CHAPTER 7

PROBATE AND DECEDENTS' ESTATES

By Carol A. Nolan, J.D.

Carol A. Nolan is a 1992 Magna Cum Laude and Most Outstanding Woman Graduate from Northern Illinois University, and a 1995 graduate of Northern Illinois University College of Law. Ms. Nolan concentrates her practice in the areas of elder law (including Medicaid and disability issues), guardianship estates for disabled adults and minors, estate planning (including special needs trusts), and probate and trust administration. She is a solo practitioner, and her office is located in Wheaton, Illinois.

Ms. Nolan is a member of the Illinois State Bar Association, National Academy of Elder Law Attorneys, DuPage County Bar Association, DuPage Association of Women Lawyers, DuPage Estate Planning Council, and the Association of Senior Service Providers. She is a frequent speaker on probate and elder law issues for the Illinois State Bar Association, the National Business Institute, the DuPage County Bar Association, and the DuPage Association of Women Lawyers. She has authored articles on guardianship and disability planning, probate and trust administration.

Scope of Chapter: Probate and Decedent's Estates

The Elder Law attorney may inevitably find themselves dealing with probate and decedent's estates as a natural progression of their practice. This chapter will discuss some of the key elements of the probate process, analyze the applicability of several of the provisions of the Illinois Probate Act, and address alternatives to probate through the courts.

7.06 Duty to file the will

7.07 Admitting will to probate

7.08 Court proceedings during independent administration

7.09 Service of inventory

7.10 Dealing with creditors

7.11 Custodial claims

7:12 Joint accounts

Treated Elsewhere:

For a discussion of the entire probate process see Volume ____

Illinois Jurisprudence, PROBATE

Research References

Text References: _____

Annotation References:_____ [This would be ALR materials]

Periodicals:_____

State Legislation**:**

755 ILCS 5/25-1;1 755 ILCS 5/25-1(a) (payment or delivery of small estate of decedent upon affidavit; paragraph 11 of the small estate affidavit states to whom the property shall be distributed);1 755 ILCS 5/25-1 10(b) 1 755 ILCS 5/25-1(c) (appointment of agent); 755 ILCS 5/25-1(d) (release); 755 ILCS 5/25-3 (recovery upon refusal to pay or deliver);755 ILCS 5/5-1 (place of probate of will or of administration of estate); 755 ILCS 5/5-2 (situs of personal estate of nonresident decedent or missing person); 755 ILCS 5/28-3 (protection of persons under disability during independent administration); 755 ILCS 5/9-5 (Notice—waiver); 755 ILCS 5/6-2 (petition to admit will or to issue letters); 755 ILCS 5/6-2 (petition to admit will or to issue letters); 755 ILCS 5/6-9 (failure or refusal to qualify—death, resignation or revocation of letters—nondesignation); 755 ILCS 5/6-20 (petition to admit will to probate on presumption of death of testator—notice); 755 ILCS 5/28-3 (protection of

persons under disability during independent administration); 755 ILCS 5/9-5 (Notice—waiver); 755 ILCS 5/6-2 (petition to admit will or to issue letters); 755 ILCS 5/6-2 (petition to admit will or to issue letters); 755 ILCS 5/6-9 (failure or refusal to qualify—death, resignation or revocation of letters—nondesignation); 755 ILCS 5/6-20 (petition to admit will to probate on presumption of death of testator—notice); 755 ILCS 5/7-2 (procedure for probate of foreign will); 755 ILCS 5/8-2 (contest of denial of admission of will to probate); 755 ILCS 5/9-4 (petition to issue letters); 755 ILCS 5/9-6; 755 ILCS 5/28-2 (order for independent administration).755 ILCS 5/28-2 (order for independent administration); 755 ILCS 5/28-5 Court proceedings during independent administration; 755 ILCS 5/28-11 Closing the estate; 755 ILCS 5/28-6(a) Service of Inventory; 755 ILCS 5/18-3 (a) Notice Publication; 755 ILCS 5/18-12755 ILCS 5/18-1 Filing of claims—mailing or delivery of copies755 ILCS 5/18-12 (a)(b) Limitations on payment of claims; 755 ILCS 5/18-11 (b) Allowance and disallowance of claims by representative1 755 ILCS 5/18-1; 1 755 ILCS 5/18-11(a) Allowance and disallowance of claims by representative; 1 765 ILCS 1005 et al.

Cases cited:

Estate of Willie Jolliff, 199 Ill.2d 510, 71 N.E.2d 346, 264 Ill.Dec. 642 (20021 Estate of Rex B. Lower, 365 Ill. App. 3d 469; 848 N.E.2d 645; Ill. App. LEXIS 396 (2006)

Estate of Douglas Harrison Lane, Deceased, 345 Ill.App.3d 1123, 804 N.E.2d 113, 281 Ill.Dec.487 (4th Dist. 2003).

