased and Bob, Cal and Ellen have all survived:
Bob, Cal and Ellen will each receive a 1/3 share.

Note, if it states "per capita, by representation," then the second generation would receive their inheritance divided equal by the number of people alive at that level.
Amy, Bob and Cal survive:
Amy, Bob and Cal each receive a 1/3 share.

Assume that Amy has predeceased and Bob, Cal, Dave and Ellen have all survived:
Bob and Cal would receive 1/3 each, Dave and Ellen will each receive a 1/6 share.

Assume that Amy has predeceased and Bob has predeceased, but Bob had one child-Frank.
Cal would receive 1/3. Dave, Ellen and Frank would split the other 2/3 (each would receive 2/9).

Assume that Amy, Bob and Cal have all predeceased. Amy has two children-Dave and Ellen, Bob has one child-Frank, and Cal has three children-Greg, Hank and Izzy.

Dave, Ellen, Frank, Greg, Hank and Izzy would reach receive 1/6 of the total amount in per capita.

"Per stirpes" is used more commonly in estate planning than "per capita" because it covers the typical family situation. Also, Illinois is a "per stirpes" state, and if this is left blank, the court will presume per stirpes. If the Testator prefers to use a "per capita" distribution, and anything is being left directly to grandchildren (while their parents are still alive) then it is important to make sure that the Will addresses any generation skipping shares that may be created by this type of distribution. In other words, leaving direct shares to grandchildren and great grandchildren through a per capita or other type of direct distribution while the children have also survived the Testator will trigger the generation skipping transfer tax on the grandchildren's and great grandchildren's shares.

This is usually not a concern with CDEL's clients, but it is an important consideration.

TRANSFER ON DEATH INSTRUMENT (TODI) DRAFTING

TODIs are governed by the Illinois Residential Real Property Transfer on Death Instrument Act. (755 ILCS 27/1). The Act sets forth various rules and requirements for drafting and executing a TODI. Drafting a TODI is similar to drafting a deed. A template TODI and Notice of Death Affidavit are included in the material.

There are five important points that must be considered when drafting a TODI for the client:

1) Capacity. It is critical that the owner has capacity to execute the TODI. Do not draft the TODI if the owner cannot sign it.
2) Confirm the information. It is important to confirm the information.
3) Confirm the Property Identification Number (PIN) and the legal description. The legal description must be exactly correct to convey the property. It is best to request a copy of the current deed or mortgage or title insurance policy to confirm the legal description. A copy of the deed or mortgage can also be downloaded from the Recorder of Deeds office, for a slight fee.
4) There is no requirement that the Notice of Death Affidavit be drafted at the time that the TODI is drafted, but it is a good idea. A template is in the material.
5) Make sure there are appropriate witnesses and a notary available at the TODI signing.

What Properties are Covered?

755 ILCS 27/5

- "Residential real estate" means real property improved with not less than one nor more than 4 residential dwelling units; a residential condominium unit, including but not limited to the common elements allocated to the exclusive use thereof that form an integral part of the condominium unit and any parking unit or units specified by the declaration to be allocated to a specific residential condominium unit;
- or a single tract of agriculture real estate consisting of 40 acres or less which is improved with a single family residence.
- If a declaration of condominium ownership provides for individually owned and transferable parking units, "residential real estate" does not include the parking unit of a specific residential condominium unit unless the parking unit is included in the legal description of the property being transferred by a transfer on death instrument.

So, only residential real estate, not commercial properties, may be transferred by a TODI.

Applicability/Legality

755 ILCS 27/20

- An owner may transfer residential real estate by a transfer on death instrument to one or more beneficiaries as owners, concurrently or successively, and upon any contingency, effective at the owner's death.

Revocability

755 ILCS 27/25

- A transfer on death instrument is revocable even if the instrument or another instrument contains a contrary provision.
    - This is a key point of the TODI. *A TODI is always revocable by the owner*, *as long as the owner still has capacity, the owner can revoke.* Note, an Agent under a Power of Attorney for Property cannot revoke a validly executed *and* recorded TODI.