In re Estate of Elson, 120 Ill. App. 3d 649, 76 Ill. Dec. 237, 458 N.E.2d 637 (2d Dist. 1983); In re Estate of Banks, 258 Ill. App. 3d 529, 196 Ill. Dec. 379, 629 N.E.2d 1223, 1994 Ill. App. LEXIS 265 (5th Dist. 1994); In re Estate of Elson, 120 Ill. App. 3d 649, 76 Ill. Dec. 237, 458 N.E.2d 637 (2d Dist. 1983); In re Estate of Elson, 120 Ill. App. 3d 649, 76 Ill. Dec. 237, 458 N.E.2d 637 (2d Dist. 1983); In re Estate of Elson, 120 Ill. App. 3d 649, 76 Ill. Dec. 237, 458 N.E.2d 637 (2d Dist. 1983); 755 ILCS 5/6-1 (duty to file will—altering, destroying or secreting).

In re Estate of Riordan, Ill. App. Ct., Sept. 10, 2004, 212 Ill. 2d 533, 824 N.E.2d 284 (2004)

In re Estate of Regelbrugge, 225 Ill. App. 3d 593, 167 Ill. Dec. 710, 588 N.E.2d 351 (2 Dist. 1992In Re Estate of Oskar Naumann, Deceased v. Edith Vanderwerff, Respondent, 1 Ill. App. 3d 419; 274 N.E.2d 147, 1971

Murgic v. Granite City Trust & Sav. Bk. (1964), 31 Ill.2d 587; Frey v. Wubbena (1962), 26 Ill.2d 62; In re Estate of Schneider (1955), 6 Ill.2d 180.

Dixon National Bank, Exr, v. Cora Morris, 33 Ill. 2d 156, 210 N.E.2d 505 (1965In Re Estate of Oskar Naumann, Deceased v. Edith Vanderwerff, Respondent, 1 Ill. App. 3d 419; 274 N.E.2d 147, 1971

In Re Estate of Oskar Naumann, Deceased v. Edith Vanderwerff, Respondent, 1 Ill. App. 3d 419; 274 N.E.2d 147, 1971

Shea v. Brennan (In re Estate of Shea), 364 Ill. App. 3d 963; 848 N.E.2d 185; 302 Ill. Dec. 185, April 28, 2006

Franciscan Sisters Health Care Corp. v. Dean, 95 Ill. 2d 452, 462, 448 N.E.2d 872, 69 Ill. Dec. 960 (1983)

In re Estate of Lewis, 193 Ill. App. 3d 316, 319, 549 N.E.2d 960, 140 Ill. Dec. 309 (1990)
1 Shea v. Brennan (In re Estate of Shea), 364 Ill. App. 3d 963; 848 N.E.2d 185; 302 Ill. Dec. 185, April 28, 2006

Kirk v. Clements, 152 Ill. App. 3d 890, 105 Ill. Dec. 881, 505 N.E.2d 7 (5 Dist. 1987).

Franciscan Sisters Health Care Corp. v. Dean 95 Ill. 2d 452, 448 N.E.2d 872 (1983)

7.01 Definitions under 755 ILCS 5/1 Illinois Probate Act

5/1-2.09 *Independent administration*

Independent administration means administration of a decedent's estate pursuant to Article XXVIII.

5/1-2.10 *Independent representative*

Independent representative means an executor or administrator acting pursuant to Article XXVIII.

5/1-2.11. *Interested person*

Interested person in relation to any particular action, power or proceeding under this act means one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative. Whenever any provision of this Act requires notice of accounting to or action by an interested person, including without limitation sections 24-2 and 28-11 of this act, and a trustee of a trust is an interested person, no notice or accounting to or action by a beneficiary of the trust in his capacity as beneficiary shall be required. When a ward would be an interested person but a personal fiduciary is then acting for him pursuant to Section 28-3, the personal fiduciary is the interested person instead of the ward, but any notice required to be given to the ward under this Act shall

be given to both the personal fiduciary and the ward. This definition also applies to the following terms: interested party, person or party interested and person in interest.

5/1-2.17 *Ward*

Ward includes minor and disabled person

7.02 Initiating Probate Proceedings

Probate is a court process that passes a decedent's assets to his or her beneficiaries under a will, or if the decedent did not have a will, to the decedent's heirs at law. The process for initiating probate proceedings in Illinois begins by identifying the assets of the probate estate.

What are the decedent's probate estate assets? Probate estate assets are those assets held in the decedent's name individually without a joint owner or a designated beneficiary. Therefore, probate estate assets are not (a) joint accounts where there is a joint survivor who takes ownership by survivorship, (b) assets with a designated beneficiary, nor (c) assets titled in name of a trust.

7.03 Small Estate Administration

In Illinois, before determining whether or not to initiate the probate proceedings though the courts, it should be determined whether the use of a small estate affidavit is appropriate. In estates where the value of the decedent's personal property totals $100,000 or less, and does not include real property, then personal property can pass

directly to the beneficiaries under a will, or to the heirs at law by intestacy, by executing a small estate affidavit. [1]

In Illinois, the Probate Act provides in relevant part:

Payment or delivery of small estate of decedent upon affidavit.