Non-Testamentary Instrument

755 ILCS 27/30

- A transfer on death instrument is a nontestamentary instrument and is subject to all other laws governing or affecting nontestamentary instruments.
    - This is the key advantage of the TODI. By executing and recording a TODI, the property is not part of the decedent's estate. For a senior with few assets, other than the house, removing the house from probate may avoid the family having to open probate at all.

Capacity

755 ILCS 27/35

- The capacity required to make or revoke a transfer on death instrument is the same as the capacity required to make a will.
- Must be 18, must be of sound mind, must not be under coercion.

TODI and Powers of Attorney

755 ILCS 27/35

- An agent under a durable power of attorney or other instrument creating an agency does not have the authority to create or revoke a transfer on death instrument on behalf of the owner.
- This Section shall not be construed to prohibit the agent from selling, transferring, or encumbering the residential real estate under the terms of the agency.

Requirements

755 ILCS 27/40

- Must contain the essential elements and formalities of a properly recordable inter vivos deed; and must be executed, witnessed, and acknowledged
- Must state that the transfer to the designated beneficiary is to occur at the owner's death;
- Must be recorded before the owner's death in the public records in the office of the recorder of the county in which the residential real estate is located.
- The failure to comply with any of the requirements will render the transfer on death instrument void and ineffective to transfer title to the residential real estate at the owner's death.

The TODI ***must*** be recorded in order for it to be an effective transfer upon the death of the owner. This is key for clients. There must be some mechanism in place to make the TODI a public record. Clients are responsible for recording the document.

Signing the TODI

755 ILCS 27/45

- Signing, attestation, and acknowledgement. Every transfer on death instrument shall be signed by the owner or by some person in his or her presence and by his or her direction,
- TODI shall be attested in writing by 2 or more credible witnesses,
- Witnesses' and owner's signature must notarized.

Witnesses

755 ILCS 27/45

- Attest to much of the same information as a Will
- The witnesses shall attest in writing that on the date thereof the owner executed the transfer on death instrument to the following:

- Executed in the witnesses presence.
- Executed as owner's free and voluntary act.
- At the time of the execution the witnesses believed the owner to be of sound mind and memory.

Revocation

755 ILCS 27/55

- A TODI may be revoked by:
  - another transfer on death instrument that revokes the instrument or part of the instrument expressly or by inconsistency; or
  - an instrument of revocation that revokes the instrument or part of the instrument;
- Revocation must have the same formality as signing the TODI.
- Revocation must be recorded.
- A TODI is NOT revoked by:
  - by a revocatory act on the instrument (e.g., writing "Revoked" on the TODI)
  - by an unrecorded instrument purporting to revoke or
  - by a provision in a will

The TODI cannot be revoked by simply destroying the recorded TODI or by a will that it is inconsistent with the TODI. The TODI controls over the will.

Effect of a TODI During the Life of the Owner

755 ILCS 27/60

- During an owner's life, a transfer on death instrument does not:
  - affect the right of the owner, any other owner, or an agent for the owner to sell or encumber the residential real estate;
  - affect an interest or right of a transferee, lienholder, mortgagee, option holder or grantee even if the transferee, lienholder, mortgagee, option holder or grantee has actual or constructive notice of the instrument;
  - affect an interest or right of a secured or unsecured creditor or future creditor of the owner, even if the creditor has actual or constructive notice of the instrument;
  - affect the owner's or designated beneficiary's eligibility for any form of public assistance;
  - create a legal or equitable interest in favor of the designated beneficiary; or
  - subject the residential real estate to claims or process of a creditor of the designated beneficiary.
- If after recording a transfer on death instrument, the owner makes a contract for the sale or transfer of the residential real estate or some part thereof that is the subject of the transfer on death instrument and the whole or any part of the contract remains executory at the owner's death, the disposition of the residential real estate by the contract does not revoke the transfer on death instrument but the residential real estate passes to the designated beneficiary or beneficiary subject to the contract.
- *This section is key.* The owner is still the owner of the property. She can still do anything with the property that she likes. She can sell it, mortgage, rent it, etc.
- The property is still subject to any claims, since it is still the owner's property. A TODI does not "wipe away" a mortgage or real estate tax lien or any other obligation on the property.
  - This is very different than a Land Trust, for instance.
- This is not considered a "transfer" for purposes of Medicaid, for instance.

- The beneficiary has only a beneficial interest in the property during the life of the owner. The creditors of the beneficiary cannot make any claim on the property at all during the lifetime of the owner.

What Happens After Owner's Death

755 ILCS 27/65

- Subject to the beneficiary's right to disclaim the transfer, the interest in the residential real estate is transferred to the beneficiary in accordance with the instrument.
- If a designated beneficiary fails to survive the owner or is not in existence on the date of the owner's death, then except as provided below, the residential real estate shall pass to the owner's estate.
- Unless the owner provides otherwise, if the designated beneficiary is a descendant of the owner who dies before the owner, the descendants of the deceased designated beneficiary living at the time of the owner's death shall take the residential real estate per stirpes.
    - If the designated beneficiary is one of a class of designated beneficiaries, and any member of the class dies before the owner, the members of the class living when the owner dies shall take the share or shares which the deceased member would have taken if he or she were then living,
    - except that if the deceased member of the class is a descendant of the owner, the descendants of the deceased member then living shall take per stirpes the share or shares which the deceased member would have taken if he or she were then living.
- A beneficiary takes the residential real estate subject to all mortgages, liens, and other interests to which the residential real estate is subject at the owner's death.
- A transfer on death instrument transfers residential real estate without covenant or warranty of title even if the instrument contains a contrary provision.
- If there is no sufficient evidence of the order of the owner and designated beneficiary's deaths, otherwise than simultaneously, and there is no other provision in the transfer on death instrument, for purposes of this Section, the designated beneficiary shall be deemed to have predeceased the owner.
- ***The TODI trumps a provision in a will.*** A beneficiary takes subject to any claims on the property. The TODI does not extinguish the mortgage, for example. TODIs are conveyed with the covenants of title, much like a quit claim deed.
- If the beneficiary predeceases, the property goes into the owner's estate, unless the beneficiary was a descendent of the owner and there are descendants of the beneficiary who are still alive.

Joint Owners Can Execute a TODI

755 ILCS 27/70

Sec. 70. Joint owners.

- One or more joint owners may execute a transfer on death instrument.
- If all of the joint owners execute a transfer on death instrument, then an instrument of joint owners is revoked only if it is revoked by all of the then living joint owners. A transfer on death instrument is revocable by the last surviving joint owner notwithstanding any contract or agreement between the joint owners to the contrary.
- If less than all of the joint owners execute a transfer on death instrument, the transfer on death instrument will be governed by the designation of the joint owner who is the last to die of all the joint owners.
    - If the last to die joint owner did not execute a transfer on death instrument, the designation of any prior deceased joint owner is ineffective.
- (d) A transfer on death instrument shall not sever a joint tenancy or tenancy by the entirety.

A TODI does not extinguish a joint tenancy. If the property is held in joint tenancy and one owner dies, the property passes by joint tenancy to the surviving joint tenants. Only when there is a single owner left, who subsequently dies, does the beneficiary take under the TODI.

Notice of Death Affidavit

755 ILCS 27/75

- Any beneficiary who takes under a transfer on death instrument may file in the office of the recorder in the county or counties where the residential real estate is located a notice of death affidavit to confirm title following the death of the owner.
- The notice of death affidavit shall contain the name and address, if known, of each beneficiary taking under the transfer on death instrument, the legal description of the property, the street address and parcel identification number of the residential real estate, if known, the date of the transfer on death instrument and its recording document number, the name of the deceased owner, the date and place of death, and the name and address to which all future tax bills should be mailed.
- The affidavit shall be acknowledged under penalty of perjury before a notary public or person authorized to administer oaths. The filing of the notice of death affidavit is not a condition to the transfer of title.
-

Disclaimer

755 ILCS 27/80

- A beneficiary may disclaim all or part of the beneficiary's interest as provided by the Disclaimer Under Nontestamentary Instrument Act.