> When any person or corporation (1) indebted to or holding personal estate of a decedent, (2) controlling the right of access to decedent's safe deposit box or (3) acting as registrar or transfer agent of any evidence of interest, indebtedness, property or right is furnished with a small estate affidavit in substantially the form hereinafter set forth, that person or corporation shall pay the indebtedness, grant access to the safe deposit box, deliver the personal estate or transfer or issue the evidence of interest, indebtedness, property or right to persons and in the manner specified in paragraph 11 of the affidavit or to an agent appointed as hereinafter set forth.[2]

The ability to pass property by a small estate affidavit is particularly useful where the decedent created and funded a living trust during their life, but held a few assets in their own name. In that situation, a small estate affidavit may be utilized by attaching a certified copy of the pour-over will and directing that the asset be distributed to the successor trustee of the decedent's trust. [3]

---

[1] 755 ILCS 5/25-1

[2] **755 ILCS 5/25-1(a) (payment or delivery of small estate of decedent upon affidavit; paragraph 11 of the small estate affidavit states to whom the property shall be distributed).**

[3] 755 ILCS 5/25-1 10(b)

The Probate Act also provides that the individuals entitled to receive the assets under a small estate affidavit may appoint an agent in writing to facilitate distribution where the sale of personal property is desired or access to a safe deposit box is needed:

Appointment of Agent

> If safe deposit access is involved or if sale of any personal property is desirable to facilitate distribution pursuant to the small state affidavit, all persons named in paragraph 11 of the small estate affidavit (excluding minors and unascertained or disabled persons) may in writing appoint one or more persons as their agent for that purpose. The agent shall have power, without court approval, to gain access to sell and distribute the property for the benefit of all persons named in paragraph 11 of the affidavit; and the payment, delivery, transfer, access or issuance shall be made or granted to or on the order of the agent. [4]

The Probate also provides a safe haven for those institutions or individuals who rely on a properly executed small estate affidavit by releasing them of liability to the same extent as if payment or transfer of the personal property was made to a court appointed representative of the estate such as an executor or administrator**:**

> Upon payment, delivery, transfer, access or issuance pursuant to a properly executed affidavit, the person or corporation is released to the

[4] **755 ILCS 5/25-1(c) (appointment of agent).**

same extent as if the payment, delivery, transfer, access or issuance had been made or granted to the representative of the estate. Such person or corporation is not required to see to the application or disposition of the property; but each person to whom a payment, delivery, transfer, access or issuance is made or given is answerable therefore to any person having a prior right and is accountable to any representative of the estate. [5]

Persons or corporations who refuse to pay, deliver, or transfer the personal estate of a decedent pursuant to a properly executed small estate affidavit face litigation. Further, the small estate affidavit serves as prima facie proof of the facts stated in the affidavit**:**

Recovery upon refusal to pay or deliver.

If a person or corporation to whom an affidavit under Section 25-1 or 25-2 is delivered refuses to pay, deliver, transfer or issue the personal estate as provided by this Article, it may be recovered in a civil action by or on behalf of the person entitled to receive it upon proof of the facts required to be stated in the affidavit. For purposes of the actions the affidavit is prima facie proof of the facts stated therein. [6]

7.04 Probate Administration through the courts

[5] **755 ILCS 5/25-1(d) (release).**
[6] **755 ILCS 5/25-3 (recovery upon refusal to pay or deliver).**

If it is determined that the probate procedure through the courts is the appropriate vehicle to pass property to legatees or heirs at law, the probate administration process begins by determining the proper place of administration. This determination is set forth in the Probate Act:

7.05 Place of administration

Probate administration shall occur in the county where the decedent had a known place of residence at the time of death; if no known place of residence then the county in which the greater part of real estate is located, and if none then in the county in which the greater part of the personal estate of decedent is located.[7]

For purpose of granting administration of both testate and intestate estates of nonresident decedents or estates of nonresident missing persons, the situs of tangible personal estate is where it is located and the situs of intangible personal estate is where the instrument evidencing a share, interest, debt, obligation, stock or chose in action is located or where the debtor resides if there is no instrument evidencing the share, interest, debt, obligation, stock or chose in action in this state.[8]

The last known residence of a decedent is often not an obvious and easy determination. The decedent's intentions prior to their death can be the deciding factor. For example, the Appellate Court of Illinois, Second District in Estate of Elson, stated

[7] **755 ILCS 5/5-1 (place of probate of will or of administration of estate).**

[8] **755 ILCS 5/5-2 (situs of personal estate of nonresident decedent or missing person).**

that it has been held that the terms "domicile" and "residence" are generally construed to be synonymous when both are used in the same statute, unless their meaning is limited by an express definition or by the context of the act.[9] The Act uses both terms and does not define either, so it appears that the terms are interchangeable. In any event, "domicile" has been defined as the true, permanent home of a person, a place where he intends to return whenever he is absent.[10]

An Illinois circuit court in probate may exercise jurisdiction over the estate of a decedent either when the deceased was domiciled in Illinois or at the time of her death owned property in Illinois. "Domicile" is defined as the place where a person has her true, permanent home to which she intends to return whenever she is absent. Domicile is a continuing thing, and from the moment a person is born she must, at all times, have a domicile. A person can have only one domicile; once a domicile is established, it continues until a new one is actually acquired. To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intent not to return to it; also, physical presence must be established in another place with the intention of making the last-acquired residence her permanent home.[11]

The court in Elson found that while the decedent lived her entire life in Illinois except for the five or six days she resided in Pennsylvania immediately prior to her death,

---

[9] **In re Estate of Elson, 120 Ill. App. 3d 649, 76 Ill. Dec. 237, 458 N.E.2d 637 (2d Dist. 1983).**

[10] **In re Estate of Banks, 258 Ill. App. 3d 529, 196 Ill. Dec. 379, 629 N.E.2d 1223, 1994 Ill. App. LEXIS 265 (5th Dist. 1994); In re Estate of Elson, 120 Ill. App. 3d 649, 76 Ill. Dec. 237, 458 N.E.2d 637 (2d Dist. 1983).**

[11] **In re Estate of Elson, 120 Ill. App. 3d 649, 76 Ill. Dec. 237, 458 N.E.2d 637 (2d Dist. 1983).**

she was nevertheless a resident of Pennsylvania and not Illinois because she did not intend to return to Illinois. When the decedent departed Illinois for Pennsylvania, she took her horse, a carload of personal belongings, established bank accounts, and established a safety deposit box which contained certificates of deposit. The decedent left items in storage in Illinois and a safety deposit box in Illinois containing her jewelry. The decedent also had an Illinois driver's license. In the case at bar the appellate court affirmed the trial court's judgment that the decedent had indeed moved to Pennsylvania.[12]

7.06 Duty to file the will

The Probate Act provides that immediately after the death of a decedent, any person in possession of the decedent's will has the duty to file that will in the proper county whether or not a probate estate will be opened. Persons who willfully alter, destroy or hide the will for the period of 30 days after the decedent's death, if convicted of same, shall be sentenced as in theft or property cases as a Class 3 felony:

> Duty of file will—altering, destroying or secreting. (a) Immediately upon the death of the testator any person who has the testator's will in his possession shall file it with the clerk of the court of the proper county and upon failure or refusal to do so, the court on its motion or on the petition of any interested person may issue an attachment and compel the production of the will. (b) If any person willfully alters or destroys a will without the direction of the testator or willfully secretes it for the period of 30 days after the death of the testator is known to him,

[12] **In re Estate of Elson, 120 Ill. App. 3d 649, 76 Ill. Dec. 237, 458 N.E.2d 637 (2d Dist. 1983).**

the person so offending, on conviction thereof, shall be sentenced as in cases of theft or property classified as a Class 3 felony by the law in effect at the date of the offense. [13]

7.07 Admitting will to probate

Anyone may file a petition in the proper county to admit a will to probate and to issue letters of office to the representative of the estate. Section 5/6-2 of the Probate Act sets forth the requirements:

> Anyone desiring to have a will admitted to probate must file a petition therefore in the court of the proper county. The petition must state, if known: (a) the name and place of residence of the testator at the time of his death; (b) the date and place of death; (c) the date of the will and the fact that petitioner believes the will to be the valid last will of the testator; (d) the approximate value of the testator's real and personal estate in this State; (e) the names and post office addresses of all heirs and legatees of the testator and whether any of them is a minor or disabled person; (f) the name and post office address of the executor; and (g) unless supervised administration is requested, the name and address of any personal fiduciary acting or designated to act pursuant to Section 28-3[14]. When the will creates or adds to a trust and the petition states the name and address of the trustee, the petition need not state the name and address of any beneficiary of the trust who is not an heir or legatee. If letters of

[13] **755 ILCS 5/6-1 (duty to file will—altering, destroying or secreting).**
[14] 755 ILCS 5/28-3 (protection of persons under disability during independent administration).

administration with the will annexed are sought, the petition must also state, if known: (a) the reason for the issuance of the letters, (b) facts showing the right of the petitioner to act as, or to nominate, the administrator with the will annexed, (c) the name and post office address of the person nominated and of each person entitled either to administer or to nominate a person to administer equally with or in preference to the petitioner and (d) if the will has been previously admitted to probate, the date of admission. If a petition for letters of administration with the will annexed states that there are one or more persons entitled either to administer or to nominate a person to administer equally with or in preference to the petitioner, the petitioner must mail a copy of the petition to each such person as provided in Section 9-5[15] and file proof of mailing with the clerk of th**e court.**[16]

In Illinois, many wills state that a representative shall seek independent administration. Even if a will is silent on the issue of independent administration, anyone filing a petition to admit a will to probate may request that the administration be independent.