After the owner dies, the beneficiary must complete and record the Notice of Death Affidavit. Generally, when drafting the TODI, the Notice of Death Affidavit is also drafted, but left partially blank and unsigned. One the owner passes, the Notice of Death Affidavit is completed, signed, notarized and recorded.

Rights of Creditors

755 ILCS 27/85

- Rights of creditors and statutory claimants. A beneficiary of a transfer on death instrument is subject to the claims of creditors and statutory claimants to the same extent as a beneficiary of any nontestamentary transfer.

The beneficiary is subject to the claims of creditors.

Contests to the TODI

755 ILCS 27/90

- An action to set aside or contest the validity of a transfer on death instrument shall be commenced within the earlier of 2 years after the date of the owner's death or 6 months from the date that letters of office are issued.
- However, a purchaser or mortgagee for value and without notice before the recordation of a lis pendens for an action to set aside or contest the transfer on death instrument for any reason shall take free and clear of any such action or contest.

This has been the most contentious part of the TODI in its short life. Some title companies argue that this means that the beneficiary cannot do anything with the property for two years (or that the title company will not insure the transaction), in case there is a claim against the property. If the title company does

insure the tile, they may raise an "exception" to the title, that the property remains subject to the potential claims.

Many title companies may require a "personal undertaking" from the beneficiary to insure the title, if the property is being sold or refinanced within two years of the owner's death. That is, the beneficiary will have to agree that the property may be subject to claims of heirs during that period.

If an estate of the deceased owner is opened, the heirs time to contest the TODI is shortened to six months. This is generally done when there are significant additional assets in the estate.

Drafting a TODI

Drafting a TODI is similar to drafting a deed. A template TODI and Notice of Death Affidavit are included in the material. A "TODI" Checklist is also included.

There are five important points that must be considered when drafting a TODI for the client.

1) Capacity. It is critical that the owner has capacity to execute the TODI. Do not draft the TODI if the owner cannot sign it.
2) Confirm the information. It is important to confirm the information.
3) Confirm the Property Identification Number (PIN) and the legal description. The legal description must be exactly correct to convey the property. It is best to request a copy of the current deed or mortgage or title insurance policy to confirm the legal description. A copy of the deed or mortgage can also be downloaded from the Recorder of Deeds office, for a slight fee.
4) There is no requirement that the Notice of Death Affidavit be drafted at the time that the TODI is drafted, but it is a good idea. A template is in the material.
5) Make sure there are appropriate witnesses and a notary available at the TODI signing.

Center for Disability & Elder Law
Founded by The Chicago Bar Association and its Young Lawyers Section

ILLINOIS TRANSFER ON DEATH INSTRUMENT

MAIL TO:
SUSAN JONES
1356 South Green Street
Chicago, Illinois 60660

NAME AND ADDRESS OF TAXPAYER:

SUSAN JONES
1356 South Green Street
Chicago, Illinois 60660

Above reserved for official use only

On this date, _____, 20_____, **SUSAN JONES (widow)**, residing at 1356 South Green Street, Chicago, Illinois 60660, executes this transfer on death instrument. **SUSAN JONES** will transfer upon her death the following residential real estate in its entirety:

Property Address: 1356 South Green Street, Chicago, Cook County, Illinois, 60660
Property Identification Number ("PIN"): 16-15-823-098-0000

Lot 16 in Brown's Subdivision of that part of Block 19 in the Harper Partition being a Subdivision of the West ½ of the Southwest ¼ of Section 10, Township 35 South, Range 19, East of the Fourth Principal Meridian lying South of the Right of Way of the Michigan Central Railroad

SUBJECT to all easements, rights-of-way, protective covenants and mineral reservations of record, if any, to **SARAH ANN MILLER**, Chicago, IL, and to
DAVID MICHAEL JONES, Chicago, Illinois, in equal shares as **joint tenants**.
Should either beneficiary predecease me the survivor shall take the real estate in its entirety.