(a) Unless the will, if any, expressly forbids independent administration or supervised administration is required under subsection (b), the court shall grant independent administration (1) when an order is entered appointing a

[15] **755 ILCS 5/9-5 (Notice—waiver).**

[16] **755 ILCS 5/6-2 (petition to admit will or to issue letters).**

representative pursuant to a petition which does not request supervised administration and which is filed under Section 6-2, 6-9, 6-20, 7-2, 8-2, 9-4 or 9-6 [17] and (2) on petition by the representative at any time or times during supervised administration and such notice to interested persons as the court directs. Notwithstanding any contrary provision of the preceding sentence, if there is an interested person who is a minor or disabled person, the court may require supervised administration (or may grant independent administration on such conditions as its deems adequate to protect the ward's interest) whenever the court finds that (1) the interests of the ward are not adequately represented by a personal fiduciary acting or designated to act pursuant to Section 28-3 [755 ILCS 5/28-3] or by another party having a substantially identical interest in the estate and the ward is not represented by a guardian of his estate and (2) supervised administration is necessary to protect the ward's interests. When independent administration is granted, the independent representative shall include with each notice required to be mailed to heirs or legatees under Section 6-10 or Section 9-5 [755 ILCS 5/6-10 or 755 ILCS 5/9-5] an explanation of the rights of heirs and legatees under this Article and the form of petition which may be used to terminate independent administration under subsection 28-4(a) [755 ILCS 5/28-4]. The form and substance of the notice of rights and the petition to terminate shall be

[17] 755 ILCS 5/6-2 (petition to admit will or to issue letters); 755 ILCS 5/6-9 (failure or refusal to qualify—death, resignation or revocation of letters—nondesignation); 755 ILCS 5/6-20 (petition to admit will to probate on presumption of death of testator—notice); 755 ILCS 5/7-2 (procedure for probate of foreign will); 755 ILCS 5/8-2 (contest of denial of admission of will to probate); 755 ILCS 5/9-4 (petition to issue letters); 755 ILCS 5/9-6.

prescribed by rule of the Supreme Court of this State. Each order granting independent administration and the letters shall state that the representative is appointed as independent executor or independent administrator, as the case may be. The independent representative shall file proof of mailing with the clerk of the court.

(b) If an interested person objects to the grant of independent administration under subsection (a), the court shall require supervised administration, except:

(1) If the will, if any, directs independent administration, supervised administration shall be required only if the court finds there is good cause to require supervised administration.

(2) If the objector is a creditor or a legatee other than a residuary legatee, supervised administration shall be required only if the court finds it is necessary to protect the objector's interest, and instead of ordering supervised administration, the court may require such other action as it deems adequate to protect the objector's interest.[18]

7.08 Court proceedings during independent administration.

[18] **755 ILCS 5/28-2 (order for independent administration).**

At any time during the independent administration any interested person may petition the court for a hearing and order as to any matter germane to the administration of the estate and said matter shall be treated as if under supervised administration. If the independent representative petitions the court for instruction as the exercise of any discretionary power, the independent administrator renounces his discretion with respect to the matter before the court and the court shall substitute its judgment for his or hers.[19]

7.09 Service of Inventory

When an independent representative is acting, the Probate Act provides that not less than 30 days prior to filing of the verified report required by Section 28-11[20], an independent representative shall mail or deliver a copy of an inventory of the estate to each interested person. However, prior to that time any interested person shall be given a copy of an inventory upon written request. An independent representative is not required to file the inventory with the court.[21]

7.10 Dealing with Creditors

The Probate Act, 755 ILCS 5/18-1 et seq. governs claims against the decedents' estate. Providing direct notice to known creditors and publishing for unknown creditors is an important part of the probate procedure and may allow for closing of the estate after

[19] 755 ILCS 5/28-5 Court proceedings during independent administration.

[20] 755 ILCS 5/28-11 Closing the estate. An independent representative seeking discharge shall mail or deliver to all interested person an accounting and shall file in the court a verified report. An independent representative is accountable to all interested persons for his administration and distribution of the estate but need not present an account to the court unless an interested person requests court accounting as in supervised administration.

[21] 755 ILCS 5/28-6(a) Service of Inventory

the six months claims period has run. The following set forth in relevant part the procedure for dealing with creditors:

Notice to creditors.

The representative of the estate has a duty to determine known or reasonably ascertainable creditors of the decedent as expressed under section 5/18-3 of the Probate Act: Notice—Publication. (a) It is the duty of the representative to publish once each week for 3 successive weeks, and to mail or deliver to each creditor of the decedent whose name and post office address are known to or are reasonably ascertainable by the representative and whose claim has not been allowed or disallowed as provided in Section 18-11, a notice stating the death of the decedent, the name and address of the representative and of his attorney of record, that claims may be filed on or before the date stated in the notice, which date shall not be less than 6 months from the date of the first publication or 3 months from the date of mailing or delivery, which ever is later, and that any claim not filed on or before that date is barred.[22]

Therefore, as soon as the probate estate is opened and the representative is appointed, he or she should publish for unknown creditors and search the records of the decedent to determine known creditors for purposes of providing notice to them. The timely attention to this task can serve to bar known creditors' claims in six months because some creditors may fail to file a claim.

[22] 755 ILCS 5/18-3 (a) Notice Publication

The probate process provides a benefit to dealing with creditors in that it sets forth a procedure and timely manner for handling and disposing of claims. The claims of creditors against a decedent's estate are barred unless they are timely filed.[23]

When filing a claim, the Probate Act provides the following procedure:

> (a) A claim against the estate of a decedent or ward, whether based on contract, tort, statutory custodial claim or otherwise, may be filed with the representative or the court or both. When a claim is filed with the representative but not with the court, the representative may file the claim with the court but has no duty to do so.
>
> (b) Within 10 days after a claimant files his claim with the court, the claimant shall cause a copy of the claim to be mailed or delivered to each representative to whom letters of office have been issued and not revoked, including the guardian of the person of a ward and to the representative's attorney of record, unless the representative or the attorney has in writing either consented to allowance of the claim or waived mailing or delivery of a copy, and shall file with the court proof of any required mailing or delivery of copies. Failure to mail or deliver copies of the claim or to file proof thereof does not affect the validity of the claim filing under subsection 18-1(a). [24]

[23] 755 ILCS 5/18-12
[24] 755 ILCS 5/18-1 Filing of claims—mailing or delivery of copies

Failure to file a timely claim is governed by the Probate Act under 5/18-12 and states in relevant part as follows:

(a) Every claim against the estate of a decedent, except expenses of administration and surviving spouse's or child's award, is barred as to all of the decedent's estate if:

> (1) Notice is given to the claimant as provided in Section 18-3 and the claimant does not file a claim with the representative or the court on or before the date stated in the notice; or (2) Notice of disallowance is given to the claimant as provided in Section 18-11 and the claimant does not file a claim with the court on or before the date stated in the notice; or (3) the claimant or the claimant's address is not known to or reasonably ascertainable by the representative and the claimant does not file a claim with the representative or the court on or before the date stated in the published notice as provided in Section 18-3.

(b) Unless sooner barred under subsection (a) of this Section, all claims which could have been barred under this Section are, in any event, barred 2 years after decedent's death, whether or not letters of office are issued upon the estate of the decedent.[25]

[25] 755 ILCS 5/18-12 (a)(b) Limitations on payment of claims

In order to satisfy the requirements of section 5/18-2 of the Illinois Probate Act, a creditor must unequivocally demonstrate its intention to pursue a claim against the estate and not against the representative of the decedent's estate in his or her "individual capacity." In The Estate of Lane, the 4th District Appellate Court determined that the letters to the widow of the decedent in her individual capacity and not as the representative of the estate was insufficient to constitute a claim filing because the letters were addressed to her in her individual capacity and not to her as representative/administrator nor made reference to her husband's estate.[26]

Allowance and disallowance of claims by representative.

The representative may at any time pay or consent in writing to all or any part of any claim that is not barred under Section 18-12, if and to the extent the claim has not been disallowed by the court and the representative determines it to be valid. When a claim filed with the court is allowed by the representative, the representative must promptly file notice of the allowance with the court, but failure to do so will not affect the allowance. [27]

The representative may also at any time disallow all or any part of any claim that has not been filed with the court by mailing or delivering a notice of disallowance to the claimant, and to the claimant's attorney if the attorney's name and address are known to the representative, stating that if the claim is not filed

[26] Estate of Douglas Harrison Lane, Deceased, 345 Ill.App.3d 1123, 804 N.E.2d 113, 281 Ill.Dec.487 (4th Dist. 2003).
[27] 755 ILCS 5/18-11(a) Allowance and disallowance of claims by representative

with the court on or before the date stated in the notice, which date shall not be less than 2 months from the date of the notice, the claim will be barred. A claim disallowed by the representative and not filed with the court on or before the date stated in the notice is barred under Section 18-12 in the same manner as a claim not timely filed.[28]

7.11 Custodial claims

The Probate Act provides for a particular type of claim against a decedent's estate known as a statutory custodial claim. Under this provisions, any spouse, parent, brother, sister, or child of a disabled person who dedicates himself or herself to the care of the disabled person by living with and personally caring for the disabled person for at least 3 years shall be entitled to a claim against the estate upon the death of the disabled person. The claim shall take into consideration the claimant's lost employment opportunities, lost lifestyle opportunities, and emotional distress experienced as a result of personally caring for the disabled person. The claim shall be in addition to any other claim, including without limitation a reasonable claim for nursing and other care. The claim shall be based upon the nature and extent of the person's disability and, at a minimum but subject to the extent the assets available shall be the amounts set forth below:

1. 100% disability $100,000
2. 75% disability, $75,000

[28] 755 ILCS 5/18-11 (b) Allowance and disallowance of claims by representative

3. 50% disability, $50,000

4. 25% disability, $25,000[29]