Upon my death, I transfer my interest in the above described property to the beneficiaries as designated above.

This instrument revokes any and all prior transfer on death instruments made by the above mentioned owner for the above mentioned residential real estate.

Before my death, I have the right to revoke this deed.

This instrument is to be recorded prior to the aforesaid owner's death in the public records in the office of the recorder of the county in which any part of the residential real estate is located.

_____	_____	_____
Owner Printed Name	**Owner Signature**	**Date**

I attest that Susan Jones, the owner of the above mentioned property, executed this Illinois Transfer on Death Instrument in my presence on _____, 2019 This instrument was executed as a free and voluntary act by the owner. At the time of the execution, I believe the owner to be of sound mind and memory.

WITNESS:
Signed: _____
Printed: _____

ADDRESS OF WITNESS:
205 W. Randolph, Suite 1610
Chicago, IL 60606

I attest that Susan Jones**,** the owner of the above mentioned property, executed this Illinois Transfer on Death Instrument in my presence on _____, 2019. This instrument was executed as a free and voluntary act by the owner. At the time of the execution, I believe the owner to be of sound mind and memory.

WITNESS:
Signed: _____
Printed: _____

ADDRESS OF WITNESS:
205 W. Randolph, Suite 1610
Chicago, IL 60606

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

The undersigned, a notary public in and for the above County and State, HEREBY CERTIFIES THAT **Susan Jones,** known to me to be the same person whose name is subscribed as the owner of the residential real estate, appeared before me and the witnesses _____ and _____ in person and acknowledged signing the instrument as the free and voluntary act of the owner who was acting of sound mind and memory for the uses and purposes therein set forth.

_____ Dated

_____ Notary Public

My commission expires: _____

This document was prepared by:
Center for Disability and Elder Law
205 W. Randolph St.
Suite 1610
Chicago, Illinois 60606
312.376.1880

Center for Disability & Elder Law
Founded by The Chicago Bar Association and its Young Lawyers Section

NOTICE OF DEATH AFFIDAVIT AND ACCEPTANCE OF TRANSER ON DEATH INSTRUMENT

MAIL TO:

_____
_____
_____

NAME AND ADDRESS OF TAXPAYER:

_____
_____
_____

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The undersigned beneficiary or beneficiaries, being duly sworn on oath state as follows:

That **SUSAN JONES** died on _____, 20___, a resident of Cook County, Illinois, owning residential real estate legally described below. Susan Jones' place of death was _____**(city),** _____**(state)**.

Lot 16 in Brown's Subdivision of that part of Block 19 in the Harper Partition being a Subdivision of the West ½ of the Southwest ¼ of Section 10, Township 35 South, Range 19, East of the Fourth Principal Meridian lying South of the Right of Way of the Michigan Central Railroad

That the street address of the residential real estate is 1356 South Green Street, Chicago, Illinois 60660, and the property identification number is 16-15-823-098-0000.
That the Transfer on Death Instrument is dated _____and recorded as Document No. _____in the Office of the Recorder for Cook County, Illinois.

That the undersigned whose names and addresses appear below are all beneficiaries entitled to receive under the Transfer on Death Instrument:

SARAH ANN MILLER		50% as Joint Tenant
Name	**Address**	**Share**
DAVID MICHAEL JONES		50% as Joint Tenant
Name	**Address**	**Share**

In witness whereof, the undersigned beneficiaries hereby accept the transfer of residential real estate under the transfer on death instrument this _____ day of _____, 20____.

_____ _____
Signature **Signature**

_____ _____
Printed Name **Printed Name**

STATE OF ILLINOIS
COUNTY OF COOK
I, the undersigned, a Notary Public in and for the State aforesaid, DO HEREBY CERTIFY THAT _____ (and _____) personally known to me to be the same person or persons whose name or names are subscribed to the foregoing instrument, appeared before me this day in person and swore on oath to the above foregoing affidavit. Signed and sworn to before me this ___ day of _____, A.D. 20____.

My commission expires on _____

_____
Notary Public