Custodian claims have historically been the attacked on constitutional grounds, but in 2002 the Illinois Supreme Court held in the Estate of Jolliff, that the statutory custodial claim was constitutional and did not violate the separation of powers provisions of the nor the equal protection clause of the Illinois Constitution. In this case, Willie Jolliff was adjudicated a disabled person and his sister, Edith Porter was his court appointed guardian. Jolliff died without a will and his daughter was appointed the independent representative of his estate. His sister filed a claim for $200,000 against his probate estate under section 18.1.1 claiming that she had been his primary caretaker for the last 12 years of his life and that he was 100% disabled. (She had collected in excess of $300,000 in court approved guardian fees for over the 22 years). The independent representative contested the claim as unconstitutional, and the circuit court agreed with her. Contrary to the circuit court, the Illinois Supreme Court did not and noted that the custodial claims provision of the Probate Act was a rational legislative goal of encouraging immediate family members to commit themselves to taking care of their disabled relatives.[30]

This provision of the Probate Act which is now held as constitutional lays to rest the common law presumption of services provided by a family member are not entitled to compensation.

[29] 755 ILCS 5/18-1.1 Statutory custodian claim
[30] Estate of Willie Jolliff, 199 Ill.2d 510, 71 N.E.2d 346, 264 Ill.Dec. 642 (2002)

In another case, Estate of Rex B. Lower, deceased the Appellate Court, Second District, upheld the trial court's granting of the custodial claim of $100,000 against the estate of one's spouse finding that the decedent was disabled and concluding that the spouse dedicated herself to his care as required under the custodial claim statute. The custodial claim defeated the efforts of a creditor who filed suit against the spouse. In particular, the court found that the spouse abandoned her social life and her interest in raising dogs and that she provided direction and control at every instances of the decedent's care; her dedication was emotional wear and tear, physically draining and that the care takers could not have functioned without respondent to translate, communicate, to know the wants and needs of her disabled spouse. Evidence was overwhelming that a decedent had been 100 % disabled during the last three years of his life and that while his widow, who had suffered a stroke, could not physically care for the decedent, she had dedicated her life to overseeing his care. Thus, custodial award in favor of the widow under 755 Ill. Comp. Stat. Ann. 5/18-1.1 was proper. [31]

The three year rule provided under this claim has been strictly construed by the courts. In Roirdan, a son who took a leave of absence to care for his disabled mother was not entitled to compensation from mother's estate under state law that authorized compensation for caregivers because he did not live with his mother for three years before she died.[32]

[31] Estate of Rex B. Lower, 365 Ill. App. 3d 469; 848 N.E.2d 645; Ill. App. LEXIS 396 (2006)

[32] In re Estate of Riordan, Ill. App. Ct., Sept. 10, 2004, 212 Ill. 2d 533, 824 N.E.2d 284 (2004)

7. 12 Joint Accounts and accounts for convenience

The Joint Tenancy Act[33] governs joint accounts and addresses statutory requirements for the creation of a joint tenancy with right of survivorship. To sustain the burden of proving a valid joint tenancy, the Second District Court (Kane County) established in Regelbrugge, stated that respondents were required to prove that: (1) an interest in personal property was created by means of a written instrument, (2) the instrument expressed the intent to create a joint tenancy by expressly providing that the property so held was subject to the rights of survivorship between the owners and (3) the instrument complied with the requirements of a will as to definiteness of description of subject matter, parties, and certainty of its object.[34]

A joint tenancy in personal property meeting the statutory requirements, can only be defeated by clear and convincing evidence of a lack of donative intent by the transferor at the time of the creation of the joint tenancy. In the absence of any contrary evidence, the form of the joint deposit agreement is sufficient to establish donative intent.[35] The relevant presumption is that the joint account agreement alone governs the ownership of a **joint account,** i.e., speaks the whole truth. However, clear and convincing evidence that the joint tenants had any understanding other than that in the joint account agreement can defeat the presumption that the joint account agreement

[33] 765 ILCS 1005 et al

34 In re Estate of Regelbrugge, 225 Ill. App. 3d 593, 167 Ill. Dec. 710, 588 N.E.2d 351 (2 Dist. 1992).

[35]In Re Estate of Oskar Naumann, Deceased v. Edith Vanderwerff, Respondent, 1 Ill. App. 3d 419; 274 N.E.2d 147, 1971; Murgic v. Granite City Trust & Sav. Bk. (1964), 31 Ill.2d 587; Frey v. Wubbena (1962), 26 Ill.2d 62; In re Estate of Schneider (1955), 6 Ill.2d 180.

speaks the whole truth.[36]

Case law provides that the depository agreement between the parties presumptively establishes the donative intent necessary for a valid gift. One who challenges the existence of the donative intent must present clear and convincing evidence of its absence. Facts and circumstances surrounding the transaction and the happenings thereafter, may be inquired into to ascertain the presence or absence of donative intent. [37]

In Naumann, Petitioner, the administrator of the decedent's will, commenced proceedings to establish the ownership of three savings accounts opened in the joint names of the decedent and petitioner, the decedent's niece. The Circuit Court of Lake County held that the accounts were established for the convenience **o**f the decedent. The niece appealed the judgment of the trial court. The Second District Appellate Court of Illinois reversed the judgment of the trial court and found that the evidence provided fell far short of being clear and convincing proof of lack of donative intent.[38] Petitioner's evidence consisted of the following: a statement by decedent to neighbor to the effect that the accounts were established for decedent's convenience; a statement to an interested party, that decedent wished to treat his nieces equally; an inference that decedent did not

[36] Murgic v. Granite City Trust & Sav. Bk. (1964), 31 Ill.2d 587

[37] Dixon National Bank, Exr, v. Cora Morris, 33 Ill. 2d 156, *; 210 N.E.2d 505 (1965)
[38] In Re Estate of Oskar Naumann, Deceased v. Edith Vanderwerff, Respondent, 1 Ill. App. 3d 419; 274 N.E.2d 147, 1971

intend respondent to withdraw funds for her own benefit; and testimony concerning respondent's payment of a single $35 doctor bill for decedent out of the several thousand dollars in the accounts.[39]

However, in Shea, the Second Appellate Court of Illinois supported the trial court's (DuPage County) finding of clear and convincing evidence proving lack of donative intent. [40] In this case, the decedent added a neighbor to his bank accounts. After his wife died, the decedent mentioned to a friend and to his lawyer that he wanted to set up convenience accounts. He then added the name of his longtime neighbor to two bank accounts. The neighbor then treated those accounts as one would expect if they were convenience accounts. The neighbor contended that the decedent intended for the bank accounts to be a gift to the neighbor upon the decedent's death. On appeal, the court found that the circuit court had to presume, pursuant to 765 Ill. Comp. Stat. Ann. 1005/2(a) (2002), that when the decedent listed the neighbor as a joint tenant on the accounts, he intended to make a gift of a joint tenancy interest in the account to the neighbor. However, the executor rebutted the presumption by showing by clear and convincing evidence that the decedent did not intend a present gift. The Circuit Court cited that the respondent was not decedent's first choice as joint tenant, and also there were two witnesses testifying to the decedent's desire to have someone on his accounts to pay bills. The court also stated that the respondent never contributed to either account,

[39] In Re Estate of Oskar Naumann, Deceased v. Edith Vanderwerff, Respondent, 1 Ill. App. 3d 419; 274 N.E.2d 147, 1971

[40] Shea v. Brennan (In re Estate of Shea), 364 Ill. App. 3d 963; 848 N.E.2d 185; 302 Ill. Dec. 185, April 28, 2006

never used the money in the accounts for herself while decedent was alive (only in the month the decedent died, to cover his expenses), respondent could not provide any evidence that decedent intended the funds as a gift, and she did not file a gift tax return or pay a gift tax on the money, and she did not exercise "exclusive control" over the funds until decedent died, when she put the money into a certificate of deposit.

The Supreme Court has adopted a "bursting bubble" theory of civil presumptions.[41]. Therefore, once the party challenging the ownership of the bank account has presented sufficient evidence to overcome the presumption of a gift, the presumption vanishes.[42] However, the burden of proof remains on the party challenging the gift. Once a party claiming an account has rebutted the presumption that when a bank account holder lists another person as a joint tenant on an account, he or she intends to make a gift of a joint tenancy interest in the account to that person, it must still show entitlement to that account by the preponderance of the evidence.[43]

Competency also must be considered when the joint accounts are created. Where a decedent was found not to have been competent to have made a gift of bank accounts

[41] Franciscan Sisters Health Care Corp. v. Dean, 95 Ill. 2d 452, 462, 448 N.E.2d 872, 69 Ill. Dec. 960 (1983)

[42] In re Estate of Lewis, 193 Ill. App. 3d 316, 319, 549 N.E.2d 960, 140 Ill. Dec. 309 (1990)

[43] Shea v. Brennan (In re Estate of Shea), 364 Ill. App. 3d 963; 848 N.E.2d 185; 302 Ill. Dec. 185, April 28, 2006

transferred into joint tenancy with his nephew, the disputed accounts were required to be returned to his estate.[44]

On the other hand, when a gift is made by one person to another who owes a fiduciary duty to the donor, that gift is presumptively fraudulent. [45] Where caregiver was not joint tenant of bank accounts until after she became decedent's fiduciary and evidence did not show decedent wanted her to have money in the accounts, finding that joint accounts were convenience accounts was not error. [46]

[44] Kirk v. Clements, 152 Ill. App. 3d 890, 105 Ill. Dec. 881, 505 N.E.2d 7 (5 Dist. 1987).

[45] Franciscan Sisters Health Care Corp. v. Dean 95 Ill. 2d 452, 448 N.E.2d 872 (1983)

[46] Estate of Teall v. Neitzel (in Re Estate of Teall), 329 Ill. App. 3d 83; 768 N.E.2d 124; 263 Ill. Dec. 364, (2002